C00115

ANTI-DUMPING DUTY - Russian Ammonium nitrate - Russian urea - Net cif price, Community frontier before customs clearance - Whether prices declared by importer were net cif prices - Appeal allowed - Demand quashed - Council Regs (EC) Nos. 2022/95 and 497/95 and Council Reg. (EC) 384/96 art 2B.9

LONDON TRIBUNAL CENTRE

VTI FERTASCO LIMITED

Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE

Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

CYRIL SHAW FCA

ROY JENNINGS FCA FTII

Sitting in public in London on 31 January and 1, 2, 3, 4, 17 and 18 February 2000

Michael Tugendhat QC, with Malachy Cornwell Kelly of Titmuss Sainer Dechert, for the Appellant

Paul Girolami, counsel, instructed by the Solicitor of Customs and Excise, for the Respondents

DECISION

1. VTI Fertasco (UK) Ltd (in liquidation) ("VTI UK") appeals against a review decision upholding demands for anti-dumping duty. The demands under appeal were addressed to VTI UK, which has been in liquidation since 17 April 1998. The first demand dated 7 July 1999 relates to importations of ammonium nitrate from Russia between July 1996 and July 1997: the amount demanded is £4,849,221. The second demand, also dated 7 July 1999, relates to imports of urea from Russia in the same period; the amount demanded is £1,831,037.

2. Anti-dumping duty is charged under article 1 of Council Regulation 2022/95 for ammonium nitrate and under article 1 of Council Regulation 497/95 for urea. The duty is on the difference between the prescribed minimum import price ("MIP") for those products and (i) in the case of ammonium nitrate, the net cif price, Community frontier before customs clearance, if lower and (ii) in the case of urea, the net free at Community frontier price before customs clearance, if lower. Article 1 of Regulation 2022/95 reads as follows:-

"1. A definitive anti-dumping is hereby imposed on imports of ammonium nitrate originating in Russia and falling within CN Codes 3102 30 90 and 3102 40 90.

2. The amount of anti-dumping duty shall be the difference between ECU 102.9 per tonne net of product and the net cif price, Community frontier before customs clearance, in all cases where this is lower.

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply."

Article 1 of Regulation 497/95 is in similar though not identical terms; nothing turns on the difference.

3. In the majority of cases, the goods were imported to warehouse and later released to free circulation. It was not in dispute that the relevant time for determining whether anti-dumping duty is due is when the goods are released for free circulation, whether from warehouse or directly upon landing: see article 1.3 of each regulation and article 201.1(a) of the Community Customs Code, Council Regulation (EEC) No. 92/2913.

4. The facts are drawn from documentary evidence. Four witnesses, to whom we shall refer at the relevant points, gave evidence for VTI UK. The officer of Customs, Carolyn Jones, gave evidence and presented the Commissioners' calculations leading to the issue of the post clearance demands.

5. The events leading to the issue of the post clearance demands started in 1995. At about that time Mr Robin Watchorn, a commission agent trading in partnership with his wife under the name RWM, had come into contact with VTI Fertasco Ltd of Cyprus (VTI Cyprus). VTI Cyprus was part of an association of VTI companies trading throughout the world. The company controlling the association of VTI companies was, according to the evidence of Mr Valeri Rogalski (at present commercial director of VTI Cyprus), a Russian company to which we refer as "VTI Inc." VTI Inc, in conjunction with a Russian state enterprise called "Azot", arranged the export of fertilizers on behalf of Russian manufacturers. The fertilizers were mainly obtained from a factory complex in Russian situated inland from the port of Novorossiysk in the north east of the Black Sea.

6. VTI Cyprus had been incorporated in Cyprus (with which Russia has a favourable double tax convention) to sell fertilizers to foreign buyers throughout the world. One of VTI Cyprus's activities was to acquire ammonium nitrate, urea and other fertilizers from VTI Inc and to export it to third countries including the UK.

7. On 5 March 1995 the European Community introduced anti-dumping duty on importations of urea by Regulation 497/95. On 24 August 1995 anti-dumping duty was introduced on importations of ammonium nitrate by Regulation 2022/95.

8. Anti-dumping duties are currently imposed by Regulations made under powers conferred by the Council by a "Basic" Regulation of which the current one is Council Regulation 384/96. Dumping is in essence the practice of selling goods in a foreign market at a price lower than that prevailing on the home market. Anti-dumping duties are a protectionist measure imposed by territories to which such goods are exported and it is designed to increase the cost of the imports.

9. Determining the existence of dumping is governed by article 2 of the Basic Regulation, which is divided into parts entitled "A.Normal Value", "B. Export Price", "C. Comparison" and "D.Dumping Margin". Part A makes provision for establishing the "normal value", i.e. the prevailing price level in the alleged dumper's home market. Part B provides -

"8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory agreement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were exported, on any reasonable basis.

In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Community frontier level."

10. Part C contains provisions governing the process of comparison between the export price and the normal value and Part D provides for establishing the dumping margin, which it defines as "the amount by which the normal value exceeds the export price". The subsequent provisions deal with the determination of injury to the Community industry and the procedure for the imposition of provisional and definitive anti-dumping duties in the amount, not exceeding the dumping margin, necessary to remove the injury to the Community industry. In the case of Regulation 2022/95 the Council determined that a variable duty, of an amount depending on the import price, should be imposed. Article 1, set out above, set the amount of duty at "the difference between ECU 102.1 per tonne net of product and the net cif price, Community frontier before customs clearance, in all cases where this is lower."

The RWM importations

11. RWM's first importation of 3,980 tonnes of fertilizer from VTI Cyprus arrived on 17 August 1995 (shortly before the imposition of anti-dumping duty). Finance had been arranged with a third party. Payment was made within 60 days. Two further importations followed. The third importation arrived in the MV Ivan Silver on 2 October 1995. The price declared on importation was £84.92 per tonne (above the MIP of some £80). None of those importations have attracted post clearance demands against RWM. Payment for the cargoes were made in the agreed time by telegraphic transfer to Cyprus.

12. On 23 October 1995 a "protocol" between representatives of VTI Inc, VTI Cyprus and Robin Watchorn was entered into. This is drafted in general terms as a confirmation by Robin Watchorn of his interest in buying nine consignments of fertilizers and urea in 1995-96 with "Prices and other conditions to be determined prior to shipment dates". Attached was a Schedule specifying consignments of between 32,000 and 52,000 tonnes a month. This document, we understand, was drawn up to satisfy the requirements of the Russian ministry of foreign trade.

13. On 17 November 1995 a cargo of 15,000 tonnes arrived in the MV Dinara. The declared price was £99 per tonne; at the time the MIP was £82.51 per tonne. The fertilizer was put into store and sold over a period bringing in, according to

calculations made by the Commissioners, £7.74 per tonne after expenses (e.g. bagging, storage, transportation, port charges and insurance). When interviewed on 2 October 1996 Robin Watchorn explained the circumstances of this importation. (Robin Watchorn did not give evidence.) None of the other witnesses was asked to deal with his explanation of the circumstances behind the Dinara importation. What had apparently happened was that the fertilizer that eventually arrived in the Dinara in the UK had, for about a year, been stored in barges in the Mississippi. During that period it had deteriorated and encrusted. Extracting the ammonium nitrate from the Dinara had been a difficult exercise. It had to be bagged. When sold it had given rise to a number of complaints. While we cannot express any firm findings of fact about the Dinara importation, we observe that nothing we have heard or seen gives us any reason to doubt Mr Watchorn's explanation.

14. Six further importations of fertilizer by RWM followed. The declared prices were between £15 and £30 per tonne over the MIPs at the time.

15. On 28 November 1995 RWM had faxed Mr Dionissiev, director of VTI Cyprus, confirming an interest in purchasing a cargo of 20,000 tonnes of ammonium nitrate in bulk at £106 cif duty paid. VTI Cyprus faxed RWM about, among other things, a consignment of 20-30,000 tonnes of ammonium nitrate in bulk to be shipped in MV Vola. The price referred to was "up to £110 cif Duty unpaid". The Vola arrived on 1 February 1996 and the declared price was £105 (£20 above the MIP). At that time the world trade prices of ammonium nitrate and urea had reached a peak. Figures supplied by a Mr T A Burgess (whose evidence is referred to later) drawn from trade statistics showed that the price of ammonium nitrate in the UK market rose from £80 per tonne in 1995 to £125 per tonne in early 1996, dropping back by the end of 1996 to about £80 per tonne.

16. Following the arrival of the Vola, five further importations of fertilizer by RWM took place. The price per tonne was £115 for a further consignment in February then dropping by stages to £100 per tonne. The last RWM importation was of part of the cargo of the Kaptain Georgi Georgiev which arrived on 1 July 1996 and the cif price declared for customs duty was £99. In all cases the declared prices were around £15-£30 above the MIPs at the time and they were more or less in line with the importation prices drawn from the trade figures referred to by Mr Burgess. It is not in dispute that all consignments of fertilizer imported by RWM from the Dinara cargo onwards were sold at substantial losses allowing for expenses of storage, insurance, transportation, bagging, port dues etc.

VTI UK and its importations

17. We heard evidence from Mr M J Kirkup, a UK chartered accountant since 1962, who had joined the VTI "group" in 1995. From May 1996 he worked for VTI Credit (Holland) BV in the Hague. Until then he had worked in Cyprus where he had become aware of VTI Cyprus's trade with RWM arranged between Mr Dionissiev and Robin Watchorn. After his transfer to the Hague, Mr Kirkup heard that there had been difficulties in obtaining payment from the United Kingdom to Cyprus for cargoes delivered. In July 1996, he told us, two accountants from Cyprus went to the United Kingdom and interviewed Robin Watchorn "because there was growing concern that he was not paying for the cargoes being delivered to him." In early September 1996 Mr Kirkup was sent to the United Kingdom to find out about the problem over payment, how the United Kingdom operation was being run and what particular problems Robin Watchorn had. By then VTI UK was trading in place of RWM. It had been incorporated in March 1996 (under the name Nitrofert Ltd with Robin Watchorn as a director) and, we understand,

though there was no evidence of this, started trading as principal in July 1996 when it took delivery of part of the cargo of the Kaptain Georgi Georgiev when it docked on 1 July.

18. Mr Kirkup met Robin Watchorn on 3 and 5 September 1996. On 31 July Mr Watchorn had been arrested. On 2 October he was interviewed by Customs officers at Lincoln police station. Mr Kirkup's impression was that Robin Watchorn had been operating as a "one man band". He had kept no proper books or records and all his documents had been seized by the Commissioners. Mr Kirkup was told by Robin Watchorn that the reasons for non-payment had been because payment by their own customers had been slow and some of the cargoes had been of poor quality. Mr Kirkup's contemporaneous notes of the meetings referred, among other things, to -

- claims for recovery of customs duty and VAT on account of bad quality of product imported into the UK,
- the need to get a solicitor to draw up proper terms of trade between DTI UK and DTI Cyprus,
- an employment contract to be entered into between Robin Watchorn and DTI UK and
- the need for a clear reporting structure concerning sales, cashflows etc.

19. Mr Kirkup said that he had not been convinced by Robin Watchorn's complaints about poor quality product. In the course of the interview on 2 October 1996, Robin Watchorn had repeatedly attributed his financial problems to bad quality product and late deliveries.

20. Mr Kirkup re-visited Robin Watchorn in October to see to the employment arrangements. On 1 November 1996 Mr Kirkup was appointed a director of VTI UK. He spent a considerable amount of time in the following months on VTI UK's affairs and set up an accounting system. He saw it as his main function to ensure that VTI Cyprus was paid for its shipments. For these purposes he investigated VTI UK's debtors and creditors, established an accounting software package and set up a "recovery team". Mr Kirkup ascribed the failure on VTI UK's part to meet its payment obligations to VTI Cyprus as attributable to VTI UK's late invoicing and non-invoicing of customers and to its failure to chase late paying customers. There had been no one in the office to do this work. Mr Kirkup said of Mr Watchorn that he was difficult to work with and that he continued to operate as a one man band even though he then had a ten person organization around him. Nonetheless Mr Kirkup's impression of Robin Watchorn was that he was a compulsive acquirer, eager to import more cargo into the United Kingdom regardless of quantity; he always wanted to please his customers offering them reckless rebates. Mr Kirkup told us in evidence, and this was not challenged, that he had never heard at any time of anything to suggest that the prices agreed between VTI Cyprus and VTI UK were not genuine; he said that he did not believe that there had been private agreements between those two companies to the effect that prices different from those appearing on the commercial documents would be paid by VTI UK for the cargoes.

21. Mr Kirkup told us that Robin Watchorn had made payments to VTI Cyprus by lump sums whenever he felt he was in a position to do so. The payments were not related to particular ships. Mr Kirkup estimated that by 31 March 1997 VTI UK had made losses of some £11,450,000 and that VTI Cyprus was the principal

creditor. On 3 November 1997 Robin Watchorn's employment with VTI UK was terminated and arrangements to deal with VTI UK's "insolvency" commenced.

22. In 1996 the trade price bagged for ammonium nitrate at the time of release to free circulation was between £80-£100 per tonne; in 1997 it fell to between £60-£80 per tonne. We have taken this information from a roughly drawn graph showing UK fertilizer prices prepared by a trade journal of December 1999 and presented as part of Mr T A Burgess' evidence. The following is a short summary of declarations for fertilizers imported by VTI UK. The invoice prices are taken from copy invoices relating to all consignments. The average price per tonne at the time of landing for bagged imports from other Russian sources (i.e. other than VTI Cyprus) are taken from Official Statistics presented by Mr S J Hook (see para 29 below).

- The Kaptain Georgi Georgiev arrived in July 1996 with a cargo of 23,000 tonnes of ammonium nitrate. The price per tonne on the invoice was shown as £100. The MIP was then £85.24. Between 8 July 1996 and 19 January 1998 18 declarations for goods released from warehouse were made.

- The Zlatoust arrived on 11 August 1996. The price invoiced by VTI Cyprus was £100 per tonne. The MIP was then £85.24. The last declaration for goods released from warehouse was in March 1997.

- The Skylark arrived on 7 September 1996. The invoiced price c.i.f. was £98 per tonne. At that time the average price per tonne for other imports was £95.64 and the MIP was £85.24. The first declaration was on 4 October 1996; the last was in March 1998.

- The Bumbesti arrived in November 1996. The invoice price was £93 per tonne. At that time the average price per tonne for other imports was £111.28 and the MIP was £85.24. The last declaration for goods released from warehouse was on 7 October 1997.

- The Glencora arrived on 19 February 1997. The invoice price was £85.50 per tonne. At that time the average price per tonne for other imports was £74.78 and the MIP was £76.35. The last declaration was in March 1998.

- The Okalchitsa arrived in March 1997. The invoice price was £80. At that time the average price per tonne for other imports was £74.78 and the MIP was £73.30. The last declaration was in March 1998.

- The Nazli Poyraz arrived in May 1997. The invoice price was £78. At that time the average price per tonne for other imports was £74.79 and the MIP was £72.36. The last declaration was in December 1997. (A complaint about this cargo was made by VTI UK to VTI Cyprus: it was settled by the P&I insurers of the ship.)

- The Adamastos, carrying urea, arrived in May 1997. The invoice price was £102 and the last declaration was in December 1997. At that time of import the average price per tonne for other imports of Russian urea was £100 and the MIP was £80.87.

- The Glencora arrived again in July 1997. The invoice price was £77 and the last declaration was in February 1998. At that time the average price

per tonne for other imports of bagged ammonium nitrate was £90.19 and the MIP was £70.30.

23. The summary of importations in the previous paragraph shows three things. First, the VTI invoice prices were at all times above the MIPs. Second, invoice prices were roughly in line with the trade prices for bagged product referred to in Mr Hook's and Mr Burgess' evidence. In this connection we have assumed a cost of bagging of £8 per tonne: we have taken this from Customs' calculations referred to in paragraph 24 below. It should be recognized that those statistical trade prices are prices at the time of importation and are not trade prices ruling at the later time of release for free circulation. Third, in all cases the fertilizer had to be stored and some of the fertilizer remained in the store for over a year with consequent storage charges.

24. The invoice prices and the declared prices for the fertilizer imported in the Okalchitsa was, as noted in paragraph 22 above, £80 per tonne. The Commissioners have calculated anti-dumping duty on the Okalchitsa consignment (which we use as an example) as follows -

- The total sales proceeds received by VTI UK over the period from March 1997 to March 1998 was £1,674,415, i.e. £73.33 per tonne.

- The inland UK costs attributable to the consignment (haulage, baggage, storage, port discharge, costs etc) were £460,402, i.e. £20.16 per tonne.

- The balance left after deducting costs from sales proceeds was £53.17 per tonne.

- The difference between £53.17 per tonne and the MIP per tonne (which varied because of currency fluctuations between £73.74 and £68.30) was the anti-dumping duty per tonne charged by the post clearance demand.

The Commissioners' figures were taken from records removed from VTI UK's premises following a further arrest of Robin Watchorn on 13 July 1998. Similar calculations were made in relation to all the consignments of fertilizers imported by VTI UK.

25. Payments made by VTI UK to VTI Cyprus were made at the rate of two to six payments each month, usually in round amounts varying from £50,000 to £300,000. The total of payments for 1996 was c.£9.2 million (partly in discharge of RWM debts) and the total of payments for 1997 was c.£6.4 million.

26. On 17 April 1998 VTI UK was placed in liquidation. Mr S J Hook FCA, a partner in Pricewaterhouse Coopers, the firm of which two partners had originally been appointed liquidators, gave evidence. He explained that VTI UK had first taken advice from the firm in December 1997. The advice had been that, despite the large liabilities to the Commissioners and to VTI Cyprus, the best course would be to defer liquidation and realize stocks in hand without incurring further costs. Most of the stocks of fertilizers were realized at poor prices (some by forced sales) by the time of liquidation. Much of these stocks had been in store since at least July 1997 and had deteriorated. VTI Cyprus lodged a proof of debt for £33,765,000.

27. Mr Hook's assessment of the reasons for VTI UK's failure was essentially that it had not been well run and had lacked "fundamental controls". The original idea

had been for VTI UK to obtain orders from farmers and distributors and on the strength of these to purchase the required fertilizer from VTI Cyprus. After inland costs it had been envisaged that VTI UK would make a small margin per tonne. Mr Hook's view was that things had gone wrong because Mr Watchorn, who managed VTI UK's business, had either been unable to read the market correctly or had ordered fertilizer in anticipation of obtaining orders which were not confirmed at the time of the shipments. Mr Hook recognized that there had been possible issues about the quality of the imported fertilizer which had not been resolved in a satisfactory manner and claims against insurers and suppliers had not been made "in a timely fashion".

28. The liquidators made attempts to determine VTI UK's liability to anti-dumping duty. Mr Hook made enquiries and reviewed the limited records available. He was aware that the Commissioners were alleging that the invoice prices, i.e. the basis for the customs declarations, were not genuine and that either no prices had been agreed or different prices had been payable by VTI UK. Mr Hook stated in evidence that he had never seen any evidence to support the contention that any prices had been agreed other than those stated on the invoices.

29. Mr Hook stated that he had tried to ascertain whether or not the prices at which the shipments were imported from VTI Cyprus corresponded to similar shipments from Russia by other producers importing into the UK at the same time. He had contacted a compiler of trade statistics and had asked them if they could provide details of shipments into the UK from Russia in respect of urea and ammonium nitrate over the relevant periods. He asked them for details of shipments of all fertilizers into the UK over the calendar years 1996, 1997 and 1998. He provided schedules for 1996 and 1997 showing the ten shipments into the United Kingdom which are the subject of this appeal. Against the month of shipment is shown the tonnage, total costs and average price per tonne for other Russian imports for that product into the United Kingdom. The schedule also shows that the percentage of VTI UK's imports as against the total imports into the United Kingdom for that month and the average price per tonne of the balance. It shows that overall the prices per tonne of VTI UK's imports of fertilizer were broadly in line with those shown in the trade statistics. This indicated to him that the import prices were at arms length and that the obvious relationship between VTI Cyprus and VTI UK had not influenced the price.

30. Mr Hook's conclusion was that nothing in the material provided by the Commissioners supported the allegations that the invoice prices were not the true transaction prices.

31. We mention at this stage that Mr Paul Girolami for the Commissioners questioned the reliability for the present exercise of the figures produced by Mr Hook. They came from single administrative documents produced at the time of the relevant declaration, i.e. when the goods were released into free circulation. Some of the prices on which the statistics must have been based related to importations that had arrived some months before. Whatever the defects in the figures relied on by Mr Hook, they show us that fertilizers imported from Russia were being imported at prices over the minimum import prices; thus, were it to be relevant to compare the prices declared by VTI UK with those declared on importations of identical or similar goods so as to determine a transaction value, the statistics show that the latter prices are over the MIPs.

32. Mr T A Burgess, who is now employed by a company called VTI Fertasco (UK) Holdings Ltd gave evidence of his experience of Mr Watchorn's methods of doing business. Mr Watchorn was regarded in the trade as a loose cannon. It was

known to Mr Burgess that at the relevant time Mr Watchorn was maintaining very poor stock control and invoicing systems. It was also known that he could never turn a sale away no matter what the condition of the market. He had, in Mr Burgess' experience, "thrived" on being the cheapest vendor, often selling products that he was unable to get access to.

33. On 4 June 1998 the Commissioners searched and seized documents at Robin Watchorn's and VTI UK's premises.

34. On 5 June 1998 VTI UK's solicitors made a formal request for compliance with article 181a of the Implementing Regulations.

35. On 13 July 1998 Robin Watchorn was again arrested and on 25 November 1998 "informations" were laid against him.

36. Post clearance demands were issued on 10 May 1999 (£1.8m in respect of the urea imports) and on 7 June 1999 (£4.8m in respect of the ammonium nitrate imports). The demands were reviewed by a Mr K Twist of Customs and Excise and upheld in a letter dated 23 July 1999.

Development of case for Customs and Excise

37. The first statement of the Commissioners' case is found in a "Summary of Allegations in relation to the Activities of VTI UK". This states that the Commissioners had formed the opinion that the values declared by VTI UK in respect of importations of ammonium nitrate between incorporation and 17 April 1999 "did not represent the total amount paid or payable by the Commissioners to the seller of the product". It goes on to say that the Commissioners are not satisfied, on the basis of reasonable doubt, that the value of any goods imported by the company or its agents on any occasion during the period in which the company was trading as declared to the Commissioners represented the total amount paid or payable under article 29 of the Community Customs Code. Then the Summary of Allegations asserted that there was substantial evidence to show that the values set out on the entries relating to the shipments were "substantially inflated so as to evade anti-dumping duty". In summary that evidence comprises:

(i) Documents seized by the Commissioners showing the price at which the product was sold on the home market. That price would not have been economically viable if Watchorn had purchased at the prices shown on the entries.

(ii) The discrepancy between the amount which would have been due to VTI UK on the basis of the commercial invoices supplied (about £16.9m) and the amount in fact remitted by Watchorn to VTI Cyprus (about £6m).

(iii) Watchorn's own admissions in interview that the price shown on the entries was not the final price of the product.

38 Mr Twist, the reviewing officer, issued his review letter on 7 July 1999. He was responding to the two grounds for VTI's request for review. The first of these was that "the declarations for free circulation of the goods in respect of which duty and tax is demanded were correct and consistent with the duty and tax actually paid". The second was that "no matter has been put to this company or to any other person pursuant to Article 181(a) of the Implementing Regulations, despite

requests therefore having been made to the Commissioners". The relevant part of the review letter reads as follows:

"Article 181(a) of Regulation 2454/93 applies in the context of the customs valuation provisions contained in articles 28 to 36 of the Customs Code. However in this case the anti-dumping duty is to be determined in accordance with article 1.2 of Regulation 2022/95.

Article 181(a) is not applicable in the context to that Article.

During an interview Mr Watchorn made admissions that the price shown on the entries was not the final price of the product.

In view of the premise that the values declared to Customs and Excise were not the final price of the product, it was necessary to calculate the anti-dumping duty payable in accordance with article 1.2 of Regulation 2022/95 by reference to the best available information. "

Mr Twist did not attend and we were not, therefore, able to ask him for better particulars of how he conducted his review.

39. On 20 January 2000 the Commissioners withdrew from the position taken in their Summary of Allegations. Their new position, as set out in that letter, is that articles 29 et seq do not apply and

"If the declarations prove inaccurate, the calculation of the cif price which falls to be applied for the purpose of ascertaining whether anti-dumping duty is chargeable under Regulation 2022/95 should take place in accordance with the method of calculation adopted in Regulation 384/96 and, in particular, article 2B of that Regulation.

The method which they have adopted was consistent with Regulation 384/96 and was therefore permitted for the purposes of Regulation 2022/95."

Conclusions

40. The post clearance demands have been issued on the footing that the Commissioners "are not satisfied on the basis of reasonable doubt" or "have reasonable grounds to doubt" that the declared import prices represent transaction values. The Commissioners do not, as we understand the position, assert that the demand is based on the "true" price secretly agreed. Instead they have purported to impose anti-dumping duty on the basis of the onward sales and realizations in the manner summarized in paragraph 24 above in relation to the Okalchitsa cargo.

41. The position now taken by the Commissioners is that they are entitled to do what they have done on the basis of Regulation 384/96: see the letter of 20 January 2000. The Commissioners are, we think, wrong.

42. Regulation 384/96 is an empowering regulation. It confers on the Council powers to impose specific anti-dumping regulations in respect of specific goods. The structure of Regulation 384/96 is set out in paragraphs 8 to 10 above. The anti-dumping regulations relating to ammonium nitrate and urea are not "delegated" or "secondary" legislation. Regulation 2022/95, for example, is a free-standing regulation created by virtue of the Council’s power given them by

Regulation 384/96 (or its predecessor). But it does not implement Regulation 384/96 which is not a charging provision and has no application to the imposition of charges. Regulation 2022/95 directs in article 1 that the amount of duty be set at "the difference between ECU 102.9 per tonne net of product and the net cif price, Community frontier before customs clearance, in all cases where this is lower"; it goes on to direct that unless otherwise specified "the provisions in force concerning customs duties shall apply". The provisions in force containing customs duties in the Community Customs Code do, we think, apply. This is clear from article 28 of the Code which provides -

"The provisions of this Chapter shall determine the customs value for purposes of applying the Customs Tariff of the European communities and non-tariff measures laid down by the Community provisions governing specific fields relating to trade goods."

The decision in Nakajima v Council [1991] ECR 1-2069 is in point. The Court's judgment contains this passage (in paragraph 105) -

"Anti-dumping duties are imposed on the net free at Community frontier price per duty, that is to say, on the customs value (cif price) of the imports."

ICT v Fazenda Publica [1997] ECR 1-2891 was concerned with an anti-dumping regulation with terms similar to those found in Regulation 2022/95. The Court decided that the net cif "free at Community frontier price" in that particular anti-dumping regulation corresponded to the customs value of the imported goods namely-

"the transaction value, that is to say, the price actually paid or payable for the goods when sold for export to the customs territory of the Community"

43. Those decisions coupled with the direction in article 1.3 of Regulation 2022/95 make it clear that articles 29-33 of the Community Customs Code are brought into play for anti-dumping duty purposes. It would be unsatisfactory if they did not apply. All article 1 of Regulation 2022/95 does is to cover the case where there is a net cif price. What if there is not? Take the common situation of an importation where a consignor and consignee are the same person. The framers of Regulation 2022/95 and the urea regulation must have anticipated that. It is inconceivable that the matter was left to implication, e.g the implied application of, article 2B.9 of Regulation 384/96, as the Commissioners claim. It is just as unlikely that they left it to the Member States to imply the application of article 2B.9 and impose an anti-dumping duty where they had reasons for doubt as to the prices declared at importation.

44. Moreover the present situation is not the situation contemplated in article 2B.9. The Commissioners have purported to invoke article 2B.9 on the basis that the prices on the invoices issued by VTI Cyprus were not agreed prices. By necessary implication the Commissioners must be proceeding on the basis that the invoice prices are not true prices. The situations contemplated by article 2B.9 of Regulation 384/96 are "if there is no export price or where it appears that the export price is unreliable because of an association or a compensatory agreement between the exporter and the importer or a third party." The first situation contemplated by article 2B.9 is where, in investigating alleged dumping, it is found that the importation is not effected through a sale between an exporting seller and an importing purchaser because the exporter consigns the goods to himself or his agent within the Community; that is not the position here. The second situation is that there is a transaction value between a seller and

purchaser, but either it is not an arms length transaction value or it is offset by some compensatory agreement. Again, the Commissioners are not suggesting that the invoiced price is at a transaction value which is not arms length or else accompanied by a compensatory agreement; instead they are suggesting that the invoiced prices are not transaction values at all. Accordingly the present case is not even analogous to article 2B.9, leaving aside the question of whether that provision has any relevance to the application of individual anti-dumping duty regulations.

45. This brings us to article 29 of the Community Customs Code. This and the succeeding provisions of the Code provide the valuation rules which, in our view, are to be applied for purposes of article 1 of the anti-dumping regulations. The terms used in article 29 need to be adapted as necessary to suit the provisions of the anti-dumping regulations. The opening words provide -

"1. The Customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods and sold for export to the customs territory of the Community, adjusted where necessary, in accordance with articles 32 and 33, provided -

(a) ... (c) ...

(d) that the buyer and seller are not related, or, where the buyer and seller are related, that the transaction value is acceptable for Customs purposes under paragraph 2."

The Commissioners do not say that the transaction value here requires to be adjusted because of any relationship between VTI Cyprus and VTI UK. They say that the declared prices are to be disregarded because they cannot be relied on. The critical question for us is this. What is the price payable under the relevant contract between VTI Cyprus and VTI UK: is it the declared price or some other price? This is a matter of evidence. VTI UK have to satisfy us that the declared prices are, reading article 1.2 of the relevant anti-dumping Regulation with article 29.1 of the Code, the net cif prices actually paid or payable for the goods.

46. The evidence relied upon by the Commissioners starts with the sequence of losses resulting from each consignment imported by VTI UK. Robin Watchorn must, they say, have been aware of the risks of selling forward then buying on a rising market and the risks of buying and holding stock then selling later in a falling market. Mr Watchorn's trading practices could have been designed to make losses. It was extraordinary that VTI Cyprus should have allowed VTI UK's indebtedness to build up to £33m; the inference must be that they did not expect to recover the invoice prices (i.e. those declared for Customs purposes). The inescapable conclusion must be that the invoice prices were merely token figures; the reality was that both sides accepted that the real price was what VTI UK had left, after expenses, to pay over to VTI Cyprus.

47. Mr Girolami invited us to rely on the answers Mr Watchorn gave when interviewed at Lincoln Police station on 2 October 1996. (Carolyn Jones, the Customs officer whose decision Mr Twist reviewed, made no reference in her evidence to the admissions (and the non-payment of the purchase prices) as grounds on which she took her decision. To judge from the letter of 7 July 1999 Mr Twist had regarded the admissions as the only evidence supporting his decision to uphold the post clearance demands.)

48. We have read and re-read the transcripts of the interview. There are occasions when Mr Watchorn gets close to admitting that the agreed prices were not the invoice prices. But, on examination, on most of these occasions he is saying that the agreed prices would not have to be paid in full because of quality complaints, because of VTI Cyprus's failure to provide bagged fertilizer and because of assertions by VTI Cyprus that he had not agreed a price when in fact he had. Mr Watchorn did not have records available to him at the interview and his answers are too vague and ambiguous to support a conclusion that the invoiced prices were not the agreed prices. For that reason also we would be against the review decision expressed by Mr Twist. Furthermore, the interview took place some three months after VTI UK had started trading. Only three cargoes had arrived by then. A large part of the cargo brought by the Kaptain Georgi Georgiev was still in store and much of the greater part of the Vlatoust's cargo was still in store. Hence Mr Watchorn's "admissions" could have no bearing on the seven cargoes yet to arrive.

49. Mr Tugendhat for the VTI UK argued that the evidence was more consistent with the declared prices being the prices actually agreed, rather than showing a conspiracy to declare false prices in place of some other prices that had been secretly agreed. He recognized that the proceeds of sale of the imported fertilizer obtained by VTI UK had resulted in substantial losses. But those losses were attributable to the fall in trade prices of the fertilizer between the time when the goods were consigned by VTI Cyprus and the time when the goods were eventually sold by VTI UK to distributors and farmers in the United Kingdom. Some sales took place a year after arrival; some were, according to Mr Hook's evidence, forced sales. The longer the period between arrival in the United Kingdom and eventual sale, the greater the storage costs and the greater the chances of deterioration become. These onward sale prices cannot, it was argued, be taken as reliable comparisons, still less can a calculation of net c.i.f. price worked back from such sale proceeds. Moreover VTI UK were taking losses on the forced sales referred to by Mr Hook. Generally, he observed, there was no benefit to VTI UK. Had there been a deliberate intention to evade anti-dumping duty, then the alleged secret agreement between VTI UK and VTI Cyprus has failed to achieve the onward sales that must have been intended; the onward sales within the United Kingdom should have been rapid if the price was so low as to lead to suspicion of evasion of anti-dumping duty. In fact it took over 18 months, and even then some of the later sales were forced sales.

50. It was further argued for VTI UK that a conclusion of the Tribunal that the declared prices were not to be taken as the net cif prices required a finding that the declared prices were shams on the grounds that either no price had been agreed or that some other price or pricing formula had been secretly agreed between VTI Cyprus and VTI UK.

51. We recognize that VTI UK has the burden of discharging the demand; nonetheless a finding that the declared prices were not the correct amounts on one or other of those grounds is required if the Commissioners' assertion is to be substantiated. Mere inference or suspicion will not be enough.

52. The Commissioners had good reasons for suspicion if only because of VTI Cyprus's action in continuing to make supplies of fertilizers to a wholly owned subsidiary (VTI UK) notwithstanding that the subsidiary was in continuing default over payment for the supplies. And Mr Watchorn's responses in the course of the October 1996 interview had done little to displace those suspicions. Moreover, although the point has not apparently been relied on by the Commissioners, it is, in the light of three particular circumstances, not easy to accept that VTI Cyprus,

which owned and controlled VTI UK, had a real expectation of payment of the amounts shown as the invoice prices for the consignments. These circumstances were that (according to Mr Kirkup's notes at the end of his minute produced in September 1996) VTI UK had neither a bank account nor was registered for VAT; so far as we can ascertain its share capital was minimal and it had no outside source of funding. Those circumstances occurred to us after the hearing. It is at least possible that there were explanations. Consequently, although we have not disregarded them, we have not placed substantial reliance on them in reaching our decision.

53. The points that tended to show that the amounts declared on VTI UK's behalf in relation to the importations were the agreed net cif prices are as follows:

(i) The declared prices were not out of line with prices for other importations of fertilizers from Russia taking place at much the same time. We have already noted that the published trade prices related to goods going into bond whereas the declared prices related to goods coming out of bond, in many cases after a long period of storage. We therefore approach this feature with some caution.

(ii) In most cases the declared prices were well over the minimum import prices. The higher the declared price the greater the liability to customs duties and VAT. Had there been an operation to defeat the anti-dumping duty provisions, it is unlikely that prices would have been declared that gratuitously exposed VTI UK to more VAT and customs duty than was necessary.

(iii) Mr Kirkup, who had been investigating VTI UK's affairs since September 1996, stated in evidence that nothing he had found had given him grounds to conclude that the amounts shown on the invoices were not as agreed. He put VTI UK's failure down to incompetent and reckless trading on Mr Watchorn's part. He accepted in evidence that he had not discussed with Mr Watchorn the invoices issued by VTI Cyprus and the prices shown on the invoices. Nevertheless, had there been a continuing exercise of avoidance of anti-dumping duty, this would surely have been apparent to a person of Mr Kirkup's accountancy background; and it was not put to him that he had been playing a part in such an exercise.

(iv) Mr Hook, the liquidator, found nothing in the material that he had seen to support the allegation that the invoice prices were not the true transaction prices.

(v) The prices of fertilizers were moving downwards throughout 1996 and into 1997. VTI UK had been left with large amounts of unsold and deteriorating fertilizer for which it was having to pay warehouse charges. In some cases it had fertilizer on its hands for as long as eighteen months: see the information set out in paragraph 22 above. It is not surprising therefore that a badly organized business such as this made losses.

54. With considerable reluctance we think that the balance of evidence supports VTI UK. The Commissioners, as we have already observed, had every reason to be suspicious and received little help from VTI Cyprus. The officer handling the investigation carried out her task carefully and conscientiously. However, for the reasons we have given we are satisfied on the strength of the limited evidence available to us that the declared prices were the net cif prices for the purposes of Article 1 of Regulations 2022/95 and 497/95.

55. It is not necessary to proceed beyond article 29 of the Community Customs Code. Had it been, the Commissioners would, in the present circumstances, have had to comply with article 181a of the Implementing Regulations. The

Commissioners' original approach to the matter was to construct values on importation apparently relying on article 30 onwards. They should have given VTI UK the opportunity to consider and respond to their doubts. Their failure to do so has, we think, amounted to a substantial procedural impropriety. To the extent that the post clearance demand sought to substitute a cif price that was not the agreed price, therefore, it was invalid and we quash it.

56. For the reasons given above we allow the appeal. We were not asked to make any direction as to costs. The parties have 60 days in which to apply for an order for costs if they wish to do so.

57. We direct that publication of this decision be delayed until the current criminal proceedings against Mr Watchorn have been completed.

STEPHEN OLIVER

CHAIRMAN

RELEASED: 18th April 2000

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