TC03852

Appeal number: TC/2013/06917

FIRST-TIER TRIBUNAL
TAX CHAMBER

Customs duties–forfeiture and seizure – reasonableness of decision not to restore - mis-declaration and mis-valuation on importation – silver flakes described as sulphide flakes – HELD – mis- declarations consistent and intentional – not merely administrative error – Border Force applied internal guidelines – reasonable decision not to restore goods – appeal dismissed.

MCCABE CHEMICAL PRODUCTS LTD **Appellant**

- and -

THE DIRECTOR OF BORDER REVENUE **Respondents**

TRIBUNAL: JUDGE RACHEL SHORT
MRS CATHERINE FARQUHARSON

Sitting in public at 45 Bedford Square, London WC1B 3DN on 3 June 2014

Mr Malcolm Doody Group Finance Manager of Stephen Betts & Sons Limited for the Appellant

Mr Fletcher instructed by the Director of Border Revenue for the Respondents

DECISION

1. This is an appeal against a decision by the UK Border Agency of 19 September 2013 not to restore to the Appellant, McCabe Chemical Products Limited ("McCabe") 32 kilogrammes of silver flakes valued at £17,551.87 seized at Heathrow Airport on 3 April 2013.

Facts

2. A package which was described on the British Airways manifest as containing 30 kilogrammes of sulphide flakes with a customs value of £2.05 was examined at the British Airways courier shed at Heathrow Airport on 3 April 2013 having been transported to the UK from Nigeria on BA flight BA074. On examination the package was found to contain silver flakes not sulphide flakes.

3. The relevant customs declaration H8647356281, which was on the outside of the package, referred to sulphide flakes with a value of $500 and was signed by a Mr A Macaulay a representative of the consignor, McCabe, a Nigerian based company.

4. The packing slip, on the outside of the package, signed by Mr Macaulay of McCabe referred to "sulphide flakes (Ag flakes) for laboratory/assay analysis".

5. The UPS Waybill dated 28 March 2013 and signed by Mr Macaulay of McCabe referred to sulphide flakes.

6. The package contained inside a letter from McCabe of 28 March 2013 also signed by Mr Macaulay, referring to the enclosed material as silver flakes and stating that the purpose of importation was laboratory/assay analysis.

7. The recipient of the silver flakes in the UK was Stephen Betts & Sons Limited ("Stephen Betts") who are refiners and bullion dealers based in the UK and have also been appointed as McCabe's representative in these proceedings.

8. A notice of seizure was issued by the Border Agency on 5 April 2013 to Stephen Betts stating that the silver flakes were liable to forfeiture under s 49 (1)(e) of the Customs and Excise Management Act 1979 ("CEMA") because they had been mis-described on the Customs Declaration. That letter included a reference to HMRC Public Notice 12A explaining the procedure for challenging the forfeiture and to seizure information Form C156. No application was made to challenge the seizure by McCabe.

9. A request for restoration of the goods was made on behalf of McCabe by Stephen Betts on 18 April 2013 and was refused by the Border Force on 5 August 2013. This refusal was confirmed after a formal review on 19 September 2013. Stephen Betts appealed against this decision on behalf of McCabe to this Tribunal on 9 October 2013.

10. The Border Agency was dissolved in April 2013 and superseded by the Border Force.

The Law

11. The silver flakes were liable to forfeiture under s 167(1)(a) CEMA and were seized under s 139(1) CEMA.

> "S 167(1) *If any person knowingly or recklessly –*

(a) Makes or signs, or causes to be made or signed, or delivers or causes to be delivered to the Commissioners or any officer, any declaration, notice, certificate or other document whatsoever.....

being a document or statement made or produced or made for any purpose of any assigned matter, which is untrue in any material particular, he shall be guilty of an offence under this subsection and may be detained; and any goods in relation to which the document or statement was made shall be liable to forfeiture."

S 139(1) of CEMA provides:

"Anything *liable to forfeiture under the customs and excise Acts may be seized or detained by any officer or constable or any member of Her Majesty's armed forces or coastguard"*

12. The relevant legislation relating to the obligation of the Border Force to restore goods which are subject to forfeiture and have been seized is set out at s 152(b) of the CEMA:

"*The Commissioners may, as they see fit –*

(a) .....

(b) Restore, subject to such conditions (if any) as they think proper, anything forfeited or seized under these Acts."

13. The basis on which the Border Force should review a decision not to restore seized goods is set out at s 15 Finance Act 1994:

(1) "Where the Commissioners are required in accordance with this Chapter to review any decision, it shall be their duty to do so and they may, on that review, either-

(a) confirm the decision; or

(b) withdraw or vary the decision and take such further steps (if any) in consequence of the withdrawal or variation as they may consider appropriate."

14. The Appellant's right of appeal to the Tribunal to challenge the reasonableness of that review decision is at s 16 Finance Act 1994:

"Appeals to a tribunal

(1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say-

(a) Any decision of the Commissioners on a review under section 15 above.....

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one of the following, that is to say-

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a further review of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a further review, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future".

The Evidence

15. Mr Raymond Brenton, a Higher Officer of the Border Force gave evidence for the Border Force and is the officer who reviewed the Border Force's decision not to restore the goods to McCabe. Mr Brenton provided a written witness statement and gave oral evidence before the Tribunal.

16. Mr Doody, the finance manager of Stephen Betts, gave evidence on behalf of the Appellant. The only direct evidence which the Tribunal saw from McCabe was an email exchange between Mr Doody and Mr Macaulay giving updates on Mr Doody's conversations with the Border Force from 15 – 30 April 2013 and a letter (undated) from Mr Macaulay to Mr Doody asking Mr Doody to appeal *"on compassionate ground, explaining to them that main error – Material Description Error, originated from the UPS official at the Origin centre in Nigeria who does not have full knowledge of the information entry for International shipment"*

Mr Doody

17. Mr Doody explained that his company, Stephen Betts, regularly received imported silver flakes from the Appellant in Nigeria. This was the first occasion on which there had been any problems on importation. Mr Doody's company would usually receive the silver flakes, melt and assay them and then issue a "self-billing invoice" to the Appellant for the value of the silver. Any relevant VAT would be paid by Stephen Betts to HMRC. The silver would then be sold on to a precious metal dealer in London.

18. Mr Doody said that when the Border Agency's notice of seizure was received, Stephen Betts were not aware of how to deal with it. Mr Doody attempted to contact the Border Agency officer (V20) but it took some time to do this. The Form C156 referred to in the seizure notice of 5 April 2013 was not included with that notice. The appeal to the Tribunal had been made because the Appellant did not understand why the silver flakes had been forfeited and seized.

Mr Brenton

19. Mr Brenton said that on the basis of its internal guidance, the Border Force would only restore goods if there were exceptional circumstances which had led to the seizure, including if a mis-declaration had occurred as a result of an innocent error. In

his view, there were a number of different mis-declarations on several documents in this case, as well as incorrect valuations which indicated that the mis-declaration had not arisen as the result of an innocent error. The mis-declarations were deliberate and reckless and more than a mere clerical error on the waybill as suggested by McCabe.

20. Mr Brenton was not able to specify what duties should have been paid by McCabe if the goods have been properly described.

21. Mr Brenton confirmed that nothing said by Mr Doody before the Tribunal had altered any of his statements in his witness statement. He explained that the missing Form C156 to which Mr Doody referred was not a relevant or critical document in this case; it was the document which was given to an individual when goods were seized in their presence. It would not have aided Mr Doody in understanding what actions to take to re-claim the seized goods, which were set out in Public Notice 12A which Mr Doody could have accessed online.

The Appellant's Arguments

22. Mr Doody appealed against the decision not to restore the silver flakes because the Appellant did not understand why they had been seized and had not been given the relevant information about how to apply against the forfeiture, in particular the Form C156 referred to in the Seizure Notice of 5 April 2013 had not been provided and it had been very difficult to obtain any information from the Border Force about what was required.

23. Mr Doody did not attempt to argue that the goods had not been mis-described but gave a number of explanations for the mis-declaration; first, the mis-declaration was due to an administrative error by a clerk in Nigeria who had attempted to write the description of the parcel contents but did not have a good understanding of English. It was common for the description of goods to be completed by a clerk of the shipping agent at the place of dispatch in Nigeria, not the person who was the owner of the goods. Second; the goods had been mis-described and under-valued in order to protect them from theft in transit, as was common in Nigeria when small packets were being transferred.

24. Mr Doody said that all of the silver flakes imported in this way from Nigeria were valued at $500 before they were melted, assayed and valued by his firm. The value of the silver could not be ascertained until after it had been melted and assayed.

25. Mr Doody stressed that there had been no attempt to de-fraud Customs, there was no benefit to any one in mis-declaring the goods, no attempt at deception had been made. In particular VAT had not been avoided because it would be accounted for by Stephen Betts as part of the self-billing process.

26. Mr Doody could not explain why the goods had been described as sulphide rather than silver in documents signed by Mr Macaulay at McCabe.

Border Force's Arguments

27. For the Border Force, Mr Fletcher pointed out that the only question before the Tribunal was whether the Border Force had acted reasonably in refusing to restore the silver to McCabe on the basis set out in their letter of 19 September 2013. By reference to the Border Force's own guidance goods would not usually be restored

when they had been seized as a result of a mis-declaration unless there were exceptional circumstances such as an innocent error in describing the goods.

28. In Mr Fletcher's view, the arguments made on behalf of McCabe did not stack up and suggested that the mis-declaration was more than an innocent error. The goods had been consistently mis-described on a number of occasions on documents signed by a representative of McCabe. McCabe had changed their explanation for the mis-declaration from a suggested clerical error to an attempt to protect the package from theft. The latter explanation was no more convincing that the first, given that 30 kilogrammes of silver could not be described as a small package which might easily be tampered with.

29. The onus was on McCabe to demonstrate that the Border Force's decision had not been reasonable. Their reference to the missing C156 document was not relevant to the reasonableness of the non-restoration decision and McCabe's failure to follow the procedure set out under Public Notice 12A to dispute the seizure was not a relevant consideration either.

30. In this case there had been a number of mis-declarations and under valuations indicating more than an innocent error and on that basis the Border Force had been acting reasonably in deciding not to restore the goods.

Discussion

31. The Tribunal's powers under s 16(4) of the Finance Act 1994 are confined to considering whether the person making the decision not to restore seized goods could reasonably have arrived at that decision.

32. It is clear from other decisions of this Tribunal that the Border Force's internal guidelines for exercising their discretion whether to restore goods seized are not in themselves unreasonable (see the *Clear PLC v Director of Border Revenue* TC/2009/14440)) decision).

33. The only question for the Tribunal is whether on the basis of the facts in this instance those guidelines, that goods would only be restored in exceptional circumstances, have not been reasonably applied.

34. It is unfortunate that the Tribunal did not hear any direct evidence from McCabe to explain how or why each of these documents were completed in the way in which they were. The only direct evidence from McCabe offered an explanation for the error made on the waybill, but no explanation for the repetition of that error in the Customs Declaration and Packing Slip. Mr Doody's evidence attempted to amplify the reasons suggested to him by McCabe for the errors in the documentation but he was not able to explain why the silver flakes had been described in three documents signed by Mr Macaulay as sulphide flakes. The Tribunal considers that it is significant that the only document in which the goods were correctly described was the packing note which was concealed inside the package of silver flakes itself. All of the documents which were readily accessible to Customs officials mis-described the silver as sulphide flakes.

35. On the basis of the evidence provided, the Tribunal considers that the consistent mis-declaration of the nature of the goods by a representative of McCabe and their undervaluation was sufficient basis for the Border Force to consider that this was not a case in which an innocent error had been made. In coming to their decision on 19 September 2013 the Border Force had every reason to suspect that the goods had been

consistently and intentionally mis-declared by McCabe and for that reason should not be restored.

36. On behalf of McCabe Mr Doody referred to a lack of a motive to deceive and the fact that no VAT was being avoided, but even if this is correct, the Tribunal does not think that this is sufficient to suggest that the mis-declaration was not intentional or that the Border Force came to an unreasonable decision.

37. The Tribunal agrees with the Border Force that the failure by McCabe and Mr Doody to understand what was required in order to challenge the seizure is not sufficient to establish that the Border Force's decision not to restore the goods was not reasonable taking account of all the circumstances of this case.

38. For these reasons the Tribunal does not consider that the Appellant has demonstrated that the Border Force acted unreasonably in deciding not to restore the goods to the Appellant and for this reason this appeal is dismissed.

39. 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.

RACHEL SHORT
TRIBUNAL JUDGE

RELEASE DATE: 30 July 2014