[2013] UKFTT 474 (TC)

TC02875

Appeal number: TC/2011/9768

CUSTOMS DUTIES – Anti-Dumping Duty – goods ordered before announcement of Commission investigation but imported after announcement – incorrect commodity code on entry advice – art 239 EU Customs Code (Council Regulation 2913/92) – whether retrospective or unfair – whether a "special situation" within art 239 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PHIL HOLDEN FASTENERS LTD **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE PETER KEMPSTER
MRS SHAMEEM AKHTAR

Sitting in public at Priory Courts, Birmingham on 17 July 2013

Mr Guy Stanhope (managing director) and Mr Phil Gurney (company secretary) for the Appellant

Mr Simon Charles of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("the Company") appeals against a Post Clearance Demand Note ("C18") issued by the Respondents ("HMRC") on 8 September 2011 for £35,152.87 anti-dumping duty ("ADD") plus £6,151.74 VAT.

Background

2. The Company's business is in industrial metal fasteners, including specialised specifications of nuts and bolts. On 20 July 2010 the Company ordered fasteners ("the Goods") from TZ Fasteners (M) Sdn Bhd in Malaysia ("TZ").

3. On 28 September 2010 the Company placed a further order for fasteners with TZ.

4. On 28 October 2010 the European Commission announced by Commission Regulation (EU) No 966/2010 ("the Investigation Regulation") "an investigation concerning the possible circumvention of anti-dumping measures … imposed on imports of certain iron or steel fasteners originating in … China by imports of … fasteners consigned from Malaysia ... and making such imports subject to registration." Article 1 listed certain fasteners by commodity codes ("CN Codes"). Article 2 required member states to maintain registers of imports of the fasteners listed in art 1, with effect from 29 October ("the Art 2 Register"). Shortly thereafter HMRC published on its website Anti-Dumping Notice AD1709 which recited the above and stated:

> "CHIEF (Customs Handling of Import & Export Freight) was updated on 30 October 2010. Some post clearance action may be necessary. The printed Tariff will be updated in the January 2011 amendment."

5. On 16 December 2010 the Goods were imported into the UK, having been shipped from Malaysia around four to six weeks earlier. The Company's shipping agents ("the Agents") erroneously entered an incorrect CN Code on the entry advice. As a result of the incorrect CN Code the Goods were not entered on the Art 2 Register maintained by HMRC.

6. On 26 July 2011 the European Commission announced the results of its investigation and the Council announced Council Implementing Regulation (EU) No 723/2011 ("the Outcome Regulation"). Article 1 extended the ADD to imports of certain listed fasteners consigned from Malaysia with effect from 27 July 2011. Fasteners produced by certain named Malaysian producers were exempted but TK was not amongst them. Article 1 also extended the ADD to those imports registered on the Art 2 Register, except those produced by the same exempted companies.

7. In August 2011 HMRC made enquiries which confirmed that an incorrect CN Code had been entered when the Goods were imported. On 8 September 2011 HMRC issued the C18. The applicable rate of ADD was 85%, which also attracted

VAT. A formal internal review upheld that decision on 26 October 2011. The Company appealed that decision to the Tribunal in November 2011

8. In May 2012 the Company applied for repayment of the ADD pursuant to art 239 of the Community Customs Code (Council Regulation 2913/92/EEC) ("Art 239"). HMRC refused repayment in July 2012 and that decision was upheld by formal internal review in September 2012. The Tribunal directed that this matter should be added to the proceedings.

Appellant's Case

9. The Company submitted as follows.

10. First, the ADD in the C18 is unfair and unreasonable as it was effectively imposed retrospectively.

(1) When the Goods were ordered in July 2010 there was no notice of the forthcoming Commission investigation, which was only announced three months later. The investigation was not concluded, resulting in the extension of the ADD, until July 2011 - that was a year after the Goods were contracted for, and seven months after the Goods were imported.

(2) The Company operates a "just in time" inventory policy which necessitates a continuous supply of stock. To have cancelled the July order would have let down the Company's customers for specialised fastener products which would be difficult to source elsewhere (the Goods had a particular plating requirement), as well as being a breach of contract with TK. The Company had managed to negotiate itself out of the later order placed in September, when it realised the potential financial consequences.

(3) TK had made representations to the Commission during the investigation but had not been included as one of the exempted companies in the Outcome Regulation. If the Company had ordered from one of the suppliers who was subsequently named as an exempted company then there would have been no ADD.

(4) The rate of ADD – at 85% - destroyed the business economics of the deal; that was the political intention of the ADD but the Company had been innocently trapped by a retrospective imposition of the ADD. It would be impossible to negotiate terms that placed the risk of future ADD on the supplier because it was a punitive rate, not a normal tax, and there would anyway be the difficulty of trying to collect large sums after the event from an overseas supplier.

11. Secondly, the World Trade Organisation on 15 July 2011 issued its Appellate Report WT/DS397/AB/R ("the WTO Report") which criticised certain EU anti-dumping measures and concluded (at para 625):

> "The Appellate Body recommends … the European Union to bring its measures … inconsistent with the Anti-Dumping Agreement and the

> WTO Agreement into conformity with its obligations under those Agreements."

Thus the WTO had ruled that the 85% ADD was wrong.

12. Thirdly, the ADD should be repaid under Art 239. Art 239(1) (so far as relevant) provided:

> "Import duties … may be repaid or remitted … in situations … :
>
> — to be determined in accordance with the procedure of the committee;
>
> — resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the committee procedure. Repayment or remission may be made subject to special conditions."

Neither the Company nor the Agent had indulged in "deception". The reason why the incorrect CN Code had been stated on import was a simple error by the Agent who had used the paper tariff (ie the paper version of the CN Code list) which had not at that time been updated to incorporate the codes resulting from the Investigation Regulation – that had been confirmed by the Agent in a letter dated 10 November 2011. That was insufficient to constitute "obvious negligence". The CN Code was correct as at the date of order but changed afterwards. The rules and classifications were complicated – for example, ADD applied to bolts but not to the matching nuts. The Company's circumstances in relation to the import of the Goods were a "situation" warranting repayment under Art 239 because the retrospective extension of the ADD was extraordinary.

Respondents' Case

13. Mr Charles for HMRC submitted as follows.

14. On the first ground of appeal:

(1) The arguments based solely on unfairness or unreasonableness have no legal basis. Subject to Art 239 (which is the third ground of appeal) neither HMRC nor the Tribunal have the ability to absolve the Company of the ADD by reference solely to notions of fairness or reasonableness.

(2) Further, the imposition of the ADD in this case was neither unfair nor unreasonable. Notice of the relevant legislative changes was published in the normal manner; the Investigation Regulation was a "red flag" warning importers of the possible liability to ADD depending on the outcome of the investigation. Other traders have also been affected so it would actually be unfair and unreasonable to treat the Company differently from those other traders.

15. On the second ground of appeal, the WTO Report has no relevance to these proceedings because:

(1) It has no legal authority. While it may carry weight for consideration by policy makers, it was not binding on the Tribunal.

(2) Any changes that occurred as a result of the WTO Report occurred after the imports relevant to these proceedings, and only with prospective effect.

16. On the third ground of appeal:

(1) It was accepted that there was no question of deception by either the Company or the Agent. However, the error by the Agent in entering the wrong CN Code was clearly negligent and thus Art 239 could not apply. The Commission's "Information paper on the application of Articles 220(2)(b) and 239 of the Customs Community Code" ("the Information Paper") states:

> "**2.2. The absence of deception or obvious negligence**
>
> *2.2.1. Principle*
>
> …
>
> The criteria to be used to determine whether an operator acted with obvious negligence or not are the same as those used to determine whether an error on the part of the customs authorities within the meaning of Article 220(2)(b) of the Code could reasonably have been detected by the operator. Particular account should therefore be taken of the precise nature of the error, the trader's professional experience and the care exercised: *Kaufring AG* … paras 278 and 279."

The revised CN Codes directed by the Investigation Regulation had been updated on CHIEF; those CN Codes were accurate and available, and should have been used. Importers and shipping agents were aware that the paper tariff was reprinted only occasionally and so may not always be completely up to date. The front page of the paper tariff stated (quote is from the January 2012 document but HMRC believe identical or similar wording has been used consistently in the past):

> "Users should be aware that in any case where information in the … CHIEF system is at variance with that contained in the appropriate Community legislation published in the Official Journal …, the latter will represent the correct legal position. Whilst every effort is made to ensure the accuracy of the UK Tariff, the onus remains with the User to consult the Official Journal as necessary and to ensure that the correct duties are paid at importation. …"

(2) Further, there was no special situation as envisaged by Art 239. These are clarified in the Information Paper which states:

> "**2.1. The concept of a special situation**
>
> *2.1.1. Principle*

> According to Community case-law, the existence of a special situation is established where it is clear from the circumstances of the case that the person liable for payment is in an exceptional situation as compared with other operators engaged in the same business and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the entry in the accounts of duties: Judgment of 26.3.1987 in Case 58/86, *Coopérative agricole d'approvisionnement des Avirons*, para. 22; judgment of 25.2.1999 in Case C-86/97, *Trans-Ex-Import*, paras 21 and 22; judgment of 7.9.1999 in Case C-61/98, *De Haan*, paras 52 and 53; *Kaufring AG* …., para. 218.
>
> In other cases, the payment of duties legally owed must be regarded as forming part of the normal commercial risk to be borne by the operator."

The Company was in the same position as other importers of fasteners from Malaysia and was clearly not "in an exceptional situation as compared with other operators engaged in the same business". Any uncertainty as to the potential imposition of ADD was common to all operators.

In *Covita AVE v Greece* [1998] All ER (D) 641 the ECJ stated (at [26]):

> "… it should be observed that it is mandatory for Community provisions introducing a countervailing charge to be published in the Official Journal of the European Communities. From the date of that publication no person is deemed to be unaware of that charge (see, to that effect, Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] ECR 2415, paragraph 19). That is the case where a professional trader importing goods is aware of the imminent possibility that a countervailing charge might be introduced for those goods. Such a trader cannot expect each customs office to be immediately informed that the charge has been introduced, but must ascertain, by consulting the relevant issues of the Official Journal, the provisions of Community law applicable to the transactions he is carrying out. To impose such an obligation on traders to inform themselves does not constitute a requirement that is disproportionate to the objective pursued by the introduction of a countervailing charge, which is to obviate disturbances on the Community market, bearing in mind, moreover, the need to apply Community law uniformly."

The ECJ concluded:

> "33. Accordingly, it clearly follows from paragraphs 25 and 26 above that a trader who, in a situation such as that of Covita, has not ascertained, by consulting the relevant issues of the Official Journal, the provisions of Community law applicable to the transactions which he carries out has been negligent, unless it is established that the Greek version of Regulation No 1591/92 was not available during the period in question.
>
> 34. The answer to the first question must therefore be that a trader who has accumulated some experience of import and export transactions and who is aware, in particular, of the imminent risk of a countervailing charge being introduced cannot, if that charge is actually introduced, benefit from the provisions of … of Article 13 of

> Regulation No 1430/79 [the predecessor of Art 239] since he could have informed himself as to the actual introduction of the charge by consulting the Official Journal of the European Communities and failed to do so."

The fact of the error by the Agent also did not constitute a special situation for Art 239. In *Mehibas Dordtselaan BV v European Commission* [2000] 2 CMLR 375 the ECJ stated:

> "83. It is settled case-law that submitting documents subsequently found to be falsified or inaccurate does not in itself constitute a special situation justifying the remission or repayment of import duties, even where such documents were presented in good faith (*Eyckeler & Malt*, paragraph 162)."

17. As a procedural and jurisdictional matter, if (contrary to HMRC's case) the Tribunal considered that Art 239 was applicable here, the matter would have to be remitted to the Commission for consideration – only the Commission could make the decision whether to repay. Accordingly, HMRC suggested the correct route for the Tribunal (if it found against HMRC) would be to require HMRC to send a dossier to the Commission for review and determination. This was in accordance with the action to be taken by member states as provided by art 905 of Commission Regulation 2454/93/EEC, as confirmed by the ECJ in *Spedition Wilhelm Rotermund GmbH v European Commission* [2001] All ER (D) 34 (Jun).

18. The following authorities were also cited by HMRC:

(1) *De Haan Beheer BV v Inspecteur der Invoerrechten en Accijnzen te Rotterdam* [1999] All ER (EC) 803

(2) *Hewlett Packard France v Directeur General des Douanes* [1993] ECR I-1819

Consideration and Conclusions

19. We have considerable sympathy with the Company on the position it has been placed in. It placed the order for the Goods with TK at a time when there was no risk of ADD being due. Only after the Company was contractually bound did it learn of the risk of 85% ADD being charged, and then only contingent on (a) the outcome of the Commission's investigation, and (b) whether TK was one of the exempted companies. It was then too late to cancel the order as, quite apart from breach of contract issues, the onward sale of the Goods had been contracted and it was unlikely to be possible to source the particular specification of fasteners from an alternative supplier. The earliest date at which the Company could have been certain of the liability for the 85% ADD was around one year after it had ordered the Goods. However, we must, of course, determine this appeal according to the proper application of the relevant law. We take each of the grounds of appeal in turn.

Unfairness and unreasonableness

20. In the absence of a specific statutory power, this Tribunal has no jurisdiction to determine matters on the basis of fairness. In *HMRC v Hok Limited* [2013] STC 225 the Upper Tribunal stated:

> "[36] It is important to bear in mind how the First-tier Tribunal came into being. It was created by s 3(1) of the Tribunals, Courts and Enforcement Act 2007, 'for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act'. It follows that its jurisdiction is derived wholly from statute. …, neither [the statutory provision relevant in *Hok*] nor any other gives the tribunal a discretion to adjust a penalty of the kind imposed in this case, because of a perception that it is unfair or for any similar reason. Pausing there, it is plain that the First-tier Tribunal has no statutory power to discharge, or adjust, a penalty because of a perception that it is unfair.
>
> …
>
> [56] … It is impossible to read the legislation in a way which extends its jurisdiction to include—whatever one chooses to call it—a power to override a statute or supervise HMRC's conduct."

21. There is nothing in the Outcome Regulation that confers any jurisdiction on this Tribunal that would legitimately permit us to put aside a liability to ADD on the grounds of unfairness or unreasonableness. Therefore we must find against the Company on this first ground.

WTO report

22. We agree with HMRC's submissions (see [15] above) and we find against the Company on this second ground.

Art 269

23. The Company faces two hurdles if it is to succeed under Art 239:

(1) It must show it comes within a "situation" contemplated by Art 239; and

(2) That situation must not result from obvious negligence attributable to the Company.

24. *"Situation"* – we consider the company advanced two possible arguments on this point:

(1) The fact that during the nine month period of the Commission's investigation there was uncertainty as to whether (and how and for which manufacturers) ADD would be extended to fastener imports from Malaysia. We consider that point is answered by the *Covita* case (see [16] above). It does not constitute a special situation for Art 239.

(2) The fact that the Company had ordered the Goods even before the Investigation Direction was announced. Because of the reference in Art 239 to "situations … to be determined in accordance with the procedure of the committee …" we consider it is legitimate to look at the Information Paper in construing Art 239. The relevant part (para 2.1.1) does no more than précis relevant case law – as the introduction to the Information Paper states, "This document is not a legal instrument. It is intended as a brief guide for Member States to the way in which [Art 239 has] been applied in certain previous cases, in order to contribute to uniform application of [Art 239]." The Information Paper states (emphasis added):

> "According to Community case-law, the existence of a special situation is established where it is clear from the circumstances of the case that the person liable for payment *is in an exceptional situation as compared with other operators engaged in the same business* and that, in the absence of such circumstances, he would not have suffered disadvantage caused by the [ADD]."

We do not accept that the Company's situation was any different from those of its competitors. Any importer who ordered before 28 October 2010 but imported after that date would be in the same position as the Company. There is nothing exceptional about the Company's situation, however unfortunate it may be.

25. Accordingly, we do not consider the "situation" requirement of Art 239 is satisfied. That excludes the applicability of Art 239 (but for completeness we also consider the second hurdle below) and so we find against the Company on this third ground of appeal.

26. *"Obvious negligence"* – The context in which this expression arises in Art 239 is: "[ADD] may be repaid … in situations … resulting from circumstances in which no … obvious negligence may be attributed to the [Company]." HMRC contend that the Agent's error of using an incorrect CN Code was "obvious negligence" and so Art 239 cannot apply. We consider that the "situation resulting" from the Agent's mistake was simply that the Goods were not entered on the Art 2 Register on importation in December 2010. That is a different "situation" from the ones contended by the Company (see [24] above). An example of a situation that did result from negligence is given in *Mehibas* (see [16] above) where the shipping agent relied on false documentation. The situations contended by the Company do not result from (indeed, are unconnected with) the Agent's error and so we would conclude that the Agent's error (even assuming it constituted obvious negligence) was irrelevant to (and so did not prevent the applicability of) Art 239. However, because of our finding in [25] above our comments in this paragraph are *obiter*.

Conclusion

27. As we have found against the Company on all three grounds of appeal, the appeal must fail.

Decision

28. The appeal is DISMISSED.

29. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

PETER KEMPSTER
TRIBUNAL JUDGE

RELEASE DATE: 13 September 2013