[2021] UKFTT 0102 (TC)

TC08072

ANTI DUMPING DUTY *— Aluminium Road Wheels – Erroneous declaration of country of origin – error by customs authorities – not proven – good faith of importer and absence of obvious negligence by importer – not proven - appeal dismissed*

Appeal number: TC/2019/00727 A/V

FIRST-TIER TRIBUNAL
TAX CHAMBER

LMD TRADING LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN MANUELL
Mr IAN PERRY

The hearing took place on 22 March 2021. The Tribunal heard Mr James Kelly, Solicitor, of The Advocate General's Office, HMRC Division, for the Respondents. (The Appellant had stated in advance that it would not be joining the hearing.)

The form of the hearing was by remote video link using the Tribunal video platform. The Tribunal decided a remote hearing was appropriate in view of the continuing pandemic. The documents to which the Tribunal were referred consisted of the agreed bundle as prepared by HMRC in electronic form.

The hearing was held in public.

DECISION

Introduction

1. The Appellant is an importer of foreign goods. The Appellant appealed to the Tribunal against HMRC's decision dated 3 July 2018 to refuse the Appellant's application for remission of payment of anti-dumping duty ("ADD") under Articles 119 and 120 of Council Regulation 952/2013 ("the Union Customs Code"). The application followed the issue of two C18 post Clearance Demand Notices on 28 and 29 July 2014. C18 Demand Notice C18165285 comprises £4,404.08 import duty, £30,296.04 ADD and £6,960.22 VAT, in total £41,761.34. C18 Demand Notice C18165281 comprises £4,522.01 import duty, £22,409.06 ADD and £5,386.21 VAT, in total £32, 317.28.

2. ADD is an import duty imposed in addition to customs duty and it applied across the European Union. On 25 October 2010 Council Regulation 964/2010 was adopted which imposed ADD on aluminium road wheels ("ARW") from the Peoples' Republic of China ("PRC"). ARW with a full commodity code of 870870 50 10 (wheels of aluminium, whether or not with accessories, and whether or not fitted with tyres) when established to be of PRC origin were subject to 4.5% duty plus ADD at 22.3% plus VAT upon the date of their entry to the United Kingdom.

3. In January 2013 the European Commission Anti-Fraud Office, OLAF, investigated activities in the Malaysian Free Ports. Evidence was obtained of ARW being shipped from Malaysia which were from PRC, not Malaysia and thus preferential as was claimed. ARW had been purchased and shipped from PRC to the Malaysian Free Port, where the container markings were changed before onward movement to the EU. OLAF established that some of the exporters of the ARW were not registered with the Malaysian Ministry of International Trade and Industry ("MITI") for the issue of any certificates of preferential origin ("origin certificates") to the exporter. ARW of preferential origin are not subject to duty or ADD. OLAF found that the origin certificates issued by the exporters in question were genuine yet incorrect.

4. During April 2014, following the OLAF investigation, HMRC audited the Appellant at its business premises. This revealed that 10 imports of ARW made between November 2011 and July 2013 by the Appellant had been falsely declared as of Malaysian origin, with Malaysian origin certificates. The ARW were in fact made in PRC. The Appellant was given the opportunity to provide evidence to HMRC against the proposed imposition of ADD but submitted nothing. The two C18 Post Clearance Demand Notices referred to above were then issued, for ADD and VAT, for the 10 shipments to the Appellant matched by OLAF. This created a debt under Article 201 of 2913/92, the Community Customs Code. That code has since been superseded by the Union Customs Code.

5. Review of the decision to issue the C18 Demand Notices was requested on the Appellant's behalf on 4 August 2014. On 14 October 2014 HMRC informed the Appellant that the original decision was upheld. The Appellant sought to appeal to

the First-tier Tribunal but that appeal was struck out on 17 October 2017 because the Appellant had not applied for remission in terms of Article 220 of the Community Customs Code. The Appellant then made a fresh application for remission of the ADD which was refused by HMRC on 3 July 2018. Further wrangling followed over the question of another review. On 29 January 2019 HMRC indicated that there was no objection to an appeal to the Tribunal against the decision of 3 July 2018 to refuse the Appellant's application for remission. Hence the present appeal.

The central issue

6. The central issue is whether the Appellant is entitled to full or partial remission of the ADD having regard to all the circumstances surrounding the importation of the ARW by the Appellant, including the actions of the Malaysian authorities.

The law

7. The key legislation is as follows:

The Community Customs Code (now superseded)

Article 201:

1.A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties; or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2.A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3.The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.

4.Where a customs declaration in respect of one of the procedures referred to in paragraph 1 is drawn up on the basis of information which leads to all or part of the duties legally owed not being collected, the persons who provided the information required to draw up the declaration and who knew, or ought reasonably to have known that such information was false, may also be considered debtors in accordance with the national provisions in force.

Article 220

1.Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts

at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.

2.Except in the cases referred to in the second and third paragraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

(a) the original decision not to enter duty in the accounts or enter it in the accounts at a figure less than the amount of duty legally owed was taken on the basis of general provisions invalidated at a later date by a court decision;

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably be detected by the person liable for payment, the latter for his part having acted in good faith and complied with all of the provisions laid down by the legislation in force as regards the customs declaration…

Article 239

1.Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236. 237 and 238:

- 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.

2.Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor…

The Union Customs Code (current)

Article 119

Error by the competent authorities

1.In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 120, an amount of import or export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable, provided that the following conditions are met:

(a) the debtor could not reasonably have detected that error, and

(b) the debtor was acting in good faith.

2.Where the conditions laid down in Article 117(2) are not fulfilled, repayment or remission shall be granted where failure to apply the reduced or zero rate of duty was as a result of an error on the part of the customs authorities and the customs declaration for release for free circulation contained all the particulars and was accompanied by all the documents necessary for the application of the reduced or zero rate.

3.Where the preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the customs territory of the Union, the issue of certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of point (a) of paragraph 1.

4.The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment.

The debtor shall be considered to be in good faith if he or she can demonstrate that, during the period of the trading operations concerned, he or she has taken due care to ensure that all of the conditions for preferential treatment have been fulfilled.

The debtor may not rely on a plea of good faith if the Commission has published a notice in the Official Journal of the European Union stating that there are grounds for doubt concerning the proper application of the preferential arrangements by the beneficiary country or territory.

Article 120

Equity

1.In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

2.The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty.

The Appellant's case

8. The Appellant's main contention was that it had relied on its freight agent and in particular on the Malaysian certificates of origin which had been issued by a sovereign government and on which the Appellant was accordingly entitled to rely. The Post Clearance Demand Notices had made the Appellant insolvent and unable to afford professional help. The Appellant had discussed the origin of the goods with the exporter but given the time since the original transactions written evidence could not be provided. The Appellant's conduct had been in accordance with commercial practice in the industry, i.e., sufficient checks had been performed.

The Respondent's case

9. HMRC contended that it had issued Guidance Notice 826 which provided importers with information about importing goods of preferential origin. An earlier version of such guidance was available to the Appellant at the time the ARW were imported. Articles 119 and 120 of the Union Customs Code had been considered when refusing remission, instead of Articles 220 and 239 of the Community Customs Code which the Union Customs Code had replaced. No prejudice to the Appellant had resulted.

10. There was no legal obligation on the authorities of third countries (i.e., non-EU nations) who issue origin certificates to exporters to carry out checks as to the origin of the goods in question, so as to determine whether the goods are of preferential or non preferential origin. The origin certificate relied on by the Appellant had been issued on an incorrect account of the facts of the origin of the goods. Moreover, the ARW were declared by the freight agent as having the commodity code 870870 50 90, for which there are no ADD. The commodity code was incorrect. Had the correct commodity code been used the ARW would have been identified as being of non preferential origin and no Malaysian origin certificate would have been issued. This meant that the Malaysian authorities were not the competent authority for the purposes of Article 119. Those authorities relied on the information provided to them; physical checks are not routinely conducted.

11. As to the Appellant's claim to rely on Article 120, that there was no deception or obvious negligence on its part, it was for the Appellant to show that it was in an exceptional situation compared with its competitors in the same business. At the time of HMRC's audit the Appellant stated that the ARW orders were placed with Shanghai CWS Auto Part Group Limited, in PRC. Yet five different suppliers were named on the Appellant's import documents. The Appellant was unable to state from which supplier the ARW were being exported. The Appellant knew from its freight agent that Shanghai CWS had production sites in PRC and in Malaysia. The Appellant told HMRC during the audit that it had discussed the origin of the ARW with the exporter. No evidence has been produced to show that the freight agent

made specific enquiries as to the country of origin of the ARW. The Appellant had produced no evidence to show that other importers in the same business would have acted no differently, i.e., made no proper enquiries as to the origin of the goods. Exceptionality had not been shown. The appeal should be dismissed on all grounds.

Burden and standard of proof

12. The burden of proof to show that it was entitled to a full or partial remission of the ADD was on the Appellant. The standard of proof is the normal civil standard, the balance of probabilities. It should be noted here that there was no challenge to the formal validity of the C18 Post Decision Demand Notices, including their timeliness.

Evidence

13. A bundle of copy documents was served prior to the hearing by HMRC, incorporating the documents requested for inclusion by the Appellant, together with copies of relevant authorities and legislation. The Tribunal will refer to specific documents as necessary below.

14. Mr Daniel Mullarkey, Higher Officer of HMRC, made a witness statement dated 28 February 2020. There he described the process of review of the Appellant's claim for remission of the ADD. His evidence had not been challenged by the Appellant so live evidence was not required.

Submissions

15. Mr Kelly for HMRC relied on his skeleton argument and on HMRC's Statement of Case, both of which have been set out in some detail above. Relevant First-tier Tribunal decisions included *FMX Food Merchants Import Export Co Ltd* [2011] UKFTT 20 (TC) and *Euro Packaging UK Ltd* [2017] UKFTT 160 (TC). Good faith required acting without deception and with the appropriate exercise of diligence or due care in making import arrangements. The Appellant had produced no evidence of that nor of industry practice and the appeal could not succeed.

Discussion

16. There was no factual dispute as such. A person who elects to import ARW into the United Kingdom undertakes a number of responsibilities. Perhaps the first is to ensure that wheels to be sold in the United Kingdom comply with all applicable United Kingdom safety standards, and are manufactured in sizes appropriate to the intended market. For commercial success an importer would also need to know what

styles or designs would find favour with buyers, and what sales price(s) would be competitive. The Tribunal infers that any responsible importer would conduct careful research before placing any orders.

17. The Appellant complains in effect that HMRC Guidance Notice 826 imposes excessively onerous duties upon importers. But is that contention correct? The existence of import duties and ADD are ultimately decisions for which Parliament is responsible, either directly or by delegation. Compliance by importers is not optional. All that HMRC has done is to attempt to alert importers to issues they may face, and provide examples of best practice. As noted above, importers of ARW have a wide range of obligations.

18. As also noted above, no evidence apart from copies of the Malaysian origin certificates was filed on the Appellant's behalf. Thus the Tribunal received no evidence on behalf of the Appellant as to process or processes which were followed when it placed orders for ARW, i.e., what due diligence was undertaken, whether directly or on its behalf. There was no evidence as to whether advice was taken, whether from trade bodies or elsewhere. There was no evidence of industry practice. There were said to be language barriers, which in the Tribunal's view would have required additional care by the Appellant. Again there was no evidence as to how such language barriers were addressed.

19. A redacted copy of OLAF's report of its Malaysian mission was included in the agreed bundle. The redaction did not interfere with the substance of the report. The investigation was conducted with MITI's cooperation. It is clear from the summary of the report that by 2012 it was notorious that ADD in the EU on ARW manufactured in PRC was being evaded through Malaysia, and that an investigation was required. Extensive electronic records were available, which showed among other matters that origin certificates were obtained from the Malaysian authorities on the basis of false information and that incorrect commodity codes had been used. The OLAF report led directly to HMRC's audit of the Appellant and the raising of the two C18 Post Clearance Demand Notices.

20. The Tribunal finds that the Appellant has had ample time to provide proper evidence of the due diligence it undertook, yet failed to provide such evidence to HMRC in 2014 or subsequently to the Tribunal. Producing copies of company records is not on its face a matter which requires legal advice, so financial stress is not an answer. In the Tribunal's view, the applicable code for evaluating the remission application is the Union Customs Code as it is (or was) current at the time of HMRC's 2018 decision under appeal. The substance of the issue is the same under either code. In order for the Appellant to show that it was not guilty of deception and acting in good faith (Article 119) and/or not "obviously negligent" (Article 120), it was necessary for the Appellant to make a positive response to the *prima facie* case set out in the OLAF report, i.e., that incorrect information had been given to the Malaysian authorities as to the place of manufacture of the ARW and that incorrect commodity codes had been used. The evidence in the OLAF report displaced any unqualified reliance on the Malaysian origin certificates which might otherwise have been available to the Appellant. The Tribunal so finds.

21. It follows that the Tribunal accepts the submissions made by Mr Kelly on behalf of HMRC, that the Appellant has failed to prove its case and that the appeal is dismissed.

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.

TRIBUNAL JUDGE MANUELL
RELEASE DATE: 31 MARCH 2021