[2016] UKFTT 0538 (TC)

TC05287

Appeal number: TC/2015/00025

CUSTOMS DUTY AND VALUE ADDED TAX – inward processing relief – importation of car for repair - whether or not shipping agent had authority to designate appellant as person responsible – held not – car not re-exported within 6 months – satisfactory bill of discharge not provided within required period – whether or not appellant was obviously negligent for the purposes of article 859 of European Commission Regulation (EEC) No 2454/93 – held not – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

RIKKI CANN LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE PHILIP GILLETT
DAVID WILLIAMS

Sitting in public at Colchester County Court on 28 July 2016

Mrs Jayne Cann, director, for the Appellant

Ms Anna Lintner of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This was an appeal against a decision by HMRC to issue a Post Clearance Demand Note ("PCDN") to the appellant ("Rikki Cann") for failing to submit a bill of discharge and failing to re-export in time a 1970 Aston Martin which HMRC alleged was imported by Rikki Cann under the Simplified Inward Processing ("SIP") procedure.

2. The PCDN demanded payment of £5,000 customs duty, £11,000 VAT and £15.17 interest, a total of £16,015.17.

3. We decided that the appeal should be allowed for the reasons set out below.

Evidence

4. We heard evidence from Mr R Cann and Mrs Jayne Cann.

5. Mrs Cann explained that she was the Office Manager and handled all administrative and financial matters. The company employed an external accountant who prepared and verified the formal accounts and would give tax advice when requested. Mr Cann was in charge of the workshop.

6. The only business of the company was the servicing, repair and restoration of Aston Martin cars.

7. Reference had been made by HMRC to a previous importation of a vehicle from outside the EU in 2010, when the company had failed to file an acceptable bill of discharge within the normal time limit. In this case the PCDN had been withdrawn under HMRC discretion on the basis that the company was inexperienced in this regime. Following that decision however a letter had been sent to the company stating that any future failing in this regard would result in duty becoming payable.

8. Mrs Cann explained that in the previous case the company, Rikki Cann, had arranged and paid for the importation of the car using the services of C.A.R.S. UK Limited ("CARS"). In 2010 the normal six month throughput period allowed for the SIP procedure to apply had been extended to 12 months following an application made by Rikki Cann, but Mrs Cann said that she had not filed the Bill of Discharge because she did not understand how the process worked.

9. Mrs Cann said that since 2010 they had not imported any vehicles from outside the EU until the Aston Martin which is the subject of this appeal, which was imported from Switzerland.

10. In 2013 the company had been approached by a Mr Dimmeler, from Switzerland, and asked to carry out some restoration work on his Aston Martin. They had no previous knowledge of Mr Dimmeler but had agreed a price of £25,000 for the work based on an exchange of photographs of the vehicle. Mr Dimmeler had said that he would arrange for the transport and importation of the car into the UK and would

arrange for it to be re-exported after the work had been done, within the six month period, of which Mr Dimmeler was apparently aware.

11. Shortly before the car arrived Rikki Cann was contacted by Mr Adam Brooks of CARS to confirm that Rikki Cann was expecting the car and that they would be carrying out the work on the car. Mrs Cann was adamant that there had been no discussion or instruction during that telephone call to the effect that the car would be imported in the name of Rikki Cann or that CARS would be acting om behalf of Rikki Cann in this regard. The car duly arrived at the premises of Rikki Cann on 11 December 2013.

12. On cross-examination by Ms Lintner, Mrs Cann confirmed that she was aware of the authorisation procedure from her previous experience but she had not asked Mr Brooks about this when he had called because she did not think it was necessary to ask because Mr Dimmeler had said that he would be arranging the importation of the car and she had assumed that he would therefore be responsible for all such matters.

13. Ms Lintner asked Mrs Cann if she was aware that it was normal practice under the SIP procedure for the processor, Rikki Cann in this case, to apply for the SIP procedure. Mrs Cann said that she was not. In this context we note that Article 116 CCC, as set out below, states that "The authorisation shall be issued at the request of the person who carries out processing operations or who arranges for them to be carried out."

14. Mrs Cann said that the next contact she received in respect of the car was when she received a telephone call from Mr Brooks approximately two weeks before the end of the throughput period saying that the car needed to be re-exported within the next two weeks since otherwise Rikki Cann would have to pay duty and VAT on the importation of the car. Mrs Cann said that she was adamant that this was not what she had agreed to.

15. Nevertheless Mrs Cann said that she had then contacted Mr Dimmeler to ask him to arrange for the car to be re-exported within the next 10 days. Mr Dimmeler agreed to arrange this but said that he would not be using CARS for this purpose because they were too expensive.

16. Mrs Cann explained that once the car had been removed from their premises she did not think any more action was required on her part and that the issue about the import being in the name of Rikki Cann had been resolved by Mr Brooks.

17. Ms Lintner asked Mrs Cann if, during the telephone conversation with Mr Brooks that had taken place two weeks before the car had been re-exported, she understood that Rikki Cann was responsible for the filing of the relevant documents under the SIP procedure. Ms Lintner made reference in this regard to an email from Mrs Cann at around that time which said "… he [Adam Brooks] is talking about releasing Rikki Cann from the temporary import licence …", but Mrs Cann said that she assumed that this had been sorted out by Mr Brooks.

18. HMRC had sent three letters to Rikki Cann during this period, a "welcome" letter, dated 12 December 2013, which stated clearly that the car had been imported in the name of Rikki Cann, a letter dated 11 June 2014, the day after the throughput period had expired, reminding Rikki Cann that they needed to file a bill of discharge within 30 days of the car being re-exported, and a formal letter dated 12 July 2014 saying that since HMRC had not received a bill of discharge they would be issuing a PDCN in the amount of £16, 015.17.

19. Mrs Cann was clear that she had not seen any of these letters. We found this surprising, as did Ms Lintner on behalf of HMRC. However we believe that Mrs Cann was generally a reliable witness and this statement was not formally challenged by Ms Lintner as being untrue. We therefore accept this statement as being true as a matter of fact.

20. Eventually, on 19 August 2014, HMRC had issued the PCDN, together with a letter setting out details of how Mrs Cann could ask for a review of the decision. Mrs Cann duly asked for a review in a letter dated 28 August 2014. However, in a response dated 6 October 2014 the HMRC review officer confirmed that she had reviewed the decision and decided to uphold the PCDN.

21. In the meantime, on 16 September 2014, the HMRC review officer had contacted Mrs Cann and explained what documentation was required. Mrs Cann said that she had confirmed to the review officer that the car had been exported but that she did not have any of the paperwork because she had not organised the re-exportation of the vehicle. Nevertheless she contacted Mr Dimmeler and the relevant paperwork was provided to HMRC on 17 September 2014.

Legal Framework

22. The law relating to Inward Processing procedures is set out in the Community Customs Code ("CCC"), Council Regulation (EEC) No 2913/92, and European Commission Regulation (EEC) No 2454/93. In particular Article 64 of the CCC provides that:

> "1. Subject to Article 5, a customs declaration may be made by any person who is able to present the goods in question or to have them presented to the competent authority, together with all the documents which are required to be produced for the application of the rules governing the customs procedure in respect of which the goods were declared
>
> 2. However,
>
> (a) where acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on its behalf.
>
> …"

23. Article 5 CCC provides that where a person appoints a representative to provide direct representation in dealing with the customs authorities, that representative shall act in the name of and on behalf of that person:

"1. Under the conditions set out in Article 64(2) and subject to the provisions adopted within the framework of Article 243(2)(b), any person may appoint a representative in his dealing with the customs authorities to perform the acts and formalities laid down by customs rules.

2. Such representations 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.

A Member State may restrict the right to make customs declarations:

- by direct representation, or

- by indirect representation.

So that the representative must be a customs agent carrying on his business in that country's territory.

3. Save in the cases referred to in Article 64(2)(b) and (3), a representative must be established within the Community.

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 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."

24. Ms Lintner brought our attention to the general UK law on agents as set out in Chitty on Contracts 32nd Edition, paragraph 31-061, which states that:

"The fact that an agent acted in his own interests and in fraud of his principal will not relieve the principal of liability if in fact the agent's act was in other respects within the scope of his apparent authority. This rule is not confined to the case of a contract made by an agent. A principal is bound by acts done by an agent in the scope of his apparent authority whether in contract or tort or otherwise. "A third party, dealing in good faith with an agent acting within his ostensible authority, is not prejudiced by the fact that as between the principal and his agent the agent is using his authority in such a way that the principal can

rightly complain that the agent is using his authority for his own benefit and not for that of his principal.""

25. Ms Lintner also referred us to the case of *Sarbot UK Underwater Rescue Ltd v HMRC* [2015] UKFTT 0494 (TC). This case was similar in some respects to the current appeal and in that case it was held that the CEO of Sarbot had identified Sarbot as the consignee of goods on an import entry using the SIP procedure and that since the person authorising the import of the goods, the CEO, had the apparent authority of Sarbot to do so, Sarbot was bound by the acts of that person and would therefore be liable for the customs debt arising from the import of the goods. We discuss further below the relevance of this decision in the current appeal.

26. Article 114 CCC provides:

"1. Without prejudice to Article 115, the inward processing procedure shall allow the following goods to be used in the customs territory of the Community in one or more processing operations:

(a) Non-Community goods intended for re-export from the customs territory of the Community in the form of compensating products, without such goods being subject to import duties or commercial policy measures;

(b) …

2. The following expressions shall have the following meanings:

(a) suspension system; the inward processing relief arrangements as provided for in paragraph 1(a);

…

(c) processing operations:

…

- The repair of goods, including restoring them and putting them in order;

(d) compensating products: all products resulting from processing operations;"

27. Article 116 CCC provides:

"The authorisation shall be issued at the request of the person who carries out processing operations or who arranges for them to be carried out."

28. There is a significant volume of regulations setting out when a customs debt is incurred but rather than set them out in full here we consider it sufficient to summarise this by saying that, amongst other things, a customs debt will be incurred if either the goods are not re-exported within the time frame allowed by HMRC or the bill of discharge is not provided within the 30 day time limit, a time limit which is also specified by HMRC. Nevertheless Article 204(1)(b) CCC states that non-compliance in this regard shall not result in a customs debt if "it is established that

those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question."

29. Article 859 of European Commission Regulation (EEC) No 2454/93 provides further explanation as to what is meant by having "no significant effect on the correct operation of the temporary storage or customs procedure in question":

> "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
> - All the formalities necessary to regularise the situation of the goods are subsequently carried out.
>
> …
>
> 1. exceeding the time limit allowed for assignment of the goods to one of the customs approved treatments or uses provided for under the temporary storage or customs procedure in question, where the time limit would have been extended had an extension been applied for in time.
>
> …
>
> 9. in the framework of inward processing and processing under customs control, exceeding the time-limit for submission of the bill of discharge, provided the limit would have been extended had an extension been applied for in time.
>
> …"

Discussion

30. The appellant's grounds for appeal are stated as :

(1) It was not aware that the car had been imported in its name,

(2) A third party, Mr Dimmeler, had arranged for its collection and re-export after completion of the repairs, and

(3) The appellant is unable to afford to pay the customs debt

31. Ms Lintner, on behalf of HMRC had addressed these issues and a number of other issues in her submissions and we summarise the key decision points as:

(1) Did CARS effectively import the car in the name of Rikki Cann such that Rikki Cann became liable for all the obligations under the SIP procedure?

(2) Can Rikki Cann effectively claim relief from the customs debt under Article 859 European Commission Regulation (EEC) No 2454/93 by arguing that the failure to re-export the car within the six month time limit and the failure to provide a bill of discharge within the 30 day time limit "do not imply obvious negligence on the [their] part" and otherwise comply with the requirements of that Article?

32. We will firstly address the question as to whether or not CARS effectively imported the car in the name of Rikki Cann such that the obligations relating to the SIP procedure fell on Rikki Cann.

33. Ms Lintner argued that if the agent, CARS, had the apparent authority of Rikki Cann to import the car on their behalf then this was sufficient. To support this argument she referred us to the decision of Judge Brooks in *Sarbot UK Underwater Rescue Ltd v HMRC* [2015] UKFTT 0494 (TC) and Chitty on Contracts, as set out above, which states that "The fact that an agent acted in his own interests and in fraud of his principal will not relieve the principal of liability if in fact the agent's act was in other respects within the scope of his apparent authority." This passage from Chitty was also quoted by Judge Brooks in his judgement in *Sarbot* and was accepted by him as the correct approach. That judgement is of course a judgement in the First-tier Tribunal and is not therefore binding on us.

34. However, we do not consider that this is the correct approach in the current circumstances. The CCC is unusual in that it is direct Community Law. It is not part of UK legislation but its effect is incorporated into UK legislation by statute. It also suffers from the drawback that it has been translated into 24 separate languages and we should possibly be wary therefore of interpreting its words in too literal a fashion. In addition it is intended to be applied directly in all member states and we would therefore find it surprising if it was intended to incorporate the full panoply and interpretations of UK contract law as regards agents. This would result in the Code having a different interpretation in other countries of the EU to the interpretation which might apply in the UK, which we would find an unexpected outcome. We also note that Articles 5 and 64 CCC do not actually use the word agent. They instead refer to persons acting on behalf of others.

35. We also consider that these provisions regarding persons acting on behalf of others are quite tightly drawn. In particular Article 64 is quite specific that "where acceptance of a customs declaration imposes particular obligations on a specific person, the declaration must be made by that person or on his behalf." This would perhaps differentiate importation under the SIP procedure, as in this case, from a normal importation of goods intended for use or consumption in the UK. More importantly from our viewpoint Article 5(4) states that "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." We understand that CARS did indicate on the importation documents that it was acting as a direct representative of Rikki Cann but we saw no evidence that it was in any way

empowered to act on behalf of Rikki Cann in this regard. In fact we heard a very clear denial from Mrs Cann that any such empowerment had been given.

36. Mrs Cann explained that this was different from the previous occasion when they had been involved with the SIP procedure in that on that occasion Rikki Cann had employed and paid CARS to arrange the transportation of the car. In the current case they had not arranged or paid for the importation of the car. The transportation arrangements had been made entirely by Mr Dimmeler without any involvement from Rikki Cann.

37. We therefore consider that CARS was not able to act on behalf of Rikki Cann so as to impose on Rikki Cann the specific obligations accompanying the SIP procedure because it was not empowered so to do, as clearly required by Article 64 and Article 5(4) of the CCC.

38. Having come to this conclusion it is not strictly necessary for us to address the question of the relief from a customs debt arising which is afforded by Article 204(1)(b) CCC and Article 859 of European Commission Regulation (EEC) No 2454/93. We do however believe that we should do so in case we are wrong on the first point.

39. Article 204(1)(b) CCC states that non-compliance with the obligations regarding re-export of the vehicle and the lodging of a bill of discharge shall not result in a customs debt if "it is established that those failures have no significant effect on the correct operation of the temporary storage or customs procedure in question."

40. The meaning of this provision is further expanded in Article 859 and, as set out above, there are two separate exceptions provided for as regards a failure to re-export the car before the end of the permitted period and the failure to lodge a bill of discharge within the permitted time. However, as a pre-condition for either of these provisions to apply, it is necessary that the failures in question "do not imply obvious negligence on the part of the person concerned."

41. In order to determine whether or not the failures on Rikki Cann's part did not imply "obvious negligence" we need to ask why Rikki Cann did not comply with the requirements of the SIP procedure. We heard very clear statements from Mrs Cann that they had not received the three letters from HMRC which set out these requirements and which stated that Rikki Cann was expected to comply with them. We found this failure in the postal service very surprising, as did Ms Lintner. Nevertheless Ms Lintner did not directly challenge these statements as being untrue and in general we found Mrs Cann to be a reliable witness. We therefore accept these statements as factually correct.

42. It was also clear from Mrs Cann's evidence that she held a genuine belief that Rikki Cann was not responsible for fulfilling the requirements of the SIP procedure. In our view it was not the case that Mrs Cann had simply not bothered to identify and act upon these obligations, such as might be considered careless or negligent. The inclusion in the legislation of the word "obvious" must also in our view be given due

weight. In our view this means that the person in question should, in order to be held negligent, have failed to perform something that is clearly their duty. Here however, Mrs Cann genuinely believed that once the car had been removed from their premises Rikki Cann had no further obligations in this regard. We therefore find that Rikki Cann's failures to comply with these requirements do not imply obvious negligence.

43. We therefore move on to the specific exceptions provided in Article 859.

44. Exception 1 states that that exceeding the time limit allowed for processing provided for under the SIP procedure will be considered to have no significant effect on the correct operation of the SIP procedure where the time limit would have been extended had an extension been applied for in time. We must therefore determine whether or not HMRC would have granted an extension.

45. We were informed that HMRC practice where an extension of time is requested is to grant a single extension, from 6 months to 12 months, as long as the relevant process is still being carried out but not to grant an extension if the process is complete. It is clear from the wording of Article 859 that the onus is on the taxpayer to demonstrate that an extension would have been granted, but this is close to impossible for the taxpayer or the tribunal to do without making reference to the normal HMRC procedure. We must therefore judge whether or not an extension would have been granted on the assumption that HMRC would have followed their normal procedure.

46. The question then arises as to what time limit might be implied by the words "in time". Ms Lintner suggested that this should mean before the end of the six month throughput period permitted, but since the process might or might not have been completed by then this would not assist us in determining what HMRC would have done. The only way we can interpret this provision meaningfully therefore is by reading the words "in time" as meaning "in time for an extension to be granted".

47. Since it is HMRC's normal practice to grant a single extension of the throughput period, from six months to 12, and in the current case the throughput period had been set at six months and not previously extended, we consider that an extension would have been granted if one had been requested in time. This condition of Article 859 is therefore in our view fulfilled both as regards the question of obvious negligence and that of whether or not an extension of time would have been granted.

48. We then turn to exception 9. This states that exceeding the time-limit for submission of the bill of discharge will be considered to have no significant effect on the correct operation of the SIP procedure provided that the limit would have been extended had an extension been applied for in time.

49. Ms Lintner emphasised the importance of this element of the SIP procedure by referring us to the case of *Dohler Neuenkirchen GmbH v Hauptzollamt Oldenburg* Case C-262/10 ECJ. This decision makes it clear that the filing of a satisfactory bill of discharge is not just an administrative nicety and in many ways is just as important as the actual re-exportation of the car. We should not therefore dismiss this element

lightly. Again however we have the problem of establishing if HMRC would have granted an extension if one had been requested. We were not given details of the policy which HMRC follow in this regard but Ms Lintner did confirm to us that HMRC were satisfied that the formalities as regards a bill of exchange had been satisfied by the production of the information on 17 September 2014, even though this was some time after the normal 30 day period. We must therefore conclude that an extension would have been granted if one had been requested since an extension was in effect granted in practice.

50. In our view therefore the conditions for exception 9 to apply are also fulfilled, both as regards obvious negligence and that of whether or not an extension of time would have been granted had one been requested.

Decision

51. The tribunal therefore decided that the appeal should be ALLOWED on the grounds that:

(1) CARS had not been empowered to commit Rikki Cann to the obligations of the SIP procedure, and

(2) Even if CARS had been so empowered then the exceptions provided in Article 859 of European Commission Regulation (EEC) No 2454/93 would have applied such that Rikki Cann would not have incurred the customs debt.

52. 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.

PHILIP GILLETT
TRIBUNAL JUDGE

RELEASE DATE: 2 AUGUST 2016