CUSTOMS ACT COURT OF REVIEW

Decision

Section 101A (4) *Customs Act* 1986

Title of Matter:	**RED LEAF LIMITED** **v** **CEO, FIJI REVENUE AND CUSTOMS SERVICES**	**(Appellant)** **(Respondent)**
Section:	**Section 101A(4) *Customs Act* 1986**	
Subject:	**Appeal against Amended Assessment**	
Matter Number(s):	**No 2 of 2018**	
Appearances:	**Mr P Kumar, Mitchell Keil Lawyers for the Appellant** **Mr E Eterika and Mr O Verebalavu, FRCS Legal Unit for the Respondent**	
Dates of Hearing:	**29 January 2019; 24 July 2019.**	
Before:	**Mr Andrew J See, Resident Magistrate**	
Date of Decision:	**1 November 2019**	

KEYWORDS: Section 10 *Customs Tariff Act* 1986; Remission or refund of duty; General Rules for the Interpretation of the Harmonized System; Section 101A (4) *Customs Act* 1986; Appeal against decision of the Comptroller.

CASES CONSIDERED

Finest Liquor (Fiji) Ltd v Fiji Revenue and Customs Authority [2014] FJCOR 1; Matter 06.2013 (4 November 2014),

Background

[1] The Appellant is an incorporated entity engaged in the business of importation and wholesaling of spice products from Pakistan and Malaysia. At the heart of this appeal, is a tariff classification ruling made by the Respondent on 11 July 2018, relating to the fiscal duty to apply on packets of seasoning mix that had been imported into the country by the Appellant. The tariff classification ruling gave rise to the Respondent re-assessing the duty payable in accordance with Section 101A of the *Customs Act* 1986. The re-assessment follows an audit investigation undertaken by the Comptroller in 2017 and 2018.

[2] The circumstances in which the liability to pay import duty is established, arises out of Section 3 of the *Customs Tariff Act* 1986,[1] that in turn makes reference to rates at Schedule 2 of that Act. Central to the dispute between the parties are the Single Administrative Documents that are completed by the Appellant as an importer, when self- assessing its duty in accordance with Schedule 2.

[3] The item at the centre of the dispute is a 60 gram packet of seasoning mix that is used as flavouring in cooking. The packets of mix have been imported into the country by the Applicant on four occasions during the 2017 and 2018 period, and on each occasion, were self- assessed as falling within a Schedule 2- Chapter 9 (Coffee, Tea, Mate and Spices) Tariff Item 9109900 and as a result, believed to attract only a 5 per cent duty. The Respondent on the other hand, claimed that the self- assessment has identified the incorrect Tariff Item and argues that the correct duty is 32 per cent, as the item falls within Schedule 2 – Chapter 21 (Miscellaneous edible preparations) Tariff Item 210390. As a result of the change in classification as made by the Comptroller, the Appellant was advised of a duty shortfall in the amount of $58,227.08 (VAT inc), that it is "a debt due to the government under Section 92 of Customs Act 1986 and shall be recovered under Section 95"[2].

How to calculate duties under the Custom Tariffs Act 1986

[4] The Court is very grateful to Counsels for both the Appellant and Respondent, in the assisting way in which they have provided information in relation to this matter. The issue of the imposition of duty is not in dispute, only the way in which the classification of the seasoning mix has attracted the quantum percentage for the purposes of Schedule 2. To reconcile the dispute, we need to consider the interpretative rules that have been established for the classification of goods that are based on the International Convention on the Harmonized Commodity Description and Coding System established by the Convention for the classification of goods in Customs Tariffs signed in Brussels on 14 June 1983. Relevantly, these have been reproduced as follows:

> *Interpretative Rules - Classification of goods in the Tariff shall be governed by the following principles:*
>
> *1. The titles of Sections, Chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:*
>
> *2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.*
>
> *(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.*
>
> *3. When by application of Rule 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:*

[1] See Section 92 of the *Customs Act* 1986.
[2] See Demand Notice dated 17 July 2018.

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets of retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

4 Part 1 Standard Tariff Interpretative Rules 4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein :

(a) Camera cases, musical instrument cases, gun cases drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;

(b) Subject to the provisions of Rule 5(a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

Issue in Dispute

[5] As mentioned above, at the end of the day, the primary issue in dispute is simply one of classification. That is, should the seasoning mix attract a fiscal duty based on the classification for Item No 0910.91.00 of Chapter 9 to Schedule 2 of the Act, or should the Comptrollers position be preferred, where it has classified the goods based on Item No 2103.90.00 of Chapter 21 to the Schedule. Let us quickly examine the way in which the commodity description and coding system is set out. Rule 2(a) provides a good starting point where it states that:

"*Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article*".

[6] The heading of Chapter 9, which the Appellant relies upon, is entitled "Coffee, tea, mate and spices". Yet the item in question, is referred to as a "seasoning mix" and the package provided during proceedings, lists its ingredients as: salt, turmeric, paprika. red chilli, dili seed, green cardamom, black pepper, clove, black cardamom, cumin, all spice, ginger, garlic, dried papaya powder, citric acid, maltodextrin, hydrolysed soy protein, cane sugar, canola oil, silicon dioxide and thatch screw pine. Based on the composition of the product, it is neither described in the heading of Chapter 9, nor do all of its components fall within that classification. We then need to move to Rule 2 (b), that provides:

Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances.

[7] When interpreting Rule 2(b), in the context of the term spices, what appears to be the case is that a spice can still be classified as a spice, even where it is combined with other materials or substances. The question arises, does the heading spices at Chapter 9, include a reference to mixtures of combinations of that material or substance with other materials or substances. The caveat provided within Rule 2 (b) provides the answer to that question, where it states that if *the classification of goods consists of more than one material or substance (then it) shall be (interpreted) according to the principles of Rule 3.*

<u>Rule 3 and its clarifying provision</u>

[8] The first point to recognise, is that the seasoning mix contains more than one substance that is being mixed with a spice (another substance), so it simply cannot be interpreted solely reliant on Rule 2. The guidelines make clear, that Rule 3 needs to be relied upon at that stage where the classification of goods consists of more than one material or substance. For example, the fact that the seasoning mix contains salt (Chapter 25) and dried papaya powder (Chapter 8), renders the good one where even if it was a spice or mixture of spices, has now two or more materials or substances that is mixed with it. In cases of this type, Rule 3 provides in the first instance, that the *heading which provides the most specific description shall be preferred to headings providing a more general description.* It is here where it is likely that the case of the Appellant falls down. The heading relied upon by the Appellant is at HS Item No 0910.99.00 - (Mixtures referred to in Note 1(b) to Chapter 9) that falls within the sub-heading*: Ginger, saffron, turmeric (curcuma), thyme, bay leaves, curry and other spices*. On the other hand, the Respondent seeks to classify based on the HS Item 2103.90.00 - Other, that falls within the heading: *Sauces and preparations therefor; mixed condiments and mixed seasonings; mustard flour and meal and prepared mustard*. The most specific description of this product is mixed seasoning, located within the heading 2103.90. The product is more than just spices. Grounds 1 and 2 of the appeal must fail on that basis.

Other Grounds of Appeal

[9] The third ground of the appeal, is that by clearing the goods through customs in a case where they have been incorrectly assessed, the Comptroller has somehow waived its right to correct the mistake. The Tribunal does not subscribe to that view. The taxing provisions have been determined by the parliament, they are not discretionary unless the law specifically makes them so. Subject to any other limitations, these are monies due by law.

[10] In relation to Ground 4, that matter is not before the Court. The Appellant should be free to make any fresh approach to the Authority, based on the special circumstances of the case. It should be noted however, the VAT claimed as an input credit, can only still be that which has been paid. Finally, the Appellant claims that the Respondent is time barred in making its demand for payment, for the reason that Section 95 imposes a 12 month limitation on the Comptroller as to when the recovery of duties can

occur. The Appellant argues that there is a time restriction imposed on the making of a demand by the Comptroller in the case of Custom Entry C11573 dated 22 February 2017. That is, it is argued that the time window for making a demand commenced from the date when the duty should have been paid; in that case, 22 February 2017. The Respondent on the other hand, argues that in the case of an amended assessment`, that in effect the time line as to when the correct amount should have been paid, commences from the date of issue of the amended notice[3].

Time limits for amended assessments

[11] This is an appeal that has been made to the court in accordance with Section 101A(4) of the Act. That is, it is an appeal against a decision of the Comptroller to amend an assessment as provided for in writing to the Appellant, by virtue of Section 101 A (2) of the Act. The language within Section 101A envisages that the Comptroller may amend the assessment; secondly that she or he may demand any short paid duty and finally, presumably in circumstances where the demand is not met, take recovery action for the short paid amount.

[12] The issuing of an amended assessment take places in accordance with Section 101A(2) of the Act. The legislation imposes no express time limit as to when an amended assessment may issue.[4] In the case of *Finest Liquor (Fiji) Ltd v Fiji Revenue and Customs Authority,*[5] this court held that a 12 month limitation should not be imposed on the issuing of a Short Payment Advice, particularly given the requirements set out within Sections 114A and 114B, in which the business records of a licensee, importer and exporter must be held on their premises in accordance with Section 114A of the Act for seven years and available for inspection within 5 years after entry. The question posed at that time, was essentially, why would there be a need to preserve records for seven years under Section 114A(2) of the Act, if after 12 months, the Authority could not re-assess excise and duties, as a result of its own inquiries. The case of *Finest Liquor* did not address, whether or not the short payment advice once issued, could be enforced in those circumstances. Of course the counter argument to the view expressed at that time, is that importers and exporters need certainty in understanding the additional costs that are imposed by fiscal duty or excise, as these would need to be factored into the price of goods once cleared. By way of example, a good with a nominal value of $10.00, that is self-assessed to attract a fiscal duty of 5% and VAT of 9%, is anticipated to be sold at no less than $11.45. If after three years, that duty was recalculated at 32% and applied retrospectively, would mean that the cost of the good at clearance is $14.40 (approx). The cost of the import has increased by approximately 30 per cent. After three years that cost cannot be recovered where the goods have already been sold. And this would seem to support the proposition that importers need certainty as to the costs of importation within that 12 month time window. With the benefit of hindsight, this is also why the 15 day rule for appeals against self-assessment should be strictly applied. Because if the imposition of the assessment was to follow, then such action should take place as quickly as possible in order not to unfairly disturb the subsequent pricing decisions of the importer that may arise. In this regard, some clarity from the parliament as to its policy intent would be helpful. A clarifying provision of a type similar to that found at Section 11 of the *Tax Administration Act* 2009 would assist in removing any uncertainty in this regard.

[13] For the moment though and in the absence of greater clarity, the power to issue amended assessments at Section 101A(2) of the Act, sits apart from the recovery of duties arrangements set out at Section 95(1)(a), where the correct amount of any duty under the Act may be demanded by the Comptroller at any time within one year from the date when such duty should have been paid. Such demands in this case,

[3] See Section 101A(2) of the Act.

[4] Compare and contrast to Section 11 of the *Tax Administration Act* 2009, where a 6 year window is created, unless in the case of fraud, wilful neglect or serious omission.

[5] [2014] FJCOR 1; Matter 06.2013 (4 November 2014)

presumably include those anticipated at Section 94(1) of the Act, where the owner of goods may pay the sum demanded by the Comptroller under protest[6]. By way of contrast, it could well be the case that an Amended Assessment was issued and no such demand for payment made, until such time as the 15 day appeal window provided for at Section 101A(4) of the Act had expired.

[14] The Appellant should remind itself of the fact it has made an appeal under Section 101A(4) of the Act not Section 94(2). In ordinary circumstances, the window for making an appeal under Section 101A(4) of the Act, is 15 days[7]. The distinction between an appeal under Section 101A(4) and that under Section 94(2) of the Act must be recognised.

[15] Section 94(2) of the Act states:

> *The owner may –*
>
> *(a) If the dispute relates to the decision by the Comptroller upon any of the matters specified in the Schedule, within 3 months after the date of payment, enter an appeal to the Court of Review established under the provisions of section 174;*
>
> *(b) In any other case, within 3 months after the date of payment, bring an action against the Comptroller in any court of competent jurisdiction for the recovery of the whole or any part of the sum so paid.*

[16] Appeals made under Section 94(2)(a) of the Act, enable the following decisions of the Comptroller to be challenged:-

(i) The interpretation of the customs tariff;
(ii) The classification of goods under the customs tariff;
(iii) Any penalty imposed under section 137A;
(iv) Any amended assessment imposed under Section 101A;
(v) The Water Resource Tax Act 2008; and
(vi) Customs rulings in accordance with Section 154G.

[17] The only distinction that seems capable of being drawn between appeals made under Section 101A(4) of the Act, as opposed to those made under Section 94(2), is that a notice in writing of an amended assessment provided under Section 101A, may be appealed against in circumstances where no payment of any duty short fall is made; whereas appeals lodged against decisions of the Comptroller in relation to amended assessments "imposed under Section 101A", assume that a payment is made. Whether the Appellant has relied on the right section of the Act for the lodgement of its appeal, is an issue that neither party has canvassed. The Court can only deal with the matter it has before it. Whether any conclusion reached by this Court in dealing with an appeal against the issuing of a notice of assessment, thereafter establishes the "correct amount" of duty that is capable of being demanded and recovered as a debt payable to the Government in a court of competent jurisdiction, is another matter[8]. Certainly in the case of appeals made under Section 94 of the Act, sub-section (5) envisages that this court has the power to determine questions of correct payment, so that if necessary the amount overpaid shall be repaid by the

[6] The scenarios will no doubt vary, as protest payments are assumed to take place prior to the goods being cleared.
[7] An extension of time was permitted by the Court for the lodging of this appeal on 29 January 2019.
[8] It is noted that this view was expressed in the case of *Finest Liquor (Fiji) Ltd v Fiji Revenue and Customs Authority* [2014] FJCOR 1; Matter 06.2013 (4 November 2014), although the workings of how that view was reached and in which limited circumstances it could apply, were not properly or perhaps even correctly ventilated.

Comptroller. But this is not an appeal under Section 94 of the Act. To summarise, the first two Grounds of Appeal as filed, do no more than bring alive the appeal against the classification of goods and the amended assessment[9].

[18] The third ground, is a matter that if it was to be disputed, would be one that after it had been properly vented between the parties, may fall within the jurisdiction of the Tax Tribunal. The fourth ground has no legal strength, as the Comptroller is clearly entitled to issue an amended assessment. And for the reason already alluded to above, the fifth ground cannot succeed, as this is an appeal against the issuing of a notice of assessment. Section 101A(4) does not provide for an appeal against the demand for payment by the Comptroller, or in fact the payment made. Whether the Appellant should have in the first instance submitted to a demand notice as made in accordance with Section 95 of the Act, is one issue. And how if monies were wrongly paid, could they then be recovered against the backdrop of a Section 101A(4) appeal, is also less than clear. Certainly Section 94(2)(b) of the Act may provide one possibility. Another notable provision is located at Section 96 of the Act that allows for the repayment of duties where they have been claimed on the basis of inadvertence or error. In this regard, it is noted that a 12 month window for making such claims is located in Section 96(2) of the Act.

[19] Some insight can be gained from the debate at the time of the Second Reading Speech for the *Customs Bill* 1986[10], when the following exchange ensued:

> **Hon H.C SHARMA:**
> …. What I am saying, Mr. Speaker, Sir, is that this piece of legislation is one sided, tilted entirely in favour of the Customs Department and against warehousekeepers and agents. In furtherance of that argument, Mr. Speaker, Sir, I draw your attention to clause 96 which deals with the refund of duty, fee or other changes paid through inadvertence and if it is paid through inadvertence, it is open to the person who has paid to ask for a refund. By the same token, Mr Speaker, Sir, if the Comptroller of Customs has erroneously made a refund, he can claim that from the person to whom he has paid. But there is a fundamental difference and I draw the attention of the honourable Attorney-general and the Minister concerned particularly to clauses 96(2) and (3). Where the Comptroller has to make a refund Mr Speaker, Sir, the claims must be made within one year. After that there is a time limit: fees that are paid in error will not be refunded by the Comptroller. But where the Comptroller has paid out in error, there is no such limitation. Clause 3 reads:
>
> > 'Where any amount of duty, fees or other charges has been erroneously refunded, the Comptroller may, within one year from the date upon which such sum was refunded, demand repayment of such sum and may recover such sum in a court of competent jurisdiction."
>
> **HON. ATTORNEY-GENERAL AND MINISTER FOR JUSTICE:-** That is the limitation.

[20] With the benefit of hindsight and despite the decision reached in *Finest Liquor*, the quarantining of acts of inadvertence or error within Section 96 of the Act to 12 months, seems supportive of the argument that assessments should not be allowed to amend after that time. And there lies the confusion. Further, in the case of penalty provisions for the making of false statements, located at Section 137A of the Act, these too are subject to a 12 month limitation. Though no such time limitation is readily discernible, in the case of the fraudulent evasion of duty for the purposes of Section 139[11].

---

[9] A further issue that remains unaddressed is in what form the Notice in Writing is to take, for the purposes of Section 101A (2).

[10] Parliamentary Debates (Hansard) The House of Representatives, Meeting of April-May 1986, p1065.

[11] Contrast this to Section 183 of the Customs Act (Cap 196) in which it appears that a three year limitation was imposed.

[21] If the Respondent can only enforce an amended assessment within the 12 month window, then the Appellant would be right in claiming that in the case of Entry C11573 dated 22 February 2017, the amount claimed of $17,619.14 was not due. Whether the Appellant can recover the excess amount paid pursuant to either Section 94(2)(b) of the Act, or even possibly under Section 96(2) of the Act, is an argument not before the court.

Remissions granted by Minister for purposes of Section 10 of the Act

[22] The final argument that has been advanced by the Appellant, albeit that it did not form part of the notice of appeal, is that in accordance with Section 10 of the *Customs Tariff Act* 1986, that for the period "from 30 June 2017 until the next National Budget announcement" a list of concessions had been granted by the Minister, including the reduction in fiscal duty imposed on Item 2103.90.00 (Mixed condiments and mixed seasoning). It is submitted that the concession had the effect of reducing the duty payable on seasoning mix from 32 per cent to 15 per cent. The approval letter dated 7 October 2017, was included within the *Applicant's Supplementary Bundle of Documents* dated 24 July 2019. In response to that submission, the Respondent submits that as a prerequisite to the Appellant being able to access any such concession, that it would first be required to make application in writing to the Comptroller for the purposes of Section 10(4) of the Act. The Court is not convinced that such a submission by the Respondent has much strength and of course one of the disadvantages here, is that neither party have adduced in evidence the relevant communications between the Authority and the Minister on 21 July 2017 and 28 September 2017, in which it would seem the issue of concessions has been raised. Based on the information available, it would appear that the Minister may have given approval to a broad class of importers in that relevant period.

[23] The supplementary argument provided by the Respondent, is nonetheless relevant. The Respondent rightly identifies that Code 232 of Part 2 to Schedule 2 to the Act, imposes conditions on any Section 10 concession that has been granted, specifically "that the goods are not for sale" and are to be used exclusively for the purpose for which the concession is granted. This submission must hold weight in the circumstances, because even if it was to be accepted that the general concession granted in the approval letter dated 7 October 2017 was to have application, the grant must still be seen to have been made within the context of any limitations imposed by the statute at Schedule 2. The Appellant's last ground must fail on that basis.

Conclusion

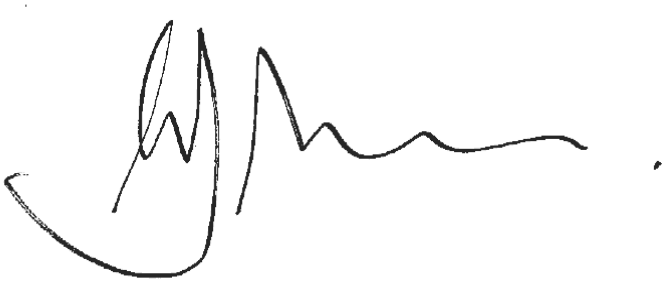
[24] To conclude, the Court is satisfied that the classification of the seasoning mix falls within the HS Item 2103.90.00, by virtue of the sub-heading at Chapter 21 of Schedule 2, that states inter alia: mixed condiments and mixed seasonings. Issues of time limitation aside, the Court does not accept that the Respondent waived its right to apply the correct fiscal duty, despite the fact that the goods initially had been cleared and self-assessed, reliant on a 5 per cent fiscal duty calculation.

[25] There is no expressed statutory limitation as to when an amended assessment may be issued for the purposes of Section 101A of the Act. That being said, it is unlikely that any amended assessment can be enforced by the Comptroller, in the case where the 12 month time window for recovery of duties under Section 95(1)(a) of the Act has already passed. Though as alluded to earlier, that is not a matter before this court. If some monies have been incorrectly paid by the Appellant because it is the case that they were not due, then those issues would need to be addressed by way of a separate application or request for refund. This appeal is only concerned with whether or not the amended assessment was correctly made, based on the tariff classifications. As indicated earlier, the court is satisfied that the classification made by the Respondent in relation to these entries, were the correct ones.

[26] In relation to the prejudice that is claimed by the Appellant, in the case where it cannot recover the VAT payable at the increased amended amount, the Court considers this is a matter, if in fact any prejudice does result, that should be resolved between the parties. And finally, insofar as any argument goes to the question of a concession that was provided by Section 10 of the Act, any such concession must find its limits within the conditions set out within Code 232 of Part 2 of Schedule 2.

Decision

[27] It is a decision of this Court, that the appeal under Section 101A (4) of the Act is dismissed.



Mr Andrew J See
Resident Magistrate