

Customs Duty relief despite use of incorrect procedure codes

Terex Equipment Ltd, FG Wilson (Engineering) Ltd (C-430/08), Caterpillar EPG Ltd v HMRC (C-431/08)

Summary

The ECJ has heard the joined cases of Terex Equipment and FG Wilson / Caterpillar, concerning the incorrect use of Customs Procedure Codes (CPCs) when re-exporting goods originally imported under duty suspension. The UK and the Commission both submitted to the ECJ that although the use of incorrect CPCs gives rise to a customs debt, it may be possible to have this remitted where the declarant acted in good faith and was not obviously negligent. Any business which may inadvertently have used an incorrect CPC on a customs declaration should take specialist advice, as this case could result in the multi-million pound assessments issued by HMRC being held to be valid.

Background

The Appellants are long-standing users of the inward processing relief (IPR) procedure under which the customs duty, which would normally be due on the importation of goods into the UK, is suspended pending processing and subsequent re-exportation of the goods.

In these cases, goods imported under IPR were subsequently exported, but rather than being declared under procedure code 31 51 (which discharges the goods from IPR suspension) they were instead declared under code 10 00 (which indicates the export of Community goods).

Whilst accepting that the goods had been exported from the UK, HMRC took the view that the use of the incorrect CPC effectively triggered a customs debt and in both cases they issued multi-million pound assessments. Although both Appellant companies appeared to enjoy a good relationship with HMRC, neither company was informed of any apparent irregularities in respect of their customs declarations and both completed the other parts of the IPR documentation (forms C&E 812) accurately. One of the Appellants approached HMRC and requested to be allowed to amend the CPC used, but HMRC refused.

On appeal (although appearing to favour the arguments put forward by the Appellants) the Tribunal, taking into account the complexities of the issues involved and the practical difficulties of a potential appeals process involving three separate jurisdictions (Scotland, England and Northern Ireland), considered it appropriate to refer the following questions to the ECJ for a preliminary ruling.

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Case C-430/08 - Terex Equipment Ltd

1. Does the Code¹, and in particular Article 78, permit revision of the declaration to correct the CPC and if so, are HMRC required to amend the declaration and to regularise the situation?
2. Were the goods in this case unlawfully removed from customs supervision within the meaning of Article 203(1) of the Code by reason of the operation of Article 865 IR²?
3. If so, was a customs debt on importation thereby incurred under Article 203 of the Code?
4. Even if there was no customs debt under Article 203 of the Code, has a customs debt arisen by virtue of Article 204 having regard to
 - (i) the findings on "obvious negligence" and
 - (ii) the question whether HMRC failed to comply with Article 221(3) 45 of the Code by failing to communicate the Article 204 customs debt within the time limit
5. Given that:
 - (i) there can be no regularisation under Article 78 of the Code and
 - (ii) there was a customs debt and
 - (iii) there was a special situation as contemplated by Article 899 IR,was it open to the Tribunal to conclude that there was no obvious negligence present, so that the customs debt should be remitted under Article 239 of the Code?

Case C-431/08 - FG Wilson (Engineering) Ltd, Caterpillar EPG Ltd

1. Were the goods in this case unlawfully removed from customs supervision within the meaning of Article 203(1) of the Code¹, by reason of the operation of Article 865 IR²?
2. If so, was a customs debt on importation thereby incurred under Article 203 of the Code?

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3. If the answers to questions 1 and 2 are in the affirmative, does the Code, and in particular Article 78(3), permit revision of the declaration to correct the CPC and if so, are HMRC required to amend the declaration and to regularise the situation?
4. If there can be no regularisation under Article 78 of the Code and given that there was a customs debt under Article 203 of the Code and given that it is common ground that there was a special situation as contemplated by Article 899 IR, was it in the circumstances and in the light of the findings that follow open to the Tribunal to conclude that there was no obvious negligence present, so that the customs debt should be remitted under Article 239 of the Code and the demand for customs duty should be withdrawn? In particular, in considering whether there has been obvious negligence on the part of the trader concerned, are the competent authorities entitled to take into account the fact that the revenue authority's own failing in its duty of care and management has contributed to the errors giving rise to the customs debt?

Comment

The UK and the European Commission made a number of submissions at the hearing. There were no submissions made by any other Member States.

In respect of questions one and three in case C-430/08, and questions one and two in case C-431/08 (the circumstances under which a customs debt is incurred pursuant to art 203 of the Customs Code and art 865 of the implementing Regulation), both the UK and the European Commission argued that the use of incorrect customs procedure codes constituted 'unlawful removal of the goods from customs supervision' and thus created a customs debt.

In respect of question four in case C-430/08 (circumstances under which a customs debt is incurred pursuant to art 204 of the Customs Code), the UK submitted that a customs debt had been incurred as the Appellant had failed to give prior notification of the re-exportation to the customs authorities. However, the UK also took the view that there were 'good grounds' for considering that in this respect, the Appellant had not been 'obviously negligent'. The Commission's view was that it was for the national court to decide whether the Appellant had displayed 'obvious negligence'.

On the question of 'regularising' the situation pursuant to art 78 of the Customs Code (question one in case C-430/08 and question three in case C-431/08), the UK was of the view that art 78 does not permit revision of the export declaration to correct the customs procedure code, and that the UK customs authorities are not required to amend the declaration to purport to regularise the situation. The Commission took a contrary view, suggesting that art 78 does permit revision of the export declaration. Consequently, unless the declarants were guilty of obvious negligence in

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submitting an incorrect declaration, and providing the customs authorities were able to verify that the compensating products had been exported, art 78 required the authorities to regularise the situation.

Regarding the question of whether the customs debt could be remitted under art 239 of the Customs Code (question five in case C-430/08 and question four in case C-431/08) the UK was of the view that there were 'good grounds' for considering that no obvious negligence could be attributed to the Appellants, and that the customs debt could therefore be remitted. According to the Commission, the customs authorities must take into account all the relevant circumstances in order to draw an appropriate balance between the Community interest in ensuring compliance with the customs legislation, and the interest of traders acting in good faith, who should not be exposed to loss going beyond normal commercial risks. In making that assessment, the authorities must have regard not only to the conduct of the trader but also to that of the Community or customs authorities. Furthermore, the Commission was of the view that the national court may not decide itself on the application of art 239 in the present case, but should instruct the customs authorities to refer the matter to the Commission pursuant to Article 905 of the implementing Regulation.

Implications

The UK's submissions to the ECJ suggest a softening of the approach originally taken by HMRC when it assessed the Appellants for customs duty of c.£40 million. However, the European Commission has suggested that it should not be open to the national court (in this case the Tribunal) to decide whether it might be appropriate to remit the sums due, and that the Commission itself should be given the opportunity to decide whether such a course of action is appropriate.

It will ultimately be for the ECJ to decide (after the Advocate-General's opinion) whether either the UK or the Commission's favoured interpretation of the relevant provisions is correct. In the meantime, any business which may inadvertently have used an incorrect procedure code on a customs declaration should take specialist advice because if, at any point, either the ECJ or the UK courts were to decide that the assessments in this case are valid, HMRC would become obliged to collect the customs debts arising.

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