

C00118

CUSTOMS DUTY - BTI issued in May 1991 by Danish Customs to Danish Company
- Whether applicable to identical goods imported into UK by associated company
in 1996 - Council regulations EEC Nos 1715/90, 2674/92 and 2454/93 -
Purposeful approach to construction - Appeal allowed

LONDON TRIBUNAL CENTRE

NIKO SURGICAL LIMITED Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR P H LAWSON (Chairman)

MR M L JAMES

Sitting in public in Bristol on 28 April 1999 and in London on 11 May 2000

Mr James Henderson of Counsel for the Appellant

Mr R H Khan of the Solicitors Department of H M Customs and Excise, for the
Respondents

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DECISION

This is an appeal by Niko Surgical Limited of Unit 3 Stroudwater Business Park,
Brunel Way, Stonehouse GL10 3SX.

1. Originally the appeal was against decisions of the Commissioners contained in
a letter dated 20 January 1998 upholding on review decisions made in

(i) a letter dated 23 May 1997

and (ii) a letter dated 13 June 1997

rejecting repayment claims made on behalf of the Appellant

and (iii) against the issue by the Commissioners of a post-clearance demand
notice dated 16 July 1997.

2. The applications for repayment were made by ASG (UK) Limited of Rono
House, Avonmouth Way, Avonmouth Bristol BS11 9EA as agent for the Appellant
on 21 January 1997 and related to import declarations made by the Appellant as
follows:

Felixstowe entry numbers

071/017192 H dated 22 April 1996

071/007634 R dated 10 May 1996

071/0101 162 H dated 15 April 1996

Tilbury entry numbers

150/004005 K dated 6 January 1996

150/012674 A dated 27 November 1995

150/004321 N dated 10 October 1995

3. The applications for repayment totalled £3,297.78 in respect of the Tilbury entries and £6,464.96 in respect of the Felixstowe entries.

4. Further duty to that originally paid on the entries was also due on the basis of the Commissioners' classification and this was notified to the Appellant by a form C18 dated 16 July 1997, the amount being £4,183.50 which included both Customs duty and VAT.

5. The letters and post-clearance demand notice related to polyethylene foam plaster imported by the Appellant company to which various rates of Customs Duty had been applied and the dispute between the parties related to the correct customs classification applicable to it.

6. By the date of the hearing in April 1999 the issues had been narrowed to one and the grounds of appeal were amended and limited as follows:

"The Appellant's grounds for appeal in relation to the duty levied in respect of this product is that on 28 May 1991 a Binding Tariff Information decision was made by Danish Customs in relation to this product. This BTI decision is binding on Customs & Excise for a period of six years to 28 May 1997. The Binding Tariff Information confirmed a classification of the product in Chapter 3005.10.00.0 and therefore zero duty is payable."

7. The Appellant's products are used in the medical field. It was stated at the hearing that at all material times the Appellant was wholly owned by a Danish company, Niko Med Aps ("Niko Med") which produces the same kinds of medical equipment and both companies import the same polyethylene foam.

8. Since the hearing the Financial Statements of the Appellant Company for the year ended 30 June 1991 have been produced to the Tribunal and these show that 99 of the issued 100 shares in the Appellant Company are held by Mr N S F Kornerup, a Director, who is also the majority shareholder and a Director of the Danish company, Niko Med. The two companies are, therefore, under SSAP I treated as "associated" companies for accounting purposes and neither is a subsidiary company of the other. Also under s.258 of the Companies Act 1985 the two companies can be said to have operated as parent and subsidiary on the basis that Niko Med exercised a dominant influence and the two companies were managed on a unified basis.

9. In 1991 Niko Med was much larger than its UK associate. All the major decisions, purchasing and administration involving both companies took place in

Denmark. Indeed in 1991 Niko Med entered the same debate with the Danish Customs authorities as to the correct classification of the foam as Niko Surgical later had with the UK Customs authorities.

10. In order to clarify their position, Niko Med applied for a Binding Tariff Information ("BTI") from the Danish Customs authorities at Ballerup. This was granted on 28 May 1991 and was, subject to regulations being adopted which changed the classification, to be valid for six years. It provided that the form should be classified under Heading 30.05 of the Combined Nomenclature. Under this Heading, there is no customs duty to pay. When Niko Med entered into the BTI, it did so, the Appellant claimed, as the parent company of a group and on behalf of its (then) very small associate in the UK. As far as Niko Med was concerned the BTI which they had obtained would be valid for operations throughout Europe.

The following is a certified translation of the BTI:

THE EUROPEAN COMMUNITY - BINDING TARIFF STATEMENT

1. The customs authority below 2. Reference 810

Customs and tax office, Ballerup

Lautrupvang 1 A DK 41-905/3637-1-/90-01/01

2750 Ballerup

Tel. 4487 04 44 Fax 44 55 46 73

3. Hereby informs 4. Valid from

NIKOMED ApS

Hørkaer 34 28.05.1991

2730 Herlev

Important note 5. Application date and reference

Subject to the provisions of Article 11 para.3

and Articles 13, 14 and 16 of Council 07.12.1990 SE no. 10 83 95 05

regulation (EU) no. 1715/90. this binding

tariff notification is valid for 6 years from

the date of validity 6. Tariff classification of goods

3005.10.00.0

This information will be stored on one of the

Commission of the European Communities'

databases with a view to applying the regulation above.

7. Description of goods

1-1.6mm thick polyethylene foam plaster in different widths (45-260mm)

The tape is coated with medical acrylic adhesive and siliconised cover strip.

Rolled into reels approx. 200 mm long.

Used for making electrodes for electrocardiography.

8. Trade name and other details

9. Reasons for classifying goods

Tarification (sic) under general tariff rules 1 and 6 of the

Combined Classification and text of KN code 3005

and explanatory remarks to HS item 30.05, section three

10. This notice is issued on the basis of the documents submitted as follows:

Specification Brochures Photographs Samples Other

4 JUNE 1991 Stamp

Town Customs and tax office, Ballerup

Lautrupvang 1 A Signature

Date 2750 Ballerup [signed in original]

Tel: 44 87 04 44 Fax 44 55 46 73

In connection with the obtaining of the BTI Mr Thomas Volder made the following witness statement:

Statement of THOMAS VOLDER

I am an employee of Lina Medical which has changed it's name from Nikomed ApS after the sale of the business on May 5th 1998.

Niko Surgical Ltd is a wholly owned subsidiary of Nikomed ApS. Niels Kornerup the private shareholder owns Nikomed ApS 100% and has 100% ownership of Niko Surgical Ltd, company number 2259855, registered in the UK.

My occupation is Divisional Manager and I am in charge of all importations and sales. During the period of 1990, and finally in April & May 1991, we had lengthy discussions with the Customs and Tax Office in Ballerup, Denmark on the

classification of goods we import from the USA for medical purposes. In the meeting were Per W Pedersen and after supporting evidence, specifications, brochures, photographs, samples and statements, the Customs and Tax Office in Ballerup issued a Binding Tariff Statement Classification of goods into code 3005.10.00.0.

Because of our production in the UK it was discussed that the tariff is used anywhere in the European Community.

The BT reference number 810-DK 41-905/3637-1-/90-01/01 was issued and it was held that it is valid for 6 years and is renewable with a new application.

In 1994 the company restructured and purchasing was directly transferred to our UK office, Niko Surgical Ltd.

Signature of Witness Thomas Volder

It seems legitimate to read "the tariff is used" as "the tariff could be used".

This appeal arises because the Commissioners claim that the correct classification is under 39.19.

11. Oral evidence was given by Mr Peter Ring, the present Danish managing director of the Appellant Company. He had held that position since 1995. He had joined from Niko Med in 1994. He said that the Appellant company was founded in 1988 and all its activities were driven by the decisions of the senior management in Niko Med in Denmark. The reason for establishing the UK company was to obtain the benefit of the UK's lower labour costs. The production of certain items was cheaper in the UK. The Appellant company was sold in 1998; by which time it accounted for 90%-95% of group production.

12. The polyethylene foam had been imported in 1991 from the USA and had not changed over 15-20 years. The quantities changed because production was increasing in the UK and diminishing in Denmark.

13. The two companies were linked financially and operationally and Mr Petersen, the chief accountant at the Danish head office who had dealt with the Danish Customs in connection with the BTI, considered that it was valid for the group's operations as a whole.

14. There are three decisions under appeal but the same point arises in all of them. As already stated, two of the decisions were rejections of repayment claims and one was a demand for more duty.

15. The regulations in force governing BTIs at the time that Niko Med obtained its BTI from the Danish authorities were Council Regulation (EEC) No.1715/90 and Commission Regulation (EEC) No 3796/90. The full text of Regulation 1715/90 is the following:

"COUNCIL REGULATION (EEC) No.1715/90

of 20 June 1990

on the information provided by the customs authorities of the Member States concerning the classification of goods in the customs nomenclature.

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 100a thereof,

Having regard to the proposal from the Commission (1),

In co-operation with the European Parliament (2),

Having regard to the opinion of the Economic and Social Committee (3),

Whereas the conditions under which traders are able to obtain from the customs authorities information on the interpretation or practical application of Community customs rules differ appreciably in the various Member States; whereas the legal effect of such information also varies considerably, depending on the Member State in which it is provided;

Whereas this situation results in considerable distortions of treatment between traders in the Community, depending on the Member State in which they operate; whereas such distortions of treatment are incompatible with the proper functioning of the customs union and also with the achievement of the internal market provided for in Article 8a of the Treaty, since it is necessary to guarantee, as far as possible, equal treatment of traders within that market;

Whereas it appears necessary, in order to ensure a measure of legal certainty for traders when carrying on their activities, to facilitate the work of the customs services themselves and secure more uniform application of Community customs law, to establish rules which oblige customs authorities to provide information which is binding on the administration under certain well defined conditions;

Whereas the Council has already accepted the principle of the provision of information which is binding on the administration in Regulation (EEC) No.1697/79 of 24 July 1979 on the post-clearance recovery of import duties or export duties which have not been required of the person liable for payment on goods entered for a customs procedure involving the obligation to pay such duties (4), as last amended by Regulation (EEC) No.1854/89 (5);

Whereas, however, in view of the scale of structural adjustments which would be required in most of the customs administrations of the Member States by the establishment of rules of general application regarding the provision of binding information, it appears desirable at the present time, to limit the scope of Community rules to information concerning the classification of goods in the customs nomenclature; whereas this is the most important and most useful category of information for traders because of the highly technical nature of the combined nomenclature and the Community nomenclatures derived from it;

Whereas it is necessary to specify precisely the procedure to be followed in order to enable information provided by a customs authority of a member State concerning the classification of goods in the customs nomenclature to bind the administration of that Member State and, from a date to be determined in an implementing Regulation, the administrations of all Member States; whereas it is also necessary to lay down the conditions governing the use of such information by the holder;

Whereas information provided in accordance with the procedure laid down can bind the administration only in respect of the classification of the goods in question in the customs nomenclature; whereas such information cannot affect the rate of duty or any other measure deriving from that classification which apply at the time of completion of the customs formalities relating to those goods;

Whereas, on grounds of sound administration, it is necessary to establish a time limit after which the information provided can no longer be relied upon by the holder thereof; whereas, however, the time limit laid down must correspond to the realities of international trade; whereas it is also necessary to lay down the conditions under which the information provided ceases to be valid before the expiry of that time limit, as a result of the adoption of Community measures amending the existing law;

Whereas it is necessary to lay down provisions concerning the communication to the Commission of all binding tariff information provided by the competent authorities of the Member States and concerning the co-operation between the latter and the Commission;

Whereas uniform application of the common rules laid down by this Regulation must be ensured and to that end a Community procedure must be provided enabling measures implementing these rules to be adopted within appropriate periods,

HAS ADOPTED THIS REGULATION:

Article 1

1. This Regulation lays down:

(a) the conditions under which information concerning the classification of goods in the customs nomenclature, hereinafter referred to as 'tariff information', may be obtained from the customs authorities of the Member States;

(b) the legal effect of such information.

2. For the purposes of this Regulation,

(a) 'customs nomenclature' shall mean:

- the combined nomenclature,

- the Tariff nomenclature and any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by specific Community provisions with a view to the application of tariff or other measures relating to trade in goods:

(b) 'person' shall mean:

- either a natural person,

- or a legal person,

- or, when the possibility is provided for in the rules in force, an association of persons recognized as having legal capacity but lacking the status in law of a legal person;

(c) 'customs authority' shall mean any authority competent to apply customs rules, even if that authority is not part of the customs administration.

TITLE I

General provisions

Article 2

1. Any person may apply to the customs authorities for tariff information. Such an application may be refused where it does not relate to a commercial transaction actually envisaged.

2. Tariff information shall be provided to the applicant free of charge. However, where expenditure is incurred as a result of analysing or obtaining an expert's report on any samples sent to the customs authority and returning them to the applicant, such expenditure may be charged to the latter.

Article 3

1. Where the conditions laid down in Articles 4 to 8 are fulfilled, the tariff information provided by the customs authority shall constitute, within the meaning of this Regulation, binding tariff information in the Member State in which it has been supplied.

2. In accordance with the procedure laid down in Article 10 of Regulation (EEC) No.2658/87 (1), the Commission shall adopt a Regulation determining the date with effect from which the binding tariff information shall become binding on the administrations of all Member States under the same conditions as those laid down by this Regulation with regard to its legal effects in the Member State which furnished it. The Commission shall adopt the functional arrangements as necessary.

TITLE II

Procedure for obtaining binding tariff information

Article 4

1. Applications for binding tariff information shall be made in writing to the customs authority designated by the Member State in which the information is to be used.

2. With effect from the entry into force of the provisions mentioned in Article 3(2), this application may also be addressed to the customs authority in the Member State in which the applicant is established.

3. An application for binding tariff information shall relate to only one type of goods. The customs authority may refuse applications which clearly seem unwarranted.

Article 5

1. Applications for binding tariff information shall include, inter alia, the following particulars;

(a) the name and address of the applicant; where the application is submitted by a natural or legal person acting on behalf of another person, the name and address of the latter shall also be shown on the application;

(b) the particulars, including, where appropriate, the use to which the goods are to be put, which are necessary to enable the customs authority to reach a decision.

Where classification of the goods in the customs nomenclature depends on the level of certain substances in the goods in question, that level and, where appropriate, the methods of analysis used for determining it shall be notified to the customs authority;

(c) where an application for binding tariff information has been submitted by a person in respect of identical goods, that person must specify the references relating to that application and, where appropriate, the classification given.

2. Applications for binding tariff information must, where appropriate, be accompanied by representative samples of the goods or, where samples cannot be taken because of the nature of the goods, by photographs, plans, catalogues and such other technical documents as may assist the customs authority to determine the classification of the goods in the customs nomenclature.

Documents enclosed with the applications shall, where appropriate, be accompanied by a translation into the official language or one of the official languages of the Member State concerned.

3. Where an applicant wishes to obtain the classification of goods in one of the nomenclatures referred to in the second indent of Article 1(2)(a), the application for binding information shall make express mention of the nomenclature in question.

Article 6

Where the customs authority to which an application for binding tariff information has been submitted considers that the application does not contain all the particulars needed to enable it to reach a decision, it shall request the applicant to furnish the missing particulars, indicating that the application cannot be considered as it stands.

Article 7

Without prejudice to the provisions governing the protection of information in force in the Member States, information supplied confidentially shall not be divulged by customs authorities without the express authorization of the person

or authority which supplied it, save where the said customs authorities might do so under the law in force or in the course of legal proceedings.

Article 8

Binding tariff information must be notified to the applicant as soon as possible in writing. It must contain, inter alia, the following particulars:

- (a) the references relating to the application for information;
- (b) a precise description of the goods in question to enable them to be accurately identified at the time of the customs formalities;
- (c) the levels of certain substances in the goods, where such indication is necessary to ascertain the classification of the goods in the customs nomenclature, together with the method of analysis on which the information is based;
- (d) the classification of the goods in the customs nomenclature;
- (e) the name and address of the person entitled to use the information, hereinafter referred to as the 'holder';
- (f) the date on which the information was supplied;
- (g) where the competent authority considers it appropriate, the reasons for the classification of the goods.

Article 9

1. A copy of the notification of binding tariff information to the applicant must be communicated to the Commission in accordance with the arrangements adopted pursuant to Article 17(2).

2. Where a Member State so requests, the Commission shall inform it of notifications received concerning specific goods or group of goods.

TITLE III

Legal effect of binding tariff information

Article 10

1. Binding tariff information may be invoked only by the holder thereof, subject to Council Regulation (EEC) No.3632/85 of 12 December 1985 defining the conditions under which a person may be permitted to make a customs declaration (1).

2. Member States may require that the holder, when fulfilling customs formalities, shall notify the customs authority that he is in possession of binding tariff information in respect of the goods being cleared through customs.

3. The holder of binding tariff information may use it in respect of particular goods only where it is established to the satisfaction of the customs service that the goods in question conform in all respects to those described in the information presented.

At the time of customs clearance, the customs service may carry out any check or examination which it deems useful in order to satisfy itself that the goods presented do, in fact, conform to those in respect of which the information has been given.

Article 11

1. Binding tariff information shall be binding on the competent authorities only in respect of the classification of goods in the customs nomenclature.

2. Binding tariff information shall be binding on the administration only in regard to goods in respect of which the customs formalities are completed after the date on which such information is provided by the customs authority.

3. Binding tariff information shall be void where it is established that it was provided on the basis of inaccurate or incomplete data.

Article 12

Without prejudice to Article 13 and 14, binding tariff information may no longer be invoked after a period of six years from the date on which it was provided.

Article 13

Where, as a result of the adoption of:

- a Regulation amending the customs nomenclature, or
- a Regulation determining or affecting the classification of goods in the customs nomenclature,

binding tariff information previously supplied no longer conforms to Community law as thus established, such information shall cease to be valid from the date on which the Regulation in question applies.

Nevertheless, where a Regulation such as that referred to in the second indent above expressly so envisages, binding tariff information may continue to be invoked by the holder thereof during a period fixed by the said Regulation, if the holder has concluded a contract as referred to in Article 14(3)(a) or (b).

Article 14

1. In addition to the cases referred to in Article 13, binding tariff information shall also cease to be valid where such information is no longer compatible with the interpretation of the customs nomenclature as a result of:

(a) the adoption of any one of the following Community tariff measures:

- amendment of the explanatory notes to the combined nomenclature,
- adoption of a Community classification slip,
- agreement reached in the Nomenclature Committee on the classification of goods, recorded in the minutes of the meeting at which it was reached;

or,

(b) the following international tariff measures:

- amendment of the explanatory notes to the harmonized system nomenclature,
- a classification opinion of the Customs Co-operation Council,

or

(c) a judgment of the Court of Justice of the European Communities.

2. Without prejudice to paragraph 3, the date on which binding tariff information ceases to be valid pursuant to paragraph 1 shall be the date of publication in the 'C' series of the Official Journal of the European Communities of the measures or judgment referred to in paragraph 1(a) and (c), and of a Commission communication regarding the measures referred to in paragraph 1(b).

3. In the case of products in respect of which an import or export licence or advance-fixing certificate is submitted when the customs formalities are completed, the binding tariff information which ceases to be valid pursuant to paragraph 1 may continue to be invoked by the holder of the information during the remainder of the period of validity of that licence or certificate.

In other cases, the binding tariff information which ceases to be valid pursuant to paragraph 1 may continue to be invoked by the holder thereof for a period of six months from the date on which he is notified of its non-conformity, as provided in paragraph 2, where it is established to the satisfaction of the customs service that the holder concluded, on the basis of the binding tariff information supplied him and prior to the date of adoption of the tariff measure in question;

(a) where such information is invoked for the import of goods:

- a binding contract for the purchase of the goods in question, from a supplier established in a non-Community country, or,
- a binding contract for the sale of the goods in question, in an unaltered state or after processing, to a customer established in the Community;

(b) where such information is invoked for the export of goods:

- a binding contract for the sale of the goods in question to a customer established in a non-Community country, or,

- a binding contract for the purchase of the goods in question from a supplier established in the Community.

4. The application under the conditions laid down in paragraph 3 of the classification given in the binding tariff information shall have effect only in regard to:

- the determination of the import or export duties,

- the calculation of export refunds and any other amounts granted on imports or exports within the framework of the common agricultural policy, and

- the use of import or export licences or advance fixing certificates which are submitted at the time of completion of the formalities with a view to the acceptance of the customs declaration for the goods in question, on condition that such licences or certificates were issued on the basis of the said binding tariff information, 5. In exceptional cases, where there is a risk that the smooth working of arrangements set up within the framework of the common agricultural policy may be jeopardized, it may be decided, in accordance with the procedure laid down in Article 38 of Regulation No.136/66/EEC(1) and in the corresponding Articles of the other regulations on the common organization of the markets, to derogate from paragraph 3.

Article 15

Upon adoption of one of the regulations referred to in Article 13, one of the tariff measures referred to in Article 14(1)(a) and (b) or following a judgment such as that referred to in Article 14(1)(c), Member States' administrations shall take the necessary steps to ensure that binding tariff information provided by the customs authorities is in conformity with the measure in question.

The preceding paragraph shall apply even where a specific date is laid down for the entry into force of the tariff measure in question.

Article 16

Where the customs authority amends binding tariff information for a reason other than those referred to in Articles 13 and 14(1), the information originally supplied shall cease to be valid from the date on which such amendment is notified to the holder.

Article 14(3), (4) and (5) shall, however, also apply.

TITLE IV

Final provisions

Article 17

1. The Nomenclature Committee provided for in Article 7 of Regulation (EEC) No 2658/87 may examine any question concerning application of this Regulation which is raised by its chairman, either on his own initiative or at the request of a Member State.

2. The provisions required for applying this Regulation shall be adopted in accordance with the procedure laid down in Article 10 of Regulation (EEC) No 2658/87.

Article 18

Binding tariff information supplied nationally before 1 January 1991 shall remain valid. If necessary, some of that information shall be communicated to the Commission as provided for in Article 7.

Nevertheless, binding tariff information supplied nationally whose validity goes beyond, by more than six years, 1 January 1991, shall be invalid from the seventh year.

Article 19

This Regulation shall enter into force on the third day following its publication in the Official Journal of the European Communities.

It shall apply from 1 January 1991.

This Regulation shall be binding in its entirety and directly applicable in all Member States."

By virtue of regulation 2674/92 with effect from 1 January 1993 BTIs issued after that date were binding on all member states. The current Commission Regulation is (EEC) No 2454/93, Article 11 of which states:

"Binding tariff information supplied by the customs authorities of a Member State since 1 January 1991 shall become binding on the competent authorities of all the Member States under the same conditions."

Mr Khan's submissions on regulation 1715/90 in relation to the 1991 BTI issued to Niko Med were as follows: -

1. The first two recitals show that the purpose of the regulation of BTIs is to avoid distortions of customs treatment of goods traded in the Community
2. In Article 1 para 2(b) the word ' person' is in the singular.
3. Article 4 para 2 did not apply to Niko Med as its application was made in 1991. The provisions referred to came into force in January 1993.
4. Article 4 para 1 required at the time that, for a BTI to be effective in the UK, the application had to be made to the UK Customs. No such application was made.
5. Article 5(1)(a) (provision of name and address of applicant etc) is a clear requirement which was not complied with in relation to the Appellant Company.
6. Article 8(e) requires the BTI to contain the name and address of the person entitled to use the information. It did not refer to the Appellant company.

7. Article 10(1). The holder of the BTI was unquestionably Niko Med. Therefore, Article 10(3) refers to Niko Med and not to the Appellant Company.

8. Under Article 18 the validity of Niko Med's BTI expired on 1 January 1997.

9. The BTI was issued to Niko Med. The Council Regulations set out above simply do not envisage that any other company, whatever its relationship to the holder, can use the BTI. Article 10 makes it absolutely clear that the BTI can only be invoked by the holder.

10. Under Article 12, paragraphs 1 and 2 of Council Regulation (EEC) No. 2913/92 establishing the Community Customs Code the issuance of BTIs is under the control of the customs authorities. To permit an associated company to rely on a BTI issued to Niko Med years before would be inconsistent with such management control.

16. For these reasons, Mr Khan submitted, the Appellant Company could not rely in 1996 on the BTI obtained in 1991 by Niko Med.

17. Further, if, contrary to his submission, the Appellant company could rely on the BTI issued to Niko Med, Article 10(3) of Council Regulation 1715/90, requiring that "it is established to the satisfaction of the customs service that the goods in question conform in all respects to those described in the information presented" had not been complied with. It must be shown, he said, that the goods are identical. Mr Ring had said that the product was the same as that referred to in the 1991 BTI, except for the labelling and dimensions. As the Appellant cannot show that the product covered by the BTI and the product imported into the UK are identical, Mr Khan submitted, the appeal must fail.

18. Mr Henderson, in closing, said that Mr Ring had confirmed that the product, whose importation into the UK is the subject of this appeal, was the same as that which was the subject of the 1991 BTI.

19. His main submission was that in considering the provisions of Council Regulation No 1715/90, we must adopt a broad and purposive approach. This is shown by the recitals.

20. Article 2 says that 'any person' may apply for tariff information, but Article 1(2)(b) defined 'person' as including an association of persons 'recognised as having legal capacity but lacking the status in law of a single person'.

21. The application was made in Denmark by Niko Med because Denmark was at the time its centre of operations and, therefore, the Member State in which the information was to be used, as required by para 1 of Article 4.

22. As we have already stated Article 11 of Commission Regulation (EEC) No 2454/93, which might be described as a consolidation measure, provided simply that

Binding tariff information supplied by the customs authorities of a Member State after 1 January 1991 "was to become binding on the competent authorities of all the Member States under the same conditions".

23. On a purposive approach, therefore, Mr Henderson said, the Appellant company could be included within the scope of the Danish BTI.

24. At the end of the hearing it was agreed, first, that the Appellant would provide definite information about the corporate relationship between itself and Niko Med and, secondly, that the parties might make submissions about the purposive approach, citing authorities, if they wished.

25. The Appellant provided information about the corporate relationship on 16 July 1999 and, on the same date, their submissions on the purposive approach. These facts and submissions were forwarded to Mr Khan but did not respond with the Commissioners' written submissions until 25 January 2000.

Mr Henderson's written submissions were as follows:

"(i) It is well established that the European Court of Justice does not approach legal texts in the same way as common law judges. The Court of Justice seeks to uncover and further the purpose of a particular provision, and in performing this task, the Court does not consider itself to be bound by the precise wording of Treaty provisions or of secondary legislation. The wording of any provision has to be read in context in order to reveal the purpose of the provision. As the European Court put it in Case 283/81 CILFIT Srl v Ministry of Health [1982] ECR 3415 at 3430:

"Every provision of Community law must be placed in its context and interpreted in the light of the Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied."

(ii) That this approach is less precise than the approach to textual interpretation in the United Kingdom is obvious, and is now fully recognised by the courts in the United Kingdom. For example, Lord Diplock said in *Henn and Darby v DPP* [1981] AC 850 at 905.

"The European Court, in contrast to English courts, applies teleological [i.e. purposive] rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth."

In interpreting the Regulations covering BTIs the Tribunal must apply the principles and techniques of Community law.

(iii) The purposive approach will very often displace other possible interpretations. For example, in Case 49/82 *Commission v Netherlands* [1983] ECR 1195 at 1205 it was used to displace an interpretation based on legislative history as well as a literal one. It determined the outcome of the case, which was broadly that the directive in question did not allow imported butter to be re-packed in small packages in customs warehouses because "the essential purpose of customs warehouses is to provide for the storage of goods".

(iv) In Case 9/70 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825 at 839 the Court held, in relation to a Council decision on applying a common system of turnover tax:

"It is true that a literal interpretation of the second paragraph of Article 4 of the Decision might lead to the view that this provision refers to the date on which the Member State concerned has brought the common system into force in its own territory. However, such an approach would not correspond to the aim of the directives in question. The aim of the directives is to ensure that the system of value added tax is applied throughout the Common Market from a certain date onwards. As long as this date has not yet been reached the Member States retain their freedom of action in this respect."

(v) In Case 67/79 *Fellinger v Bundesanstalt für Arbeit* [1980] ECR 535, the Court again rejected a literal reading, this time of the social security Regulation No 1408/71 which appeared to give the claimant an unequivocal right to unemployment benefit at one rate, in favour of an interpretation which it found more compatible with the objectives of that provision and which entitled him to unemployment benefit at another rate.

(vi) Mr Fellinger lived in Germany. After he became unemployed there, he went to work across the border in Luxembourg, while still residing in Germany. Having become unemployed in Luxembourg he claimed unemployment benefit from his local German Employment Office, and a dispute arose as to whether the amount should be based on the wage which he had last earned in Luxembourg or on that which he had last earned in Germany. Mr Fellinger relied on Article 68(1) of the basic social security regulation, regulation No. 1408/71, which reads:

"The competent institution of a Member State whose legislation provides that the calculation of benefits should be based on the amount of the previous wage or salary shall take into account exclusively the wage or salary received by the person concerned in respect of his last employment in the territory of that state."

On a literal reading of that provision it was clear that Mr Fellinger should have received benefit on the basis of the wage he received from his last employment in Germany, as being "his last employment in the territory of" the Member State of the competent institution. The Court, however, did not follow the plain words of Article 68(1) but adopted an interpretation that came to the opposite result. Such result was more in line with the fundamental concept of the free movement of workers.

Conclusion

26. Applying this purposive approach to the present case, it is submitted that the Regulations governing BTIs should be construed so as to allow the Appellant to rely on the BTI entered into on its behalf by Nikomed Aps.

27. Such a result is in line with the spirit and aim of the customs union and common customs tariff provided for by Article 9 of the EC Treaty, namely a consistent treatment of customs duties throughout the Community. On the Respondent's approach the parent and subsidiary undertakings in this case would be charged under different tariff headings in respect of the importation of identical products.

28. More specifically, one of the main purposes behind supplying BTIs is to give an importer the certainty that the same goods will be treated consistently in terms of customs duties over a period of time. The purpose behind the supplying of BTIs would not be fulfilled unless someone who has in good faith obtained a BTI is able to rely on it. The "someone" in this case is, in the Appellant's submission, both the Appellant and Nikomed Aps."

29. The Commissioners written submissions were as follows (the numbering is ours):

"1. The submissions dated 16 July 1999 and further evidence referred to therein produced by the Appellants do not materially advance the Appellants case or the evidence submitted by at them at the hearing of their appeal, in particular the evidence of Mr Peter Ring.

2. The close relationship between Nikomed Aps of Denmark and Niko Surgical Limited of the United Kingdom was noted.

3. Intermittent exchange of staff and common share ownership in each undertaking by Mr N S Kornerup, who also acts as a Director of both companies, was also noted. The fact that the companies had a close and "significant trading relationship" is not disputed by the Respondents.

4. The submissions and supporting evidence set out in paragraph 1(i)-(v) of the Appellant's written submission provides no sustainable basis upon which the Appellant can be construed as being the same legal entity as the Danish company Nikomed Aps either as a matter of English law nor, more pertinently, to bring the Appellant within the definition of "holder" of the Danish BTI issued to Nikomed Aps.

5. The Commissioners do not dispute the correct approach to be adopted in the interpretation of Community legislation is purposive.

6. The Respondents set out and referred in full at the hearing to the relevant provisions of Community law necessary to determine this appeal. Those provisions are therefore not duplicated herein. The Respondents referred to the relevant Regulations setting out the basis for and issue of BTIs and the recitals to the Regulations which set out in particular that the requirement for certainty in importation dealings needs to be balanced between the customs authorities and traders.

7. This balance is struck, inter alia, in Article 12 of Council Regulation 2913/92 whereby traders may individually apply for BTIs binding against the customs authorities in favour of the "holder" of the BTI in respect of the precise nomenclature code contained in the BTI.

8. The purpose of the legislation is abundantly clear. It enables a particular trader to apply across the Member States for a BTI which once issued in their favour entitles them to rely on the classification contained therein against the customs authorities on subsequent importations of the identical product to which the BTI relates for a period of six years.

9. It is completely contrary to the purpose and scheme of the legislation to enable a trader who has not availed themselves of the clear right they have to apply for

BTI to then attempt to bind the customs authorities by purporting to rely on a BTI issued instead by the customs authorities to a different trader.

10. To adopt the interpretation called for by the Appellant would not be to apply a purposive interpretation to Community law by placing the regulations in context, but would instead be to utterly distort the meaning of the legislation which has been set out clearly to provide a mechanism for balancing the desire for certainty by an importer with the need for consistency and certainty by the customs authorities in control of the importation process.

11. Adoption and application of the interpretation suggested by the Appellant would breach the essential balancing exercise by frustrating the terms and purpose of the legislation. It would enable a trader who never applied for and therefore had no legitimate expectation to gain the benefit of binding the customs authorities to a particular nomenclature, to have the benefit of certainty in relation to acts undertaken by another trader and to the clear detriment of the customs authorities.

12. Paragraph 4 of the Appellant's submission is not supported by the case law cited previously in the submission. Nor is the submission supported by reference to the clear legal regime applicable to the issue and governing of BTIs as set out by the Respondents at the hearing of the Appeal.

13. Paragraph 5 of the submission is incorrect. The procedure for applying, and the legal effects of holding a BTI allow the "holder" of it to rely on that BTI as against the customs authorities of Member States throughout the Community for specific purposes (classification) for a clearly defined period (ordinarily six years). This is fundamental mechanism to achieve consistent treatment of customs duties throughout the Community.

14. The spirit, aim and operation of a common customs union and common Customs Tariff would be distorted if the customs authorities were placed in the position where they were bound by BTIs issued to persons other than those who are then seeking to rely on them. The procedure for obtaining and use of BTIs is intended to bring about the consistent treatment of customs duties throughout the customs territory of the Community. It is necessary within the scheme of consistency to protect the expectations of the trader in so far as those expectations are legitimate.

15. On the correct interpretation contended for by the Respondents the consequence would be that, had Nikomed Aps and the Appellant each applied for BTIs providing a sample of the product, BTIs would be issued by each Member State ensuring the tariff heading was first verified to ascertain whether it was correct and whether the BTIs were consistent with each other.

16. The BTIs would each have been issued by the Danish and United Kingdom customs authorities classifying the product consistently. Certainly would therefore have been achieved for each trader in their future importations of the identical product for six years.

17. The Appellants do not dispute the tariff heading applied by the Respondents. The holding of BTIs by each of Nikomed Aps and the Appellant would enable the Appellant to rely on the classification contained in the BTI issued to them or to have challenged the classification originally contained in the BTI. If the products were identical, the holding of individual BTIs as required by Community law would therefore afford the Appellant certainty. Conversely, adopting the Appellant's

submission in paragraph 5 there would be no certainty for the customs authorities in knowing or being able to verify that the products imported by the Appellant were identical to those originally submitted as the precise sample upon which the classification decision contained in the Danish BTI was based.

18. The Appellants state that one of the main purposes of applying for BTIs is to give an importer certainty that the goods would be treated consistently in terms of customs duties over a period of time. This is a fundamental purpose of the BTI regime, central to which is also the requirement for the customs authorities to also be in a position of consistent application and operation of the importation regime. The customs authorities can only effectively achieve such consistency if it is clear to them who has applied for and has the benefit of being able to bind the authorities for the given period and in respect of which precise product. Each person who is entitled to hold the benefit of the BTI is clearly and unequivocally stated on it to be the holder. In this way the customs authorities know precisely who is entitled to rely on a BTI.

19. A fundamental consequence of acceptance of the Appellant's submissions would be that the customs authorities would never have certainty in operating the importing process as any trader could, unknown to them, potentially be the beneficiary of a BTI. This would make the achievement of consistency of classification in the importation and post clearance recovery procedures extremely difficult to operate and would inevitably detract from the very consistency the BTI regime is designed to achieve, which is fundamental to the operation of a common customs tariff.

20. A trader can only legitimately expect legally binding consistency if it has complied with the express and simple legal requirements of procedure necessary to bring about the position of certainty. In this instance by specifically applying for a BTI in relation to them.

21. The purpose behind the BTI regime is only properly fulfilled when the person seeking to rely on it has complied with the express legal requirements contained now in Article 12 of Council Regulation 2913/92 and Articles 5-15 of Commission Regulation 2454/93.

22. As the Respondents submitted at the hearing the legal regime is clear. The "holder" of the BTI is entitled to rely on it as against the customs authorities. The holder is the person who is unequivocally stated as holder on the BTI itself. In this instance Nikomed Aps and only Nikomed Aps. The Community law (and their predecessor national law) provisions are clear. Any person can obtain the benefit of a BTI subject to their complying with the legal provisions cited.

23(a) The Appellant at the material time did not seek to comply with the provisions by applying for a BTI either to the United Kingdom customs authorities before the community system of BTIs was implemented nor to the United Kingdom or customs authorities of any other Member State after the Community wide provisions were introduced.

(b) The Appellant cannot therefore now retrospectively be allowed the benefit of a BTI available in relation to a product submitted to the Danish authorities by a separate undertaking; Nikomed Aps which the customs authorities have no method of verifying was, in all respects an identical product.

(c) As submitted at the hearing by the Respondents, the Appellants could not in any event seek to rely on the national binding tariff information issued by the Danish customs authorities to the Danish company Nikomed Aps.

In conclusion it remains the Respondents submission that:

1. The Appellant is not and cannot properly be construed as the same legal entity as Nikomed Aps;

2. The legal regime is unequivocally clear. The person entitled to the benefit of a BTI is the holder. The Appellant cannot, by attempting to have itself construed as the same legal entity as Nikomed Aps or otherwise bring itself within the definition of "holder" of the BTI by urging on the Tribunal the adoption of a broad unspecific "purposive" approach to the legal regime which is entirely contrary to the terms, aims and purposes of the applicable legal provisions."

30. A further hearing took place in London on 11 May 2000 at which we raised a number of points on the parties' written submissions and they also made their own comments.

31. The principal point of difference which arose at that hearing was on the meaning and effect of Article 1 of Regulation 2674/92 and in particular the words "under the conditions laid down by Regulation (EEC) No.1715/90".

32. Mr Khan's argument was that this imports, and makes applicable, the whole of Articles 4 to 8 of Regulation 1715/90. Mr Henderson did not agree and we are ourselves not persuaded that this is so.

We now record our conclusions.

1. We assume that the goods covered by the 1991 Danish BTI are identical to those which are the subject of this appeal. We have not physically inspected them.

2. In regard to the question of purposive construction it is necessary to review chronologically the successive Council regulations relating to BTIs: -

(a) Until 1 January 1993 the Appellant Company could not rely on the BTI obtained by Niko Med in Denmark in 1991 (Articles 4(1) and 10(1) of Council Regulation 1715/90 set out in full above).

(b) Regulation No.2674/92 of 15 September 1992 "supplementing the provisions for the implementation of Regulations 1715/90 on the information provided by the Customs authorities of the Member States concerning the classification of goods in the customs nomenclature ..."

provided in Article 1 that

"As from 1 January 1991, binding tariff information supplied by the customs authority of a Member State since 1 January 1991 shall become binding on the competent authorities of all Member States under the conditions laid down by Regulation (EEC) No.1715/90 with regard to its legal effects in the Member state which supplied it."

(c) There followed Regulation No.2454/93 which was largely a consolidation measure but made certain amendments and contained the following:

"Article 5

For the purpose of this Title:

1. Binding tariff information means tariff information binding on the administrations of all Community Member States when the conditions laid down in Articles 6 and 7 are fulfilled."

Article 6 relates to the detailed information required to be supplied in an application for a BTI.

Articles 10 and 11 read as follows:

"Article 10

1. Without prejudice to Articles 5 and 64 of the Code, binding tariff information may be invoked only by the holder.

2. The customs authorities may require the holder, when fulfilling customs formalities, to inform the customs authorities that he is in possession of binding tariff information in respect of the goods cleared through customs.

3. The holder of binding tariff information may use it in respect of particular goods only where it is established to the satisfaction of the customs authorities that the goods in question conform in all respects to those described in the information presented.

4. The customs authorities may ask for this information to be translated into the official language or one of the official languages of the Member State concerned.

Article 11

Binding tariff information supplied by the customs authorities of a Member State since 1 January 1991 shall become binding on the competent authorities of all the Member States under the same conditions."

The evolution of the regulations relating to BTIs follows the evolution of the EEC into the EU and the establishment of a common system of classification of goods entering any member state from outside the EU.

3. The provision introduced by Article 1 of regulation 2674/92, re-enacted in Article 11 of regulation 2454/93, that a BTI issued by a member state after 1 January 1991 shall be binding on the competent authority of all member states from 1 January 1993 seems in the case of a BTI issued (as in this case) between 1 January 1991 and 1 January 1992, inconsistent with the provision that a BTI may only be invoked by the holder. Given that the purpose of the system is to have a common customs code throughout the EU it would be, at the very least, anomalous to require that a holder of a BTI issued between those dates in a Member State to a trader established in that state should not be binding on the customs authorities of other Member States unless a new application was made by the trader, and accepted by the customs authorities of its own Member State.

4. Further, there are in this case companies incorporated in both Denmark and the UK in common ownership and the evidence has shown that most of the business was gradually transferred from the Danish company to the UK company. This does not mean that the Danish company and the Appellant are the same legal entity; nor does it mean that the Appellant can be treated as substituted for Niko Med Aps as "someone who has in good faith obtained a BTI."

5. Mr Khan argued (para 8) that a particular trader must apply across the Member States for a BTI in respect of its particular product so as to be able to rely on the classification in it against the customs authorities on subsequent importations of the identical product to which the BTI relates. But, as stated above, it seems to us that Article 11 of regulation 2454/93 is wider than this. It does not expressly or explicitly require a separate application to be made in respect of a particular product to each Member State into which the trader wishes to import it.

6. However, it seems to us that this situation has only arisen in relation to BTIs issued between 1 January 1991 and 1 January 1993, essentially because it was only from the latter date that a common customs code was established.

7. We agree (para 14 of the Commissioners' submission) that consistent treatment of customs duties throughout the "customs territory" of the Community must be maintained through the procedure for obtaining and use of BTIs. In this particular case, it would appear that no one appreciated that (in the Commissioners' view) it was necessary to apply to the Commissioners in the UK for a BTI in respect of a product which was the subject of a BTI already issued to its sister company in Denmark from which it had taken over a good deal of its business and despite the provisions of Article 11 of regulation 2454/93.

8. We consider that the purposive approach permits us to find, and the justice of the case requires, that in the exceptional circumstances already described the Appellant is entitled to the benefit of the BTI obtained in Denmark by its sister company in 1991.

33. In so deciding we accept, and do not intend to derogate from, the strength of the Commissioners' argument that there must be consistent application and operation of the importation regime.

34. We therefore allow the appeal with costs. If the Appellant's costs cannot be agreed within two months from the release of this decision there will be liberty to apply to the Tribunal for directions.

P H LAWSON

CHAIRMAN

RELEASED: 6th June 2000

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