

CUSTOMS DUTY – Community transit procedure – Guarantee waiver – Refusal to grant guarantee waiver – Whether refusal reasonable – No

LONDON TRIBUNAL CENTRE

EUROBOX LINE AGENCIES LTD Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

ALEX McLOUGHLIN

Sitting in public in London on 1 July 2002

Peter Gilmore, director, for the Appellant

Michael Zeffman, of the office of the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This appeal, brought by Eurobox Line Agencies Limited ("Eurobox") is against a disputed decision contained in a letter from the Commissioners dated 21 December 2001. In that letter the Commissioners confirmed upon review their decision to refuse to grant Eurobox a "guarantee waiver".

2. The decision is one within section 14(1) of Finance Act 1994 and an appeal lies to the Tribunal under section 16(1). The appeal relates to an "ancillary matter". The issue for the Tribunal therefore is whether the decision was one which no reasonable body of Commissioners could have taken.

3. Eurobox applied on a form C1343 dated 23 October 2001 for authorisation to use a guarantee waiver to enable them to use the simplification procedures of the Community Transit Procedure set out in Articles 372-384 of Commission Regulation 2454/93 (the Implementing Regulations) as amended by Commission Regulation 2787/2000. Those provisions implement Article 94 of the Community Customs Code. Generally speaking these provisions cover the arrangements enabling goods not in free circulation to move within the community.

4. Article 94 directs that the "principal" is to provide a guarantee to ensure payment of any Customs debt incurred in respect of the goods: the guarantee will either cover a single transit operation or will be "comprehensive" and cover a number of such operations. Paragraph 4 empowers the Member state to authorise the principal to use a comprehensive guarantee for a reduced amount or to have a guarantee waiver; the criteria for such authorisation are – correct use of community transit procedures, co-operation with Customs authorities and "in

respect of the guarantee waiver, a good financial standing which is sufficient to fulfil the commitments of the said person".

5. Article 380 of the Implementing Regulations provides (in paragraphs 3 and 4) that a guarantee waiver maybe granted where the principal demonstrates, so far as is relevant, that he "has sufficient financial resources to meet his obligations having regard to the criteria set out in Annex 46b". Criterion 4 in Annex 46b is headed "Sufficient financial resources to cover obligations" and this is explained as follows:

"The principal demonstrates that he has the financial resources to cover his obligations by providing the customs Authorities with evidence to show that he has the means to pay the customs debt likely to be incurred in connection with the goods concerned."

6. Eurobox's application for a guarantee waiver submitted with the Form C1343 the financial statements for the years ended 30 June 1999 and 30 June 2000.

7. Eurobox's application stated that they intended to use "Common/Community transit arrangements" weekly or by-monthly (up to 30 times a year). £6,000 was stated to be the likely highest total of duty and other charges applicable to any single "CCT" consignment within the next twelve months. The application stated that Eurobox had three years experience in CCT procedure and that it co-operated closely with the Customs Authorities using data-processing methods to complete transit declarations and providing non-mandatory data on transit declarations and that it always presented its transit declarations to the Tilbury Customs Office. It went on to state that all the vehicles used were owned by Eurobox and operated by Eurobox drivers who were proved to be trustworthy and experienced and who understood the delicate nature of CCT goods.

8. It was not in dispute that the average amount of customs debt likely to be at risk at any time was £15,500.

9. The decision refusing a guarantee waiver was given by letter of 14 November 2001. It states –

"We have considered your recent application ...

Unfortunately at this time we are unable to offer a guarantee waiver as requested, as, in the opinion of our accountant, your financial position is insufficient to protect the possible liability which may accrue.

We are, however, prepared to offer a comprehensive guarantee with a reference amount of £15,000 100% of which will be backed by your bank".

10. On 15 November 2001 Eurobox wrote back. In that letter they pointed out that the sum of £15,000 was far in excess of any liability to the revenue and that their financial position was stable as was demonstrated by their audited accounts. They also observed that no reliance had been given to the fact that they had had a guarantee waiver for the last eight years without any default or query.

11. The review decision was given by the Reviewing Officer (Mrs C L Gowing) by letter of 21 December 2001. The letter acknowledges that Eurobox have had

sufficient experience of community transit procedure and that they have demonstrated that they are able to co-operate with the Customs authority and that they have been able to demonstrate that they are in command of their transport operations. The letter goes on to state:

"The CCTO do not consider that the requirement as laid down by the regulations has been satisfied with regard to your financial position.

The Collection Chartered Accountant on consideration of your year end 2000 audited accounts does not believe that a guarantee waiver should be granted at this time.

He has reported that the company has negative current assets in the year 2000 of (£91,447) and in 1999 (£42,353). He has said that in his opinion the situation is not improving and despite the net assets of £223,996 he considers that you should not be granted the guarantee waiver.

...

As I have already stated the Collection Chartered Accountant in his considered opinion does not believe that your financial position is sufficiently strong enough to allow a guarantee waiver to be granted.

Consideration has been given to your previous history of compliance but all of the requirements need to be complied with before a guarantee waiver would be allowed.

In considering all of the above facts I agree with the decision given by the CCTO and am therefore upholding the decision to refuse your request for guarantee waiver."

12. Mrs Gowing was unable to attend and give evidence. Mr David F Pearson, the Collection Chartered Accountant, did give evidence.

13. Before we review the evidence for the Commissioners we set out the relevant material from Eurobox's financial statements for the two years. Unless otherwise stated the figures are rounded upwards and downwards to the nearest £10,000.

14. The turnover in 1999 was £1.45 million and in 2000 was £2 million

- gross profit in 1999 was £0.41 million and in 2000 was £0.47 million
- operating profit in 1999 was £64,661 and in 2000 was £79,841
- interest charges in 1999 were £14,853 and in 2000 were £28,558
- dividends of £40,000 were made in both years
- net current liabilities for 1999 were £42,353 and for 2000 were £91,447
- current trade debtors for 1999 were £290,000 and for 2000 were £360,000.

15. Notes 4-7 read as follows:

"NOTES TO THE FINANCIAL STATEMENTS

for the Year Ended 30th June 2000

9. CREDITORS: AMOUNTS FALLING

DUE WITHIN ONE YEAR

30.6.00 30.6.99

£ £

Bank loans and overdrafts 47,479 43,320

Hire purchase contracts 118,265 91,561

Trade creditors 212,317 223,918

Other creditors 17,517 6,168

V.A.T. 29,195 3,852

Social security & other taxes 52,095 23,843

Taxation 11,177 8,696

488,045 401,358

10. CREDITORS: AMOUNTS FALLING

DUE AFTER MORE THAN ONE YEAR

30.6.00 30.6.99

£ £

Bank loans 70,555 76,562

Hire purchase contracts 144,206 125,984

214,761 202,546

11. SECURED DEBTS

The following secured debts are included within creditors:

30.6.00 30.6.99

£ £

Hire purchase contracts 262,471 217,545

Assets under hire purchase are secured against the asset concerned.

The bankers have a fixed and floating charge over the book debts and floating charge over all other company assets."

16. It follows from the above figures that the surplus of current trade debtors over current trade creditors was some £65,000 in 1999 and some £145,000 in 2000. As noted already, the total of net current liabilities was (£42,353) in 1999 and (£91,447) in 2000.

17. The evidence of Mr Gilmore for Eurobox, which was not challenged, was that Eurobox had had a guarantee waiver for some ten years. It had operated a bonded warehouse and had stored goods covered by guarantee waivers without being required to give further security. It had operated a registered enhanced remote transit shed without financial security being required. It provides a bank guarantee to the Commissioners for £250,000 as security for its excise duty obligations and it has provided a "movement guarantee" for a further £20,000 covering the movement of high value goods.

18. Referring to the increase (some £27,000) in the hire purchase element in current liabilities, Mr Gilmore stated that this related to the funding of purchases of handling equipment and vehicles where there were insufficient cash flow resources to cover the costs of these. Referring to the increase of some £25,000 in VAT liabilities (shown in current liabilities) Mr Gilmore stated that this could have resulted from a change from one month to three month accounting. The increase of some £28,000 in the current liabilities figure for tax and social security had resulted from a substantial increase in numbers of staff in 1999 and 2000.

19. How did the Commissioners approach the decision-making process? We know from the Reviewing Officer's letter that she took the following considerations into account:

- the opinion of Mr Pearson, the chartered accountant, that a guarantee waiver should not be given based on the increase in negative current assets from £42,000 to £91,000 and on the non-improvement of the situation:
- Eurobox's previous history of compliance.

The review letter of 21 December 2001 refers to those considerations (and to no others) as the facts that the Reviewing Officer considered in agreeing with the decision to uphold the CCTO's refusal to grant a guarantee waiver.

20. Mr Pearson's professional opinion was endorsed in handwriting on the front of Eurobox's financial statements. It is dated 13 November (i.e. the day before the Commissioners' original decision was released). It states:

"I have examined the attached accounts and my comments are as follows:

The company has negative net current assets: 2000 (£91,447) and 1999 (£42,353).

The situation is not improving and in my opinion despite its net assets of £223,996 it should not be guaranteed a CCT waiver."

21. In evidence Mr Pearson said that the existing method used by him to examine the annual accounts for applicants for guarantee waivers had been instituted in January 2000. The tests applied were simple basic equity tests that required the applicant to be able to show that he had the ability to pay the guarantee should it be called upon. These tests entailed the applicant having positive net current assets and positive unencumbered but net assets that would be sufficient to meet potential liabilities. These tests have been designed so that the Customs staff could "quickly approve the accounts of those companies that met the tests and check out the accounts of those companies that at first sight had not met them." He went on to air his concerns regarding Eurobox's annual accounts for the year ended 30 June 2000. These concerns had centred on the increasing negative net asset figures. He observed that the increase in negative net assets incurred despite Eurobox having reduced the average number of days taken to collect their trade debts from 73 to 65 days and the average number of days taken to pay trade creditors from 101 to 66 days. It was his opinion that notwithstanding these improvements Eurobox clearly had a problem in managing its working capital. He also observed that, in the light of fixed and floating charges given by Eurobox to its bankers and its declining liquidity position, it did not have financial resources to meet its relevant obligations. He also observed that Eurobox had paid dividends of £40,000 each year rather than plough those amounts back in to the business. He could not comment on the £270,000 guarantees given at Eurobox's expense to the Commissioners for excise liabilities.

22. Apart from the opinion endorsed on the financial statements, there is no evidence that any of the explanations given in the course of the present hearing had been provided to the Reviewing Officer when she was taking her review decision in December 2001.

23. Mr Pearson had also stated in evidence, that the value of one movement had been "calculated upon an average value of VAT and duty per movement of 100,000 ecu's or £70,000". Mr Gilmore for Eurobox observed that the figure of £70,000 was far in excess of the value of any of Eurobox's movements. Mr Pearson's response had been that that figure had been provided by Customs management and not by him.

24. We are not satisfied that the Reviewing Officer took all the relevant considerations into account. For that reason we think that her decision was "unreasonable" in the sense that that word is used in section 16(4) of Finance Act 1994. It appears that she simply followed the Collection Chartered Accountant's opinion and applied no further judgment to the decision-making exercise. If she had looked into the circumstances she would have discovered factors that did not apparently play any part in the Chartered Accountant's considerations when he gave his advice. For example the Reviewing Officer would have noted that the average amount of liability for Customs debt at risk was £15,500: this is less than

0.75% of the annual turnover of Eurobox of £2 million. It is a fair inference that an amount of that size could easily be met out of cash flow. If not met out of cash flow, there might well have been bank credit facilities available; there was no suggestion at any time that such facilities were not available to Eurobox. Moreover, we are not satisfied that adequate (or any) attention was given to the existence and form of the guarantees for £270,000 provided by Eurobox in favour of the Commissioners for excise duties liabilities. These guarantees need to be examined. Is it really so that they are limited to excise liabilities and cannot be applied in meeting other debts due to the Commissioners? We suspect that the Commissioners can and do use guarantees of this sort to meet all liabilities due to them whether those be for VAT, Excise Duties or Customs Duties.

25. All in all we think that the Reviewing Officer relied too much on the Collection Chartered Accountant. He laid down a test and applied it. That was his job. But he did not and could not in the time available look at the wider range of relevant considerations. We are not therefore satisfied that the Commissioners properly applied the criterion in Annex 46(b).

26. For all those reasons we quash the decision under appeal and direct that a further review take place. We were not asked to make a costs award. If the matter arose, we would be inclined to award Eurobox an amount in respect of their costs.

STEPHEN OLIVER QC

CHAIRMAN

RELEASED:

LON/2002/7002