

C00117

ANTI-DUMPING DUTY - Russian ammonium nitrate - Net cif price - Post clearance demand - Customs declarations for imported goods showed amounts in excess of minimum import price - Declared amounts alleged by Commissioners to be too high - Commissioners constructed net cif prices by working back from importer's selling prices - Importer given no opportunity to respond to Commissioners' allegations before post clearance demand was issued - Whether Customs Code and Implementing Regulations require this - Yes - Whether a substantial procedural defect - Yes - Appeal allowed - Council Reg (EC) No.2022/95 - Council Reg 384/96 art 2B(9) - Council Reg 2913/92 arts 29-33 - and Implementing Reg art 181a

LONDON TRIBUNAL CENTRE

ROBIN WATCHORN & ROSEMARY WATCHORN & Appellants
T/ A ROBIN WATCHORN MARKETING

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

C R SHAW FCA

ROY JENNINGS FCA

Sitting in private in London on 31 January, 1, 2, and 3, February 2000

Nicholas Paines QC, instructed by Bridge McFarland, solicitors, for the Appellants

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

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DECISION

1. At this hearing we were asked to determine two matters as preliminary issues. The appeal is against a review decision the effect of which was that anti-dumping duty "ADD" together with VAT on the ADD was due on importations made by Robin Watchorn Marketing (RWM) of ammonium nitrate from Russia. The RWM partnership consisted of Robin Watchorn and Rosemary Watchorn until the partnership was dissolved. The amount in dispute is £4,889,093.58. It arises from post clearance demands. The preliminary issues are -

(i) whether the post clearance demands are "bad on their face" and

(ii) what is the proper construction and application of Articles 29 and 30 of the Community Customs Code ("the Code").

2. The appeal concerns eight shipments of ammonium nitrate fertiliser which took place between November 1995 and July 1996 in respect of which RWM is alleged to be liable for ADD.

3. The ADD in respect of the ammonium nitrate is demanded pursuant to article 1 of Council Regulation (EC) No.2022/95. This imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia. Article 1 provided -

"1. A definitive anti-dumping duty 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, provisions in force concerning Customs duties shall apply."

4. The minimum import price represents the sterling equivalent of ECU 102.9 from time to time. The result of the declarations in respect of the eight shipments of ammonium nitrate fertiliser was that both ad valorem customs duty and import VAT were payable on the full amount represented by the declared prices.

5. The Commissioners have made the post clearance demands because they contend that the net CIF prices shown in the declarations made for entry into free circulation have been inflated so as to ensure that the minimum import prices were exceeded in each case and thus that no ADD was to be levied. Mr K J Twist, the review officer, stated as one of the reasons in the letter appealed against that Mr Robin Watchorn had admitted in the course of an interview that the declared prices were not the true prices. The admission referred to had been made by Mr Watchorn in the course of an interview on 2 October 1996 following his arrest by the Commissioners.

6. The demand was, as already noted, made on 11 May 1999. The papers accompanying the demand do not contain any narrative explanation of how the demand was calculated. Mr Twist did not attend and give evidence. We understand, however, that the method followed by the Commissioners has been to attempt to calculate (1) the total receipts from onward sales of fertiliser comprised in each of the various shipments and (2) the total costs incurred within the United Kingdom in effecting those sales. The Commissioners had then subtracted the costs from the receipts and have calculated ADD in respect of each shipment on the difference between the resulting figure and the sterling equivalent of ECU 102.9.

7. Typical of Customs declarations and invoices covering the importations to which this appeal relates is the documentation covering the importation of some 23,000 tonnes of ammonium nitrate in bulk in a vessel called the Kaptain Georgi Georgiev. The invoice, dated 17 June 1996, shows a company called VTI Fertasco Ltd of Cyprus as the consignor and VTI (UK) Ltd as consignee. (It was accepted for both sides that part of the consignment was the property of RWM.) The price, based on cost plus freight to a safe UK port, is some £2.3m payable within 60 days. The declaration refers to the arrival date as 1 July 1996. It is made by

agents and relates to 2,881 bags and bulk released into free circulation from a bonded warehouse at Immingham on 1 September 1996. The "item price" is shown as £171,000 upon which some £44,000 of "taxes" have been calculated as payable. The "value declared" is £171,000. The declaration records that buyer and seller are not "related". The case for the Appellants is that no ADD is chargeable because the value declared of £171,000 represents a value per tonne which is well over the sterling equivalent of ECU 102.9. The Appellants say that the demand calculated on the basis summarized in paragraph 6 is bad on its face since (a) value constructed in this way plainly does not represent or amount to the net CIF price in the import transaction, which is what Regulation 2022/95 refers to, and (b) even if (contrary to that contention) the method of calculation were lawful, the demand is bad because the Commissioners have not followed the mandatory procedure under the Implementing Regulations. The Commissioners say, in essence, that the relevant provisions of the Community Customs Code ("the Code"), and consequently the Implementing Regulations, have no application to the imposition of ADD where the declared price is unreliable. Their function in such circumstances is to construct a net CIF price on lines similar to those set out in Part B.8 and 9 of Article 2 of the "Basic" Regulation (Council Regulation 384/96 to which we shall now turn).

Community anti-dumping duties - the legal framework

9. ADDs are currently imposed by Regulations made under the powers conferred on the Council by the Basic Regulation, Regulation 384/96. The following is a brief outline of the procedure. In broad outline, dumping is 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, designed to increase the cost of the imports. Regulation 384/96 is one of a series of Regulations that have empowered the Council to impose ADDs.

10. Determination of 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 (which is set out in full because of the Commissioners' reliance on it) 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 arrangement 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."

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 is defined 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 ADDs in the amount, not exceeding the dumping margin, necessary to remove the injury to the Community industry.

11. 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. It reads -

"87. It is concluded that definitive anti-dumping duty on imports of ammonium nitrate originating in Russia be imposed in the form of a variable duty. This would have the advantage of increasing export prices to a level at which injurious dumping is eliminated, while at the same time not imposing any extra burden on exporters which have subsequently increased export prices to or beyond a non-injurious level."

The Commissioners' reliance on Regulation 384/96

12. There was no evidence of what if any regulatory provision the Commissioners applied in calculating the demands which are the subject matter of the post clearance demands appealed against. At a preliminary hearing on 26 November 1996 the Tribunal was advised that the Commissioners considered that articles 29 and 30 of the Code applied. The Commissioners abandoned that approach giving notice by letter of 20 January 2000. Their revised approach is to rely on Regulation 384/96 with particular reference to article 2B paragraph 9, set out above.

Does Regulation 384/96 apply here?

13. We do not think that article 2B.9 of Regulation 384/96 provides an appropriate method of determining the "net cif price Community frontier before Customs clearance" for purposes of Regulation 2022/95. Regulation 384/96 has a separate and different function from Regulation 2022/95. The former is concerned with prescribing the procedure to be adopted by the EC institutions in establishing an export price for the purpose of adopting a Regulation that imposes ADD. Regulation 384/96 says nothing about the procedure to be followed by national customs authorities in applying such a Regulation once adopted. In particular it says nothing about the determination of cif. prices for the purpose of such a Regulation; and paragraphs 8 and 9 of article 2B are not directed at the determination of the cif price. The procedure for calculating ADD pursuant to Regulation 2022/95 is stated shortly and precisely in article 1 of that Regulation. Article 1.2 expressly provides for consignments which are sold at net cif prices. Regulation 2022/95 makes no express provision for consignments of goods entering the Community without a cif price, e.g importations from outside the Community where consignor and consignee are the same person; and it makes no provision for cases where the customs authorities believe that the cif price as declared is unreliable or a sham price. Had the Council intended to provide that, in particular circumstances, net cif prices should be "constructed" in accordance with Regulation 384/96, which is self-evidently dealing with a different situation, it would have said so explicitly and prescribed the circumstances. The clear terms of Regulation 2022/95 are, we think, irreconcilable with the Commissioners' contention.

14. Even if, contrary to our conclusion in paragraph 13, Regulation 384/96 were applicable by analogy (which is what the Commissioners now contend) the circumstances of the present case are not, we think, analogous to article 2B.9. The grounds on which the Commissioners invoke article 2B.9 is because the

declarations do not represent the prices as agreed between VTI Cyprus and RWM. This contention is based on the implication that the declared prices are shams. We do not think article 2B.9 can be invoked by way of analogy on this basis even if the declared prices are shams. That is not a situation contemplated by article 2B of Regulation 384/96.

15. 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 former situation referred to in that extract is where, in investigating alleged dumping, it is found that the importations are 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 as between a seller and purchaser, but either it is not an arms length transaction value or it is offset by some compensatory agreement. The Commissioners do not suggest here that the invoice prices are transaction values albeit ones that are not arms length or else accompanied by a compensatory agreement. Instead they are suggesting that the invoice prices are not transaction values at all. It follows that the present case is not analogous to article 2B.9 even leaving aside the question of whether that provision has any relevance to the application of individual ADD Regulations.

16. For those reasons we conclude that Regulation 384/96 does not apply, by analogy or at all, to enable the Commissioners to construct a cif price to replace the price declared in the declaration made on behalf of RWM. At the same time it is unthinkable that the regulatory framework should fail to cover the situations where no net cif price exists, either because consignor and consignee are the same person or because the declared cif price is a sham. The Council cannot have intended that in such situation ADD be charged by implication or even to leave the manner of taxation to the discretion of the national customs authorities. The answer lies, if anywhere, in the Code which contains a set of general purpose rules for duties that are in force and is a more obvious place to find the requisite valuation provisions. And if the Code provides no method by which the Commissioners can substitute a constructed value for the cif price that they regard as unreliable, it would not be proper for us to devise one.

Does the Code apply to enable the valuation to be substituted for the declared price?

17. The Code, though not necessarily all its provisions, applies to ADD and in particular to Regulation 2022/95. This is clear from article 1.3 which, it will be recalled, directs that -

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

The argument for the Appellants is that the reference in article 1.2 to "the net cif. price, Community frontier before Customs clearance" is a reference to the contract price between exporter and importer, determined in accordance with the Code. They rely on *Nakajima v Council* [1991] ECR 1-2069 where the ECJ held at paragraph 105 of its judgment that -

"Anti-dumping duties are imposed on the net free-at-Community-frontier price before duty, that is to say, on the Customs duty (c.i.f. price) of the imports."

Reliance is also placed by the Appellants on *ICT v Fazenda Publica* [1997] ECR 1-2891 where, in the context of an ADD Regulation relating to imports of cotton yarn originating from Brazil and Turkey containing similar expressions to those found in Regulation 2022/95, the Court decided (in line with the opinion of the Advocate General (Fennelly)) that the value to which the duty fell to be applied was the customs duty determined in accordance with the predecessor legislation to the Code. The Court, in paragraph 14, held explicitly -

"Secondly, as the Portuguese government and the Commission have pointed out, the free-at-Community-frontier price, to which the anti-dumping duty is applied, corresponds to the customs value of the imported goods, as defined by article 3.1 of Council Regulation (EEC) No.1224/80 of 26 May 1980 on the valuation of goods for customs purposes ... , 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."

On that basis it was submitted for the Appellants that on the true construction of Regulation 2022/95 the figure to be taken into account in determining when ADD was due was the "transaction" value, i.e. the value determined in accordance with the Code.

18. For those reasons the Appellants argued that the Commissioners had wrongly failed to observe the steps laid down in articles 29 to 31 of the Code. We now turn to these.

19. The valuation Chapter of the Code lays down a defined series of steps to be gone through in effecting a customs valuation. The "transaction price" is found in article 29. It is only if the transaction price method does not succeed in producing a customs value that the customs authority is permitted to proceed to the next method. And the sequence of the methods prescribed in article 302(c) and (d), if the valuation exercise gets that far, is to be reversed if the declarant so request. (Article 30.1 is in point; it provides as follows -

"Where the Customs value cannot be determined under article 29, it is to be determined by proceeding sequentially through subparagraphs (a), (b), (c) and (d) of paragraph 2 to the first subparagraph under which it can be determined, subject to the proviso that the order of application of subparagraphs (c) and (d) shall be reversed if the declarant so requests ...")

In summary, the valuation methods are as follows:

- (1) the price actually paid or payable for the goods (article 29);
- (2) the transaction value of identical goods sold for export to the Community and exported at or about the time as the goods being valued (article 30(2)(a));
- (3) the transaction value of similar goods sold for export to the Community and exported at or about the same time as the goods being valued (article 30(2)(b));
- (4) the value based on the unit price at which the imported goods or identical or similar imported goods are sold within the Community in the greatest aggregate quantity to persons not related to the sellers (article 30(2)(c));

(5) the computed value, i.e. the cost of materials, their manufacture along with profits and general expenses equal to those usually reflected in sales of goods of the same class or kind (article 30(2)(d)) and

(6) valuation based on data available in the Community, using reasonable means consistent with the principles and general provisions of Article VII of GATT (article 31).

20. The case for the Appellants is that while the exercise carried out by the Commissioners has had some resemblance to the method provided by article 30(2)(c) to the extent that it is based on onward sales, it is not identical to it. The Commissioners' method does not, on the the Appellants' argument, correspond to any method prescribed in the Code. Moreover, they say, the Commissioners are bound to give a declarant, such as RWM or its agent, the right to choose the article 30(2)(d) method before applying the paragraph 2(c) method. They have not done so here. On those grounds alone the post clearance demand is legally and procedurally flawed.

21. The Commissioners argue that articles 29 and 30 have no application. Neither is appropriate to deal with both ad valorem duty and an ADD (or indeed any duty fixed by reference to a minimum import price). Applying them leads to absurdities. Articles 29 and 30 are appropriate for determining values for ad valorem customs duties but they do not necessarily lead to a net c.i.f. price. Article 29 in conjunction with the required adjustments referred to in articles 32 and 33 is designed to ensure that the transaction value is kept up to an amount, appropriate for ad valorem duty purposes, that is unaffected by, for example, legal and business relationships between the seller and buyer which might otherwise result in a lower transaction value. The reality of ADD, they say, is that its introduction in relation to a particular commodity tends to influence the sales price of that commodity. That, according to charts produced in evidence, happened in the present case where sales prices were substantially increased. In determining the net cif price for ADD purposes, when the declared price is unreliable or where there is no price at all, the customs authorities need to have available to them a means of determining a different and probably lower amount than the article 29 "transaction value". Article 29 itself, so the Commissioners' argument runs, is not therefore appropriate in an ADD context. Essentially the same features disqualify the methods in article 30.2(a) and (b). The article 30.2(c) method, applied in accordance with article 152 of the Implementing Regulations, likewise tends to uplift values for customs duty purposes; furthermore, the short time limits (up to 90 days see article 152.2) qualifying onward sales within the Community would not, the Commissioners say, be appropriate in the present case where much of the ammonium nitrate has remained in bonded warehouses for a year. The article 30.2(d) method is, say the Commissioners, wholly inappropriate where, as here, the exporting country (Russia) is not a proper market economy and, in any event, is uncooperative in disclosing production costs.

22. The Commissioners accept that the wording of article 31 is in general terms appropriate. This directs -

"1. Where the Customs value of imported goods cannot be determined under articles 29 or 30, it shall be determined, on the basis of data available in the Community, using reasonable means consistent with the principles and general provisions of -

- the agreement on implementation of Article VII of the General Agreement of Tariffs and Trade,
- Article VII of the General Agreement of Tariffs and Trade,
- The provisions of this chapter."

The opening words, the Commissioners say, are sufficiently similar to those found in Regulation 384/96 to validate their (the Commissioners') approach based on article 2B.9 (see paragraph 12 above). The Commissioners concede that strictly speaking article 31 cannot apply here because it is directed in terms at duties covered by Article VII of GATT; ADD is a matter within the exclusive provisions of Article VI.

23. We are persuaded that the provisions of article 29 do not and cannot produce a net cif price as referred to in article 1.2 of Regulation 2022/96 where no such price exists. It is, as we mentioned in paragraph 14 above, inconceivable that the framers of Regulation 2022/96 and other comparable ADD Regulations overlooked the case of consignment imports with no cif price (e.g. where consignor and consignee are the same person). Whether they thought of cases of false declarations of prices higher than the minimum import price is less clear. Quite possibly they left this particular problem to the law enforcement authorities of the Member States into which the goods are imported. Those authorities would be in a position to invoke their own criminal sanctions. At all events, recourse to articles 30 to 33 for ADD valuation purposes, calls for a purposive and adaptive construction of those provisions. The procedures and safeguards cannot, however, be disregarded. The importer is entitled to a measure of legal certainty. He must be accorded his right to choose the order of application of the methods prescribed in article 30.2. This, we think, is obvious. If the importer has available to him the information referred to in paragraph 2(c), e.g. costs of production in the country of origin, he must be free to advance these in presenting an available alternative to the transaction value referred to in article 29.

24. The Commissioners gave Mr Watchorn no opportunity to choose whether methods (d) or (c) in paragraph 2 of article 30 should apply. That was so even when they thought they were using the valuation provisions of the Code. Then the Commissioners declined to comply with the procedural rules contained in article 181a of the Implementing Regulations. This latter provision makes specific provision as to the procedure to be followed in cases where the Commissioners do not believe a declarant's declaration of transaction value.

25. Article 181a of the Implementing Regulations reads as follows -

"1. The customs authorities need not determine the customs valuation of imported goods on the basis of the transaction value method if, in accordance with the procedure set out in paragraph 2, they are not satisfied, on the basis of reasonable doubts, that the declared value represents the total amount paid or payable as referred to in article 29 of the Code.

2. Where the customs authorities have the doubts ... they may ask for additional information If those doubts continue, the customs authorities must before reaching a final decision, notify the person concerned, in writing if requested, of the grounds for those doubts and provide him with a reasonable opportunity to respond. A final decision and the grounds therefore shall be communicated in writing to the person concerned."

26. On 4 June 1999, i.e. shortly after the post clearance demand of 11 May 1999, a request was made for a written communication of the grounds for the Commissioners' doubts on RWM's behalf. The request and consequently the terms of article 181a were not complied with. Moreover the Commissioners have never rejected the declared prices as the transaction values for the purposes of customs duties.

27. The case for the Appellants is that the Commissioners' failure to comply with the prescribed procedure invalidates the post clearance demand; they have no power to issue it without complying with article 181a.

28. The Commissioners' first response is that article 181a has no part to play in ADD. Articles 29 and 30 being inapt and therefore inapplicable, article 181a is not engaged. Moreover, it is argued for the Commissioners, the Tribunal should first identify the correct methodology; and even if it happened that the Commissioners had produced the right result by the wrong methodology, it would be wrong in law to quash the post clearance demand. Consequently the post clearance demand should not be quashed without a full hearing of the evidence and the determination of the correct amount of ADD. Finally, it was said, even if the Commissioners had been obliged to comply with article 181a and had failed to do so, their failure should not be sufficient to invalidate the post clearance demand. This is because in practice a communication under article 181a would, in the Commissioners' view, have been pointless; all it would have done would have been to provoke the same response from Mr Watchorn or RWM, namely that the declared prices were the net cif. prices.

29. We are against the Commissioners on this point. Article 181a enables the Commissioners to depart from the transaction value method if they are not satisfied with the declared price. The transaction value method is the first valuation method in Chapter 3 of Title II to the Code. Article 28 makes it clear that articles 29 to 33 are the provisions to be used for determining customs values not just for customs duties but for "non-tariff measures laid down by Community provisions governing specific fields relating to trade in goods". Article 29 and the transaction value method may not, in the particular circumstances of the importation, be the appropriate method for determining the net cif. price for ADD purposes. But, as was pointed out in the ICT case (see paragraph 17 above), article 29 and the succeeding provisions are nonetheless applicable for ADD. The Commissioners cannot therefore depart from the transaction value method and move into some other valuation regime without first giving the importer the grounds for their doubts and providing him with a reasonable opportunity to respond. Even if the Commissioners were, rightly or wrongly, to assert that none of the methods prescribed in articles 29 to 31 of the Code was appropriate in the circumstances of the particular importation, with the result that they should proceed to an external method (such as that found in article 2B.9 of Regulation 384/96), they would still be bound to go through the procedures prescribed by article 181a. Only then might they proceed freed from the constraints of the transaction value method referred to at the start of paragraph 1 of article 181a.

30. The courses open to us are either to quash the post clearance demand in accordance with the powers given by section 16(5) of Finance Act 1994 or to dismiss the preliminary application and allow the appeal to go ahead to a full hearing on the facts. The second alternative is, we think, unacceptable in a situation, such as the present, where the ADD Regulation makes no provision for determining a net cif price. The article 181a procedure gives the importer a measure of legal certainty. He can advance his own case for using a particular method. He may, for example, be able to invoke section 8 of the Sale of Goods

Act or some similar provision as a substitute for the allegedly unreliable cif price on the declarations. In the present case the Appellants, the importer, has been denied the opportunity to respond through the article 181a procedure. This has, we think, amounted to a substantial breach of the procedural requirements. The right result is to quash the decision. This will enable the Commissioners to take the correct procedural steps and, if they decide it to be proper in the light of the information obtained from the Appellants, issue a new post clearance demand.

31. For those reasons we decide the preliminary issue by directing that the post clearance demand be quashed. We have considerable sympathy for the Commissioners who have had to make the best of wholly inadequate regulations. They have worked carefully and conscientiously in their efforts to construct replacement net cif prices. However we have to recognize the Appellants' enforceable Community rights and give effect to them in the present situation.

STEPHEN OLIVER

CHAIRMAN

RELEASED: - 24th March 2000

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