BEFORE CUSTOMS APPEAL AUTHORITY

CAA 010/18

[2019] NZCAA 02

UNDER THE	Customs and Excise Act 1996 ("the Act")
Between	**XXXX**
	Appellants
AND	**Chief Executive of the New Zealand Customs Service**
	Customs

SUBJECT TO ORDER LIMITING PUBLICATION

DATE OF DECISION **Tuesday, 26 February 2019**

DECISION

The background

[1] This matter proceeded to an oral hearing, though the parties did file an agreed statement of facts. To the extent necessary, the Authority will make factual findings, however before doing so I set out the uncontroversial aspects.

[2] The appellants import motorhomes, the relevant cases are imports from the United Kingdom in October and November 2017. There were four consignments, and seven vehicles in total.

[3] The declared value of the vehicles was $278,458, and freight of $35,891. The values were underdeclared, to the extent that GST and duty shortfalls amounted to $44,663.27. The appellants agree that the under declarations occurred, and the amount of them. It is common ground that the appellants did not themselves under-declare the values, or know at the time of the under-declarations.

[4] The appellants engaged a party they understood to have expertise in arranging shipping and importation (the agent), and paid the full

amount of GST and duty to the agent, understanding the money would be paid to Customs. In fact, the agent without the knowledge of the appellants engaged a customs broker (the customs broker), and the customs broker apparently used forged invoices to calculate the amount of GST and duty and paid that money to Customs. Customs approved the entry submitted by the customs broker, allowed the motorhomes to clear customs, and the Appellants took delivery without knowledge of the deception.

[5] After the motorhomes cleared customs, Customs investigated the shipments; when Customs contacted the appellants, and showed them what the customs broker submitted, the appellants realised they had been duped. They paid the full amount of GST and duty to the agent, and the customs broker (knowingly or unknowingly) underpaid using a false declaration to have the goods entered and cleared.

[6] While the appellants were not a party to the false declarations used by the customs broker, Customs has sought recovery of the unpaid GST and duty from them. Those elements are not controversial, however some of the circumstances are contentious:

[6.1] Customs say the appellants failed to take adequate care, and criticises them for not making their own inquiries, and for that reason say they should bear some of the responsibility.

[6.2] Customs has an ongoing investigation, and was reluctant to provide evidence of the respective roles and responsibilities of the agent, the customs broker and its staff. If that were determinative, it would have been necessary to require the evidence to be produced. However, for reasons I discuss, in my view that is not necessary. I note, however, it is uncontroversial that the appellants had no contact with, or knowledge of, the customs broker; they understood that the agent managed all the customs issues. I will make findings regarding the actions of the agent and the customs broker on the balance of probabilities on the evidence that is before me.

[7] I note that the agent and the customs broker were not parties to these proceedings, and no evidence was presented by them or individuals who performed actions for them. Accordingly, it is important to bear in mind that the findings I make are solely for this appeal, which does not involve any liability for the agent or the customs broker. Nonetheless, the actions of the agent and customs broker do have a bearing on aspects of the assessment made against the appellants. I can and will

make findings to the extent necessary to determine that issue, which is the matter before the Authority.

[8] The issue to be determined is the correctness of a decision made on 22 June 2018 to amend an assessment of duty under s 89(1) of the Customs and Excise Act 1996 (the 1996 Act), by imposing an additional liability for GST and duty of $44,663.27.

[9] The appellants, who appeared in person, say they paid all the GST and duty to the agent, and gave no authority to the customs broker, so they should not be liable for the additional GST and duty.

[10] Customs say the appellants were “importers” under the 1996 Act, they have joint and several liability for the GST and duty shortfall. Accordingly, whatever transpired between the appellants, the agent and the customs broker is irrelevant. Customs has elected to recover from them and it has an absolute and unfettered right to do so, without regard to the agent, the customs broker and what they did or did not do.

[11] I make findings on the actions of the appellants, the agent and the customs broker, and then examine the statutory provisions relating to the imposition of liability on the appellants, and the correctness of the amended assessment.

[12] For reasons set out below, my finding is that the amended assessment is not valid, which is not a finding that the appellants are immune from liability. I have found that there was no existing assessment against the appellants, so the amendment procedure could not apply. The statutory power to make an initial assessment is distinct from the power to amend an existing assessment. The Chief Executive’s delegate has purported to exercise the power to amend an existing assessment.

[13] When determining this appeal, the Authority does have the power to make an initial assessment against the appellants, and would usually do so when the wrong statutory provision has been applied. However, in my view this is not a case where I should do so. Making an initial assessment will potentially involve consideration of factors beyond those addressed when the Chief Executive’s delegate made the amended assessment.

Discussion

Factual findings regarding the actions of the appellants

[14] The Chief Executive says the appellants did not take adequate care, and are to some degree responsible for not discovering the false declaration and underpayment of GST and duty. However, there was no suggestion the appellants had any actual knowledge of the falsification until alerted by Customs.

[15] There is no doubt the appellants selected the agent to represent them, and entrusted the shipment of the motorhomes and customs processes to the agent. It appears that the appellants undertook some level of scrutiny before engaging the agent. They conferred with the United Kingdom supplier of motorhomes, and understood the agent was representing another importer of motorhomes and dealing with large volumes. The agent had some presence on the internet. Later the agent dealt with the appellants using the identity of a company named XXXX. Correspondence with the agent initially appeared regular, and gave no obvious reason for concern. However, the agent did produce a tax invoice when the shipments arrived. It gave a street address in Auckland, and bore the name of a company. A company with that name appears on the New Zealand companies register, with that address. However, that company was removed from the register in December 2014, and had been registered under the industry classification of an interior design or decorating consultancy service. The sole director was recorded as having an offshore address. Customs ascertained that there is no office maintained by the company at the Auckland address.

[16] Accordingly, it was a matter of public record that the agent's identity on tax invoices was potentially bogus as from the point it purported to issue tax invoices in 2017. However, the bogus identity was not evident until the first GST invoice was issued with the identity of the New Zealand company. Mr Muggeridge is a Supervising Customs Officer who gave evidence, he has investigated the agent in relation to this and other cases. It appears the agent and the customs broker were involved in a number of similar matters, and the investigation is ongoing. I understand false declarations and underpayment of GST and duty occurred in the other cases too. Despite having the resources of Customs available, and being responsible for investigating what appears to be a serious fraud on the Revenue, Mr Muggeridge could not tell me whether there is a genuine group of XXXX companies. Accordingly, whether the agent assumed the identity of a genuine

service provider or the whole operation was bogus is unknown. All that Mr Muggeridge could confirm was:

[16.1] He knew that the New Zealand company had been removed from the register of companies in 2014, so could not have been providing services legitimately, and persons unknown had used that identity in 2017.

[16.2] Persons unknown had produced GST invoices using the identity of the company as part of a scheme to provide false declarations to Customs, underpay GST and duty, and procure full payment from the appellants and others.

[17] In these circumstances, I cannot find any lack of commercial prudence on the part of the appellants in engaging the agent. Specifically, I am persuaded because:

[17.1] The evidence includes emails that refer to XXXX international entities, which appear to be written by persons aware of shipping and customs processes, they do not on their face raise suspicions.

[17.2] Mr Muggeridge, after investigation, has not been able to ascertain that the XXXX companies are bogus, I therefore cannot infer there was anything alerting the appellants to that possibility.

[17.3] The appellants had contact with the supplier and understood a major importer of motorhomes into New Zealand was also using XXXX, and reasonably took assurance from that information.

[18] The point where the appellants could have ascertained the agent was potentially bogus was when they received a tax invoice with the New Zealand company's name. Searching the companies register would have raised concerns. However, by that point:

[18.1] The consignment had arrived in New Zealand, so the agent had already performed a key part of the arrangement.

[18.2] There is no evidence, and I could not infer without evidence, that it is a usual practice to search the companies register or make other inquiries when receiving an apparently regular GST invoice.

[18.3] The GST invoice required payment of the correct amount of GST and duty on the consignments.

[19] Accordingly, I cannot find on the balance of probability that there was any lack of commercial prudence on the part of the appellants in their dealings with the agent. As discussed below, the appellants, if fully informed, would have also understood that only persons licensed by the Chief Executive could lodge the import entry (an essential document declaring the value and nature of the import), and also understood that the Chief Executive maintained the right to recover unpaid duty on such entries from the customs broker. Further, they would have known that the Chief Executive only provided financial information relating to the import entry to the customs broker who made the entry, unless the importer took steps such as lodging an official information request.

[20] Customs suggested the appellants were at fault for not making inquiries with Customs as to how much duty had in fact been paid on the consignments. However, Mr Muggeridge said in evidence that the way of doing so would be to lodge official information requests with Customs. He said the appellants could not have logged into the Customs computer system and examined the entries, only the customs broker could do that. In my view, until they were on notice of a potential irregularity there was nothing that the appellants could have been expected to do to guard against false declarations and underpayment. Primarily, that was a matter for the Chief Executive and the customs broker, who was dealing exclusively with Customs. It is not a realistic proposition that every importer should issue official information requests to check against the possibility of a false declaration by a customs broker.

[21] Accordingly, I find no evidence that supports Customs' view that the appellants were in any respect responsible for a lack of care contributing to them, and Customs, being defrauded.

There was a probable fraud and the appellants and Customs were the innocent victims

[22] I emphasise again that the findings I make in this appeal relate only to the assessment of GST and duty against the appellants. If I were making a finding relating to liability for fraud on the part of the agent or the customs broker, while this is a civil proceeding I would need to have regard to the gravity of the finding in terms of the standard of proof. For present purposes, I approach the matter on a straight forward balance of probabilities.

[23] For each of the importations, the following occurred:

[23.1] The appellants held invoices from the supplier and the shipper, and they knew the cost of the motorhomes and the shipping costs. They also knew what GST and duty should be paid.

[23.2] After the consignments arrived, the agent sent the appellants a GST invoice in the name of the New Zealand company. These invoices showed the correct amounts, and required that the appellants pay freight, fees, duties and GST. The GST included the GST to be paid to Customs on importation.

[23.3] The appellants examined these invoices, found they corresponded with the documents they held and paid the agent the full amount of the invoice.

[23.4] The evidence establishes that the customs broker presented declarations containing false values to Customs, and thereby procured the release of the goods on payment of less than the amount of GST and duty due on the importation.

[23.5] The evidence also establishes clearly that to support the false declarations forged invoices had been created.

[23.6] There is no dispute that the appellants had no knowledge of the false invoices and false declarations, they paid the agent the full amount due. The evidence does not establish who created the false invoices, or who was aware of them. Determining whether it was the agent, the customs broker or particular staff members of one or more of them, or whether some or more of the participants worked in concert, involves an element of speculation. Potentially, there could be persons who have not been identified who had a part.

[23.7] On the balance of probabilities, I conclude that the persons acting as the agent were knowingly involved, I reach that conclusion as after the deception was discovered they stopped responding to communications and have apparently absconded. For present purposes, it is not necessary to make any further finding. The position is clearly that the appellants were duped into paying the full amount of GST and duty, a dishonest person/s arranged for a false declaration to be made to Customs and GST and duty was underpaid, and the dishonest person/s took the $44,663.27 paid by the appellants and not paid to Customs due to the false declarations. I make

no finding as to whether the customs broker and declarant for the customs entries was or ought to have been aware of the deception. I do not need to do so to determine this appeal, this is discussed further in the following section.

[23.8] For completeness, I note there is no evidence to find any lack of care on the part of Customs. The customs broker filed apparently regular documents and they were accepted. The appellants did suggest that Customs should have detected the values were suspiciously low. I find no merit in that, as Customs must necessarily deal with high volumes of imports, and cannot be expected to make evaluations of that kind unless on notice in a particular case.

The role of the customs broker

[24] For the reasons identified, I do not have the evidence to make findings on the role of the customs broker. There are forged documents, and the evidence does not establish whether, or if so, in what circumstances, they were presented to the customs broker. It is accepted that the appellants had no knowledge of the customs broker at all, and gave no authority to the customs broker to act on their behalf.

[25] Accordingly, what I can and do find on the balance of probabilities is that:

[25.1] The appellants gave authority to the agent to deal with customs. That did not involve engaging the customs broker, the appellants understood the agent would deal with customs.

[25.2] The agent gave instructions to the customs broker that were wholly outside of the instructions they had from the appellants. The instructions were to file declarations the agent probably knew were false, if not another party gave instructions to file false declarations, or the customs broker chose to knowingly file a false declaration.

[25.3] On any permutation of the possible chain of causation leading to the customs broker lodging false declarations with Customs and underpaying GST and duty, there is no nexus with the appellants. They did not directly or indirectly instruct, permit or authorise the customs broker to file the false declarations; they had no reason to suspect there were false invoices, or import entries and declarations with false values.

Liability for GST and duty

[26] Liability for GST[1] and duty is created as a result of importation, it is not necessary for the Chief Executive to quantify the liability; for the legal obligation to exist, the 1996 Act imposes the liability. However, recovery of GST and duty does depend on the Chief Executive taking the appropriate administrative steps.[2] It appears s 86(1) of the 1996 Act has the same structure as the equivalent taxing provision in the Income Tax Act 2007. That structure was explained by Richardson J, where he discussed the charging provisions of the 1954 Income Tax Act (consistently with earlier authorities):

> The charge for tax is imposed by the Act itself. The Commissioner acts in the quantification of the amount due, but it is the Act itself which imposes, independently, the obligation to pay (*Reckitt & Colman (N.Z.) Ltd.* v *T.B.R.* [1966] N.Z.L.R. 1032 per McCarthy J. at p. 1045). Section 77(2) [of the Land and Income Tax Act 1954] states that, subject to the provisions of the Act, income tax shall be payable by every person on all income derived by him during the year for which the tax is payable. Section 78(1) [of the Land and Income Tax Act 1954] goes on to provide that income tax shall be assessed and levied on the taxable income of every taxpayer at such rate or rates as may be fixed from time to time by Acts to be passed for that purpose.

[27] The 1996 Act is structured to impose liability for GST and duty in many cases on multiple parties. Section 86(2) of that 1996 Act provides:

> Such duty is owed by the importer of the goods, and, if more than 1 (whether at or at any time after the time of importation) then jointly and severally by all of them.

[28] The definition of "importer" in s 2 of the 1996 Act is:

> **importer** means a person by or for whom goods are imported; and includes the consignee of goods and a person who is or becomes the owner of or entitled to the possession of or beneficially interested in any goods on or at any time after their importation and before they have ceased to be subject to the control of the Customs.

[29] In the present case, the appellants are an importer as they were owners, entitled to possession and/or beneficially interested in the motorhomes while they remained in the control of the Customs. However, it appears likely that the agent was also an importer as the agent was potentially a person by whom the goods were imported, or

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1 Goods and Services Tax Act 1985, s 11(3) and 12(3), (4) and (5), and the definition of "duty" in s 2 of the 1996 Act apply the collection mechanism in the 1996 Act to GST as though it were a duty.

2 Section 86(1) of the 1996 Act appears to have the same structure as the equivalent taxing provision in the Income Tax Act 2007, which is explained by Richardson J, where he discussed the charging provisions of the 1954 Income Tax Act in *Lowe v C of IR* (1981) 5 NZTC 61,006.

possibly as a consignee (some of the documentation does refer to a Seabrook company as the consignee).

[30] It follows that the appellants are liable for the GST and duty, potentially jointly and severally with the importer. It is now necessary to turn to the statutory provisions that make the GST and duty recoverable. The primary provisions are contained in s 88 of the 1996 Act, the material subsections are:

> **88 Assessment of duty**
>
> (1) An entry for goods made under this Act is deemed to be an assessment by the importer or licensee, as the case may be, as to the duty payable in respect of those goods.
>
> (2) If the Chief Executive has reasonable cause to suspect that duty is payable on goods by a person who has not made an entry in respect of the goods, the Chief Executive may assess the duty at such amount as the Chief Executive thinks proper.
>
> (3) The person liable for the payment of the duty shall be advised of the assessment by notice in writing.

[31] The reference to a "licensee" in subsection (1) is not relevant in this case, it concerns excise duty in a regulated facility (such as a brewery). There is also the power to amend an assessment of duty, s 89 provides:

> **89 Amendment of assessment**
>
> (1) Subject to section 94, the Chief Executive may from time to time make such amendments to an assessment of duty as he or she thinks necessary in order to ensure the correctness of the assessment even though the goods to which the duty relates are no longer subject to the control of the Customs or that the duty originally assessed has been paid.
>
> (2) If the amendment has the effect of imposing a fresh liability or altering an existing liability, notice in writing shall be given by the Chief Executive to the person liable for the duty.

Did the Chief Executive make an initial assessment?

[32] The customs broker filed false declarations for each of the importations in the circumstances already described. For the reasons stated, those declarations were made without any authority from the appellants, direct or indirect, and the appellants had no knowledge of the declarations. As far as they were aware, declarations and payments were for the correct values.

[33] When applying s 88(1) and (2) to those circumstances, in my view it is inevitable that subsection (2) must apply. The appellants had not made an entry in respect of the goods. They did not initiate or authorise the actions of the customs broker in any respect.

[34] The Chief Executive was accordingly required to exercise the power in s 88(2) to make an initial assessment against the appellants, he instead purported to exercise the power in s 89(1) to amend an assessment already made. In my view, that was not possible as there was no assessment made against the appellants.

[35] Given the absence of any connection between the customs broker and the appellants, and the fact the customs broker filed false information the appellants knew nothing of, I am satisfied the situation was covered by s 88(2): "… the Chief Executive [had] reasonable cause to suspect that duty is payable on goods by a person who has not made an entry in respect of the goods".

[36] If it were otherwise, customs brokers could trigger assessments of duty against persons who are strangers to them using false information. It would appear the Chief Executive could not licence persons to act in that way, and the structure of s 88 of the 1996 Act is not consistent with that outcome.

[37] There is limited authority dealing with analogous situations. This is not a situation where an authorised agent has made an error that benefits the principal. In such cases the principal is likely to be liable to account for the error. That would be an unsurprising outcome where a tax agent, customs broker or similar intermediary is acting within the scope of authority. It is quite a different matter in a case like the present where the customs broker had no instructions at all from the appellants, instead they relied on instructions from a person who was stealing money from the appellants, and those instructions were intended to facilitate the theft. I am aware of no authority that supports treating the actions of the customs broker as the actions of the victim in such circumstances.

[38] Of course, those observations in no way alter the liability the Act imposes on the appellants as importers. They are however very relevant to whether it was appropriate to exercise the power to amend an existing assessment based on the actions of the customs broker rather than exercising the power in s 88(2).

Exercise of the Authority's power

[39] That the Chief Executive exercised the power under the wrong provision by amending an assessment, rather than making a new one, would usually be of little consequence in an appeal. There is no doubt that:

[39.1] As one of the importers the appellants are liable jointly and severally for the GST and duty.[3]

[39.2] The failure to make a proper assessment or a deficient assessment in no respect absolves the appellants from liability for GST and duty.[4]

[39.3] This Authority has the functions (including discretions) the Chief Executive held when making the amended assessment on 22 June 2018.[5] If the issue were merely that the assessment should have been a new assessment under s 88(2), rather than an amended assessment under 89(1), I would not hesitate to make such an assessment.

[40] I accept the Chief Executive's position that the structure of the 1996 Act is such that generally it contemplates one of the importers will ultimately make good the liability for duty under the 1996 Act, whether or not it was properly assessed at the time of entry. Subsections 86(1), (2) and (5) clearly have that effect. Further, the Chief Executive relied on authorities that support a duty to assess duty regardless of considerations of equity that could arise from the appellants having been duped into making a payment that was misappropriated.[6]

[41] However, there are two further factors to consider:

[41.1] If effective recourse can be had against the agent or the customs broker, potentially that would be the appropriate course. There is clearly joint and several liability borne by the appellants. However, if the persons who took the appellants' money using a false declaration to Customs are available and have the means to pay the unpaid duty, a reasonable

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3 Customs and Excise Act 1996, s 86(2).

4 Customs and Excise Act 1996, s 86(5).

5 As the Customs and Excise Act 2018 is now in force, and will apply to hearing current proceedings, Schedule 8, cl 13(2) of that Act will apply.

6 *Rothschild Properties Ltd v New Zealand Customs Service* (2006) 1 NZCC 55,032 (HC), *Daily Freightways Ltd v Collector of Customs* [1974] 2 NZLR 704, *Attorney-General v Steelfort Engineering Co Ltd* (1999) 1 NZCC 55-005, *Reid v Chief Executive of the New Zealand Customs Service* (2003) 1 NZCC 55-025.

decision-maker may consider taking recourse against them before turning to the appellants. As discussed, a range of persons are potentially an importer for a shipment and jointly and severally liable. For reasons discussed below, it appears that customs brokers are also liable for GST and duty. In my view, it would not be proper for me to preferentially require the victim of a false declaration to pay in preference to those responsible for it, without considering the liability of the perpetrator/s. Doing so would both undermine public confidence in the exercise of powers under the Act, and fail to discourage fraudulent practices in the most effective way.

[41.2] There is also a legislative consideration that reinforces the need to consider whether recourse against the appellants is the proper response, or at least the proper response without first considering (and possibly exhausting) other options for recovery. Now the Customs and Excise Act 2018 (the 2018 Act) is in force. Clause 1(9) of Schedule 1 of the 2018 Act provides that ss 109 and 110 of the 2018 Act apply to continuing functions under the 1996 Act. It appears that if I exercise powers to make an assessment pursuant to Schedule 8, cl 13 of the 2018 Act, ss 109 and 110 of the 2018 Act would apply. Those sections are potentially relevant when considering whether the assessment should be made against the appellants, or another party in a situation where there is potential joint and several liability for more than one importer, and recourse against a customs broker.

[42] Section 109 of the 2018 Act requires the Chief Executive, and accordingly the Authority, to exercise powers in a manner that endeavours to protect the integrity of the system for assessing and collecting duty. Section 110 requires the exercise of powers so as to secure the collection over time of the highest net revenue.

[43] It is not necessary or appropriate to consider the detail of s 109 and 110; it is obvious that when selecting who is to be assessed for unpaid GST and duty, the integrity of the system for assessing and collecting duty requires consideration of who should properly bear liability if there is an election as to who is to bear liability. The Chief Executive has not considered that issue in the present case, his officer Mr Muggeridge has indicated he has not advanced his inquires far enough to determine who the agent was. Potentially the identity of the agent will not be able to be discovered, and that may be the factual position the

Chief Executive will need to accept when making a decision of who should be assessed.

[44] The other party that could potentially carry liability is the customs broker and/or the declarant. A person can only be a customs broker or declarant after approval by the Chief Executive and registration. When requested to provide submissions on the obligations relating to customs brokers, counsel for the Chief Executive declined to do so on the basis that it was irrelevant. I understood her to be saying effectively that the Chief Executive has an obligation or unfettered discretion to make an assessment against the appellants without considering recourse against the customs broker and declarant responsible for the false declaration, notwithstanding they facilitated the apparent theft of the appellant's payment and may be made liable for the duty and GST.

[45] As the Chief Executive was not willing to deal with this factor, I exercised my investigative powers under Schedule 8, cl 21 of the 2018 Act. I have done so simply for the purpose of ascertaining whether the situation may be that there is no recourse against the customs broker, and accordingly I can dismiss that as a possibility to consider. However, I found that on the contrary the Chief Executive publishes on Customs' website that recourse against a customs broker is available. In the present case, an essential part of the deception of the appellants was the use of a deferred payment system which the customs broker employed. The broker could only do so after being registered, and giving certain undertakings. I do not have access to the particular terms that applied to the customs broker in this case, however the Chief Executive currently requires a declaration in the following form before registering a customs broker for the deferred payments scheme:

BROKER CREDIT FACILITY DECLARATION FORM

New Zealand Customs Service ("Customs")

Broker Code: .....

Client Name (Customs Agent): .....

Company Registration No: .....

Do you understand the following:

- ☐ Statement format and how to check a statement
- ☐ Billing cycle and when the debt is created
- ☐ When the statement is due for payment
- ☐ Implications in the event of default
- ☐ Situations in which account reinstatement may not be approved
- ☐ The conditions and procedure for seeking the release of any guarantee/security (if applicable)
- ☐ Direct debit process and what to do if you change your bank account.

Declaration:

I/We agree to accept responsibility as principal for the payment of all duty/GST due from the Importer to Customs and I/We acknowledge that Customs has the right to seek payment from me/us for any duty owing to Customs from the Importer without first seeking payment from the Importer.

These terms are in addition to, and without prejudice to, any rights (whatever their nature) Customs may have against me/us and/or the Importer.

I/We acknowledge that I/We understand and agree to be bound by the above terms and conditions of the Broker Credit Facility for the granting of a broker account by Customs.

Signed by the Customs Brokerage's Manager or Director

.....
Signature

.....
Name

.....
Signature of Customs Officer

[46] Accordingly, it is apparent that the Chief Executive informs customs brokers that Customs may seek payment from them for any duty owing from the importer (GST and duty appear to be the same for this purpose), without first seeking payment from the importer. It would appear that is founded on having a legal basis for recourse. The reasons for holding that power are obvious, and relate to the integrity of the system for assessing and collecting duty.

[47] Against this background, I conclude that the amended assessment Mr Muggeridge made as the Chief Executive's delegate was wrong, as there was no existing assessment against the appellants. The only power he could exercise to assess the appellants was to make an initial assessment against them under s 88(2) of the 1996 Act.

[48] I will not make an assessment under that section as I do not have sufficient facts to do so. The appropriate course is for the Chief Executive to decide whether to make an initial assessment against the appellants. If so, that could be subject to an appeal where the Authority can consider the Chief Executive's reasoning and the material facts.

[49] Specifically, I do not consider I should make an initial assessment on the facts before me at this point under s 88(2) of the 1996 Act, because:

[49.1] I do not know the true identity of the agent, or whether that will be known.

[49.2] I do not know what actions were performed by the agent, the customs broker and potentially others to defraud Customs and the appellants.

[49.3] I do not know whether the persons responsible for the deception of Customs and the appellants have the means to pay the unpaid GST and duty.

[49.4] The evidence establishes (for the purposes of this appeal) that the customs broker did not have any authority from or communication with the appellants, and appears to have potentially taken instructions from a party using the front of a company that had been removed from the register of companies. I do not have information regarding customs brokers standards for identifying clients, authenticating instructions, and reporting to clients and other stake holders.

[49.5] I do know that a central element in the deception in this case being effective was that the customs broker had been authorised to operate a deferred payment account. The way that account operates is that Customs deals with the customs broker; Customs does not send out notices to the importer/s, or give importers access to financial records (except through official information requests). Isolating the appellants as importers from the financial information was necessary to effect the deception. If the appellants knew of the false declarations they would have raised the alarm on the first importation. I also know that Customs puts customs brokers on notice they carry personal liability to make good duty liabilities when using the deferred payments scheme.

[49.6] It is also evident that the Chief Executive licensed customs brokers under the deferred payment scheme because it facilitates maintaining the integrity of the system for assessing and collecting duty, and assists to gather the highest net revenue from duty that is practicable. There are obvious administrative efficiencies in dealing with approved customs brokers using an account paid in arrears; the alternative being individual payments for every import transaction. Importers may well not use the system if Customs take the approach it will not hold customs brokers to account for false declarations, limit importers to inquiries using official information requests;

but none-the-less treat importers as primarily liable for false declarations they were not responsible for. Whether that is so generally, or relevant to this case, or there are other considerations, can only be speculation on my part. It requires a far wider consideration than the evidence in this appeal. I refer to this issue simply because there are wider matters that potentially should be considered by a person making an initial assessment against the appellants.

[49.7] For those reasons, in my view, deciding to make an assessment against the appellants without considering the implications for the deferred payment scheme and the integrity of the system for assessing and collecting duty would be a breach of my obligation. I do not need to do so to resolve this appeal.

[49.8] I am accordingly in no position to decide an assessment against the appellants will be appropriate in preference to other potential forms or recourse. It is a matter for the Chief Executive to consider in the light of the facts, many of which I can only speculate on.

Outcome of the appeal

[50] The appeal is allowed, the amended assessment is not valid, as there was no assessment against the appellants to amend. It is not appropriate for me to make an initial assessment on the information currently before me.

[51] It is important to be clear that in no sense does this decision determine that an assessment may not be made or cannot be made against the appellants. If that occurs, it will be a matter for the Chief Executive to consider, and I have no function to direct how that decision would be made. I have explored the issues only as far as necessary to be satisfied that I, at this point in time, on the information before me, should not presently make an initial assessment against the appellants.

[52] Nothing I have said should be seen as undermining the joint and several liability imposed on all importers, generally or in a situation involving dishonest representations to Customs. The extent of this decision in that respect is to conclude ss 109 and 110 of the 2018 Act exclude an unfettered election to preferentially recover from a particular person, when recovery may and potentially should be

sought from others to best protect the integrity of the system for assessing and collecting duty.

Costs

[53] The appellants have been successful. They would usually be entitled to costs; however, they were not represented by a lawyer. Accordingly, it would appear they can only recover their direct and actual costs.

[54] They may submit a schedule of their costs within 1 month of the date of this decision, and the Chief Executive will have 10 working days to reply.

Order for non-publication

[55] The names and identity of the appellants, the agent (including references to the names associated with the agent) and the customs broker are not to be published. This decision has been made without evidence from the agent or the customs broker, they had no opportunity to participate in these proceedings. The facts determined in this decision are determined only for this appeal.

Dated at Wellington 26 February 2019.

G D Pearson
Customs Appeal Authority