

C00121

CUSTOMS DUTIES - End-use relief - Appellant failed to claim relief when it might have been available - Whether Commissioners empowered to grant relief retrospectively - No - Community Customs Code 2913/92 Arts 21, 82 and 86 - Whether special situation sufficient to support repayment of duty existed - No - Art 239 of Code and Art 905 of Implementing Regs 2454/93 - Appeal dismissed

LONDON TRIBUNAL CENTRE

ALIGN RITE LTD Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: STEPHEN OLIVER QC (Chairman)

R K BATTERSBY

Sitting in public in London on 13, 14 and 15 June 2000

Roger Bindschendler of KPMG, for the Appellant

Sarah Moore, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. Align-Rite Ltd ("Align-Rite") appeals against two decisions of the Commissioners. The first of them, taken on review, was to uphold their refusal to grant a retrospective authorization for "end-use relief" for the period 1 January 1992 to 10 February 1997. The second of them, again taken on review, was to

uphold the rejection of applications for repayment of duty paid on consignments imported between 1 January 1992 and 10 February 1997.

2. Put shortly and without going into the disputed areas of fact, the background to the appeal is as follows.

3. Since 1994 Align-Rite has been an importer of photographic plates of specially treated glass. This product is suitable for one use only, namely in the manufacture of photo-masks which are incorporated into computer chips. The product has been imported from outside the EU and it has not been available in sufficient quantities within the EU.

4. Since 1984 and until February 1996, Align-Rite has imported the product under tariff classification 3701990090 as -

3701 Photographic plates and film in the flat, sensitised, unexposed, of any material other than paper, paperboard or textiles; instant print film in the flat sensitised, unexposed, whether or not in packs;

xxxx 19 Other;

xxxx xx 99 Other;

xxxx xx xx 90 Other.

Under this classification goods are entered for free circulation at a duty rate of 6.5%.

5. As it happened, from January 1992 there was another tariff classification available in relation to the product. This was classification 3701990010. This reads -

3701 Photographic plates and film in the flat, sensitised, unexposed, of any material other than paper, paperboard or textiles, instant print film in the flat sensitised, unexposed, whether or not in packs;

xxxx 19 Other;

xxxx xx 99 Other;

xxxx xx xx 10 Plate of quartz or of glass, covered with a film of chromium and coated with a photo-sensitive or electron sensitive resin, for the manufacture of masks for goods of heading No. 8541 Or 8542

This classification had a duty rate of zero per cent, subject to the goods being put to qualifying end use.

6. It is not in dispute that since January 1992 the product was put to a qualifying end use with the result that classification under 3701990010 would have been available to Align-Rite in respect of the product.

7. On 11 February 1997 Align-Rite's representative notified the Commissioners that it intended to reclaim the overpaid Customs duty. It stated -

"The purpose of this communication is to notify you that our client intends to claim for a period going back from 10 February 1997 for a minimum of three years, or to 1 January 1992 if legislation permits."

Align-Rite's representative sought to obtain agreement from the Commissioners as to the principles of the claim for retrospective end-use relief.

8. On 28 May 1997 the Commissioners informed Align-Rite's representatives that end-use relief could not be granted retrospectively; although the EC regulations governing the matter did not specifically preclude retrospection, there was, they explained, an underlying assumption that end-use relief is granted at the time when goods are released for free circulation.

9. Align-Rite requested a formal departmental review of the Commissioners' decision not to grant authorization retrospectively to 1 January 1992. On 14 August 1997 the Commissioners informed Align-Rite that they had decided to uphold the decision in the letter of 28 May 1997. On 28 January 1999 Align-Rite appealed that decision and on 12 April 1999 Align-Rite submitted further and better particulars of the original repayment claim and requested a further decision. In the events the Commissioners provided two review decisions upholding the decisions not to allow repayment.

10. The central issues in this appeal are (1) whether, as Align-Rite contends, the Commissioners were wrong to say that the relevant EC regulations do not permit authorization for end-use relief with retrospective effect and (2) whether, as Align-Rite contends, the circumstances surrounding the payment of the duty and the claim for repayment constitute a "special situation" sufficient to support repayment of duty under Article 239 of the Community Customs Code (2913/92) and Article 905 of the Implementing Regulations (2454/93). Align-Rite says that, in the circumstances, the Commissioners should repay the duty under Article 236 of the Code or allow the original erroneous declaration to be amended or withdrawn and resubmitted (using Article 78) resulting in a repayment under Article 237.

Do the EC regulations prevent authorization for end-use relief with retrospective effect?

11. It will be convenient to address the first issue as a discrete matter without, at this stage, exploring the facts in dispute. End-use relief is a trade economic measure under which certain goods may be imported at a favourable rate of Customs duty provided they are put to a prescribed use under Customs control. In this context paragraph 11.1.1 of the Customs Tariff (Volume 1) states that: -

"End-use relief is designed to assist certain industries and trades in the EC by allowing the granting of a favourable rate of duty and/or levy on certain goods imported from non-EC countries, provided these goods are put to a prescribed use. The relief is common to all EC Member States".

12. Articles 21 and 82 of the Customs Code set out the basic rules in relation to end-use relief:

"Article 21

1. The favourable tariff treatment from which certain goods may benefit by reason of their nature or end-use should be subject to conditions laid down in accordance with the Committee procedure. Where an authorization is required Articles 86 and 87 shall apply.

2. For the purposes of paragraph 1, the expression "favourable tariff treatment" means a reduction in or suspension of an import duty as referred to in Article 4(10) even within the framework of a tariff quota.

#### Article 82

1. Where goods are released for free circulation at a reduced or zero-rate of duty on account of their end-use, they shall remain under customs supervision. Customs supervision shall end when the conditions are laid down for granting such a reduced or zero rate of duty cease to apply, where the goods are exported or destroyed or where the use of the goods for purposes other than those laid down for the application of the reduced or zero rate of duty is permitted subject to payment of the duties due.

#### Article 85

The use of any Customs procedure with economic impact shall be conditional upon authorization being issued by the Customs authorities.

#### Article 86

Without prejudice to the additional special conditions governing the procedure in question ... the authorization referred to in Article 85 ... shall be granted only:

- to persons who offer every guarantee necessary for the proper conduct of operations,
- where the Customs authorities can supervise and monitor the procedure without having to introduce administrative arrangements disproportionate to the economic needs involved.

#### Article 87

1. The conditions under which the procedure in question is used shall be set out in the authorization.

2. The holder of the authorization shall notify the Customs authorities of all factors arising after the authorization was granted which may influence its continuation or content."

The Implementing Regulations set out more detailed rules:

#### "Article 291

1. The admission of goods entered for free circulation with favourable tariff treatment by reason of their end-use shall be subject to the granting of written authorization to the person importing the goods or having them imported for free circulation.

2. The said authorization shall be issued at the written request of the person concerned by the Customs authorities of the Member States where the goods are declared for free circulation.

#### Article 585a

1. The import duties to be charged under Article 121(1) of the Code on import goods eligible, at the time when the declaration of entry for the procedure was accepted, for favourable tariff treatment by reason of their end-use shall be calculated at the rate corresponding to such end-use without special authorization for the granting of such treatment being required, provided that the conditions attaching to the granting of favourable tariff treatment are satisfied."

13. In normal circumstances the trader who has identified that goods are eligible for end-use relief will complete an application form (Form C 1317) and forward this to the local advice centre. If satisfied with the application the local advice centre will issue an authorization which grants permission to import goods to end-use and sets out any special conditions attaching to the authorization. Once authorized, the trader will need to keep adequate records showing what the goods are, when they were imported and from where, what they have done with them and how they have been disposed of and when. When a trader is authorized, officers will visit him to ensure that the records and systems are adequate for Customs purposes. Officers will also check that the trader is complying with the requirements of the procedure and that the goods are put to the prescribed end-use. The features of the relief summarized above were the subject-matter of evidence given by C M Davis, an officer of the Customs, and it was not challenged.

14. The case for Align-Rite in essence is this. Nothing in the legislation says that end-use relief cannot be granted with retrospective effect. The only real case for withholding retrospective authorization is that, on the basis that authorization and relief depend on supervision of the importer's use, that would not present any problems here. This follows from the fact that the Customs officers made a number of visits to Align-Rite's manufacturing premises and saw the product. Second, it was said (and this was not in dispute), Align-Rite maintained an effective audit trail of all the raw materials going through its manufacturing facility. Third, it was said (and again this was not in dispute) a number of Align-Rite's customers audited their own consumption of the finished product. In these circumstances, Mr Bindschender for Align-Rite argued, the Commissioners' refusal to allow retrospective authorization led to unfairness.

15. The Commissioners, as mentioned, did not dispute the existence of the audit trails. They said that although there had been a number of visits, these had not been concerned in any way with checking the use to which the product was put. The purpose of these visits had been routine anti-smuggling checks. We will return to these later.

16. As we read the regulations set out in paragraph 12 above, authorization and supervision are key requirements of the end-use code. Articles 21 and 85 and 86 of the Customs Code refer in terms to authorization; and Articles 82 and 86 of the Customs Code direct that the goods in question should remain under Customs supervision. Article 291 of the Implementing Regulations provides that end-use relief is "subject to the granting of written authorization".

17. Further, as we read Article 82, it is an underlying assumption of end-use relief that it will be granted, if at all, at the time of importation. This follows from the

fact that Article 82 refers to goods being released for free circulation at a reduced or zero rate of duty, thereby assuming that at the point of release the goods already benefit from end-use relief. Moreover, the wording of Articles 291 and 585a of the Implementing Regulations also suggest that the end-use relief is granted at the time of importation. It will noted that Article 291 refers to "the admission of goods entered for free circulation with favourable tariff treatment by reason of their end-use"; this again assumes that at the point of release the goods benefit from end-use relief. In this connection Article 585a refers to goods being "eligible [for end-use relief], at the time when the declaration of entry for the procedure was accepted"; this also suggests that eligibility for end-use relief is determined at the point of importation.

18. These provisions, we think, leave no room for any necessary implication that retrospective authorization was, at the relevant time, permitted under the Customs Code or under the Implementing Regulations. The Commissioners had no discretion in the matter and were, we think, right to refuse to allow retrospective authorization to Align-Rite.

19. Before we leave this point we mention certain other features of the end-use regime that were drawn to our attention.

20. The Customs Code Committee of the European Commission have introduced a proposal for a new end-use system. This makes it clear that the current legislation does not permit retrospective authorization for end-use relief. In this respect the Committee states that:

"The following innovations are introduced by the proposal:

...

8. The possibility of granting an authorization with retrospective effect is introduced (article 294)."

Article 294 provides:

"1. The Customs authorities may issue a retroactive authorization

without prejudice to the following paragraphs, a retroactive authorization shall take effect on the date the application was submitted.

2. If an application concerns renewal of an authorization for the same kind of operation and goods, an authorization may be granted with retroactive effect from the date the original authorization expired.

3. In exceptional circumstances, the retrospective effect of an authorization may be extended further, but not more than one year before the date the application was submitted, provided a proven economic need exists and

(a) the application is not related to attempted deception or to obvious negligence,

(b) the applicant's accounts confirm that all the requirements of the arrangements can be deemed to be met ... ,

(c) or the formalities necessary to regularise the situation of the goods can be carried out, including, where necessary, the invalidation as the declaration."

This demonstrates that even the new and specific power to grant retrospective authorization is carefully limited in its scope.

21. The proposal referred to in the last paragraph is, we think, a clear indication that the Customs Code Committee of the European Commission consider that the national Customs authorities currently have no power to authorize end-use relief with retrospective effect.

22. Furthermore, the new proposal, while making provision for Customs authorities to issue retroactive authorization, limits claims by traders such as Align-Rite to relief for a period prior to the date one year before the application is submitted.

23. Further, an illustration of the application of the current law is provided by Commission Decision REM 3/94 (131) in which it is stated that authorization for end-use relief cannot be made retrospective and with failure to comply with the rules does not constitute a special situation. In response to this point Mr Bindschendler said that this was an outdated ruling and that the practice of the Commission had moved on. But he was unable to provide any satisfactory evidence that the Commission's position on retrospective authorization had changed.

24. Mr Bindschendler placed further reliance on Article 236(1) of the Customs Code. This provides that:

"Import duties shall be repaid insofar as it is established that when they were paid the amount of such duties were not legally owed or that the amount has been entered in the accounts contrary to Article 220(2)."

25. The issue is therefore whether when they were paid the duties were legally owed. In these cases the duties were legally owed; authorization is, we think, a prerequisite of end-use relief and since authorization had not been obtained there was no entitlement to relief and the duties were accordingly legally owed.

Was there a special situation sufficient to support repayment of duty under Article 239 of the Customs Code and Article 905 of the Implementing Regulations?

26. Article 239 provides that:

"1. Import duties ... may be ... repaid in situations other than those referred to in Article 236 ...

- to be determined in accordance with the procedure of the Committee;

- resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedure to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.

2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate Customs office within twelve

months from the date on which the amount of the duties were communicated to the debtor.

However, the Customs authorities may permit this period to be exceeded in duly justified exceptional cases."

27. Article 239 of the Customs Code is applied in accordance with Articles 899 to 909 of the Implementing Regulations. In this respect Article 899 provides that where the decision-making Customs authority establishes that an application for remission or repayment is based on circumstances set out in Articles 900-903 of the Implementing Regulations, and that these do not result from deception or obvious negligence on the part of the Importer, or is based on circumstances set out in Article 904 of the Implementing Regulations, then the Customs authority is empowered to remit or repay the duty concerned. However, Article 905 states:

"1. Where the decision-making Customs authority to which an application for repayment or remission under Article 239(2) of the Code has been submitted cannot take a decision on the basis of Article 899, but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906-909.

The term "the person concerned" shall be interpreted in the same way as in Article 899.

In all other cases, the decision-making Customs authority shall refuse the application.

2. The case sent to the Commission shall include all the facts necessary for a full examination of the case presented.

As soon as it receives the case the Commission shall inform the Member State concerned accordingly.

Should it be found necessary that the information supplied by the Member State is not sufficient to enable a decision to be taken on the case concerned in the full knowledge of the facts, the Commission may ask for additional information."

28. What is a special situation for these purposes? Mr Bindschendler for Align-Rite emphasises that Article 239 is an equitable provision and that the test is one of fairness. The special situations provision is designed to cover situations where the relationships between the trader and the administration are such that it would be inequitable to require the trader to bear a loss which he normally would not have incurred. See the decision of the Court of First Instance in *Primex Produkte Import-Export GmbH and Co KG and Others v EC Commission* [1999] 1 CMLR 99 at 127. In the present circumstances it was, Mr Bindschendler said, fair and equitable that the Commissioners should repay the duty for which end-use relief should have been claimed. This followed from the fact that the law was not clear from a simple reading of the text. In this connection Mr Bindschendler referred to internal guidance of the Commissioners which, he said, show that end-use relief should be operated in a manner favourable to Align-Rite notwithstanding the obscurity of the legislative provision. An internal guidance on end-use relief published by the Commissioners sets out the supervision intended. Section 4 is entitled "Control of goods after importation" sub-paragraph 4.1 reads:



"... you are to confirm that the goods are covered by the importer's end-use authorization. If they are not covered but are eligible for end-use, invite the importer to apply to have the authorization varied to include them ... ."

Because the Commissioners had failed in their duty to facilitate trade in the manner contemplated by end-use relief and to respond in a helpful manner to the simple question asked by Align-Rite, equity dictated that the Commissioners should repay the duty.

29. Sarah Moore for the Commissioners relied on the meaning of special situation ascribed by the Court of First Instance in Case C-86/97, Woltmann [1999] ECR I-1041. In that case the Court said:

"In undertaking its examination, in the light of the objective of fairness underlying Article 239 of the Code, the Customs authority must confine itself to verifying whether the circumstances relied on are liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business."

In the circumstances of the present case the Commissioners had, she said, acted properly in response to Align-Rite's requests for information. In this respect she challenged Align-Rite's assertions as to what enquiries had been made and when.

30. It seems to us from the guidance of the Court of First Instance and from our own reading of Articles 239 of the Customs Code and 905 of the Implementing Regulations that the body responsible for giving effect to Article 239 has to determine all the circumstances in which the alleged overpayment of duty has been made. That body has to decide in the light of these circumstances whether a reasonable competent importer in comparable business circumstances to those that Align-Rite found itself in at the time would have continued to pay duty at the old rate notwithstanding the introduction of end-use relief in 1992 and the reclassification of the product. That approach is, we think, in line with the equitable nature of Article 239 as interpreted in *Primex* and the requirement to do justice on an even-handed basis as required in *Woltmann*. We turn now to examine the evidence in the light of the rival contentions.

31. Mr Bindschendler for Align-Rite claimed that the position had been as follows (and here we quote from his skeleton arguments):

"As any prudent businessman, the Appellant contacted the people who should know [on several occasions] and asked the Respondent a specific question - 'This is what we import, this is what we use it for - logically we think there should be a reduced rate of duty available - is there a reduced rate of duty?'

The Respondents are tasked with protecting the Revenue with facilitating international trade and hold themselves out as the people to contact with regards to duty and classification queries. They did not respond to requests for assistance by Align-Rite when asked to confirm that there is a reduced rate of duty available on the purchase of glass plates. These were not blanket questions such as "can I do this better?" But a specific question, "is there a reduced rate of duty for these goods?"

It was not always clear "from the face of the text". The tariff does take a certain amount of effort and expertise to be able to analyse; the tariff entry relating to end-use itself is not evident from the fact of it. The existence of a reduced rate of duty for a specific end-use is only inferred by looking at the footnotes to the tariff

classification, these footnotes merely stating that lower rate of duty may be available.

As a result Align-Rite has paid duty which it ought not to have paid."

The key witness for Align-Rite was Diane Driscoll. She is now European Commercial Director of Align-Rite. At the material time she was employed as Customer (sic) Services Support Group Manager and as such was responsible along with other members of the management team for monitoring the profitability and expenditure within the company. In the years 1992 and 1993, i.e. immediately following the introduction of the end-use relief in January 1992, Align-Rite had incurred trading losses and the management team were instructed to reduce costs and overheads.

32. During the period between 1992 and 1997, she said, she had made four or five telephone calls to the departments dealing with general inquiries in the Customs at Swansea and Cardiff to enquire if there was any relief from duty on the type of product imported by Align-Rite. Two of her colleagues within Align-Rite were, she said, aware that she had made these telephone calls. Indeed one of them had been working in the same office as herself when several of the telephone calls were taking place. Her superior was, she said, also aware of the calls as she had reported back to him on the occasion she made them. She had, she said, been told on all but one occasion that there was no relief from duty on the glass imported by Align-Rite. On one occasion (on 17 May 1995) Customs had advised her that they did not think there was relief from duty on the glass imported but suggested that she should go to a local library to consult the tariff classification. She duly visited the local library and found there volumes of the tariff classifications. She looked for the type of glass imported by Align-Rite and found the entries to be very confusing; nonetheless it appeared to her that they were paying the correct amount of duty. Diane Driscoll also pointed out that in the period before Align-Rite became authorized for end-use relief there had been many supervisory visits from Customs to check on the glass shipments that they had imported. On those occasions a Customs representative had visited to check that the contents received corresponded to the importation paperwork. In February 1997, she explained, the American financial director of their parent company visited a German company which it had been in the process of acquiring and discovered that the German company had not been paying duty on the glass. That spurred Diane Driscoll to telephone Customs at Cardiff. Within a week Customs had given Align-Rite authorization for end-use relief.

33. Kerris Vizard FCA, European Financial Controller of Align-Rite, gave evidence that she "was aware" that Diane Driscoll had made telephone enquiries on two occasions in 1995 but she said that she had not been with Diane Driscoll at the time of the telephone calls. It had, she said, been "general knowledge" in the department that Diane Driscoll had made several enquiries. The message that she had received from Diane Driscoll, she said, was that the 6.5% rate was the correct rate.

34. Mark Cottey, manufacturing manager of Align-Rite, gave evidence about the accounting procedures for dealing with the product. These, as we have already noted, established an effective audit trail. As this was accepted by Customs, we need not give details of the recording and accounting procedures.

35. The principal witness for the Commissioners was J E Robinson, the Customs officer who had been managing the excise advice centre at Cardiff since 1993. He said that enquiries received were recorded on an enquiry sheet and then entered

into a computerised system. For the purposes of the present appeal he had interrogated the computerised system to establish all contacts made by Align-Rite prior to 6 February 1997. Enquiries from Align-Rite had been made in 1993 and 1994 with requests to inspect Customs sealed goods. There had been a request for 20 EUR 1 Community Preference Forms. On 17 May 1995 a request had been made for advice on the duty rate on blank photo plate glass (i.e. the present product). In 1996 queries had been received concerning the importation of glass from Japan to the United States to the United Kingdom, about importing laser equipment from Israel, about Israel preference and about community preference. The only enquiry that had referred to tariff headings had been the enquiry of 17 May 1995. The advice given had been that the enquirer should look at a Customs Tariff; this, Mr Robinson said, was the standard advice given when queries of that sort are received. The enquirer is advised that they can view the tariff at the enquiry office or at another Customs office or at a local library. He said that they are unable to give advice on tariff headings over the telephone as the technical nature of the products is such that the importer has a far greater knowledge of the products and the Customs does. He mentioned that he had previously visited Align-Rite and so was aware of their manufacturing activities.

35. Asked about the visits, Mr Robinson said that they had taken place at Align-Rite's request to enable Align-Rite to open sealed consignments of blank photo plate glass. This was part of the Customs' normal anti-smuggling procedures. Because of the sensitivity of the product, the containers could not be opened and inspected at the point of entry into the EC. They had to be opened in controlled conditions at Align-Rite's premises under the supervision of a Customs officer. The sole purpose of these inspections had, Mr Robinson said, been to ensure that the imported products were photo plate glass; they had not been concerned with the payment of duty. Mr Robinson was referred to the "audit trail" as explained by Mark Cottey. He accepted that the audit trail had been in place but said that the procedures were commonly found in businesses manufacturing information technology, aircraft, television and light equipment.

36. We accept Mr Robinson's evidence that an enquiry touching on classification of a product or on the correct rate of duty would be met with the advice to consult the tariff. The Customs officer answering the enquiry could not, we agree, go further because he would not have had the opportunity to inspect the product: nor would he have been able to learn about its function in a manufacturing process.

37. What did Diane Driscoll's visit to the library reveal? The library had a copy of the Tariff Classification and we assume that it was up-to-date in 1992; (we are aware that several editions are released each year). She would have seen classifications 3701990090 and 3701990010. To the right of the latter entry, in a special column, would have been the words "S(1) Free". At the foot of the page against "(1) she would have seen the words "Tariff suspension may apply". The relief referred to is end-use relief. Either Diane Driscoll did not see the footnote or, if she did, she did not spot the significance of it.

38. Align-Rite, as we have noted, discovered that end-use relief was available to it, and should have been available to it from 1992, in February 1997 following the acquisition of the German company. Approval was given on 18 February without further enquiry on the part of the Customs. In correspondence with Customs, Align-Rite's advisers sought relief retrospectively to 1992. It is significant that in the first relevant letter of 14 February 1997 reference was made to only one enquiry made to the Customs enquiry office, i.e. that of May 1995. And the letter of 9 June 1997 makes no complaint about wrong advice on the part of the

Customs. A letter of 12 April 1999 alleges only one incident of erroneous advice. The statements in those letters are not easy to reconcile with Diane Driscoll's recollection that she had made 4 to 5 telephone calls to the Customs department to enquire if there was relief on the product they imported. They are completely at odds with the present assertion of Mr Bindschendler that Align-Rite had contacted the people who should know (i.e. Customs) and had specifically told them what the product was that Align-Rite imported and what they used it for and had specifically asked if there was a reduced rate of duty.

39. Diane Driscoll's recollection that she had made 4 to 5 such enquiries is not borne out by the Customs records kept by Mr Robinson and the Excise Administration Centre. The records show that, as noted above, there had been nine enquiries made by Align-Rite during the relevant period; but only one such enquiry (i.e. that of 15 May 1995) concerned the duty rate for blank photo plate glass and that had triggered the suggestion to look in the library. Align-Rite have been able to produce no notes or other contemporary evidence to substantiate Diane Driscoll's own recollections about the enquiries that she says were made. It was not until Diane Driscoll's witness statement of 7 June 2000 was prepared that the final version of her recollection of the facts is fully set out.

40. For the reasons given above we prefer the evidence of Mr Robinson. We do not accept that Align-Rite made specific enquiries of the sort asserted by Mr Bindschendler. It seems to us that the reasonable prudent importer would have been more searching in his enquiries. Had he been in Align-Rite's shoes he would have been importing the same product since the mid-1980s and would have been paying the right amount of duty, at least until 1992. The value of his imports would have been substantial, and he would not, we think, have left as technical a matter as rates of and reliefs from Customs duties to his customer service manager. He would have ensured that he had someone on his staff with sufficient knowledge of Customs duties or he would have consulted accountants or Customs duty advisers. Align-Rite, in contrast apparently to the German company that they bought in 1997, did none of these things. They were short of funds and making losses in 1992; we accept this but it does not make theirs a special situation. The circumstances in which they failed to claim end-use relief did not, we think, place them in an exceptional situation as compared with other reasonable competent operators engaged in the same business. We think that Align-Rite's standards fell short of those of the assumed reasonable competent importer. Consequently we do not accept that this was a special situation of the sort referred to in Article 239.

41. Having said that, we put on record the fact that end-use relief is a measure which is intended to benefit importers such as Align-Rite who are forced to look outside the Community for ingredients in the product that they are manufacturing. The Customs could, we think, have been more active in bringing the message home.

42. The Commissioners took the point that even if this Tribunal formed the view that Align-Rite's application was supported by evidence that might constitute a special situation, it nonetheless has no jurisdiction to make an order that the duties be repaid. This, the Commissioners say, is because pursuant to Article 905 of the Implementing Regulations, that decision can only be taken by the European Commission and not by the Commissioners of Customs and Excise. That follows from the Woltmann decision. And given that the Commissioners have no authority to order that the duties be repaid, the Tribunal has no jurisdiction either. This, we think, must be correct. In the first place, it follows as a matter of domestic law that an appellate tribunal such as ours which is regulated entirely by

the statute, cannot have jurisdiction to substitute its own decision for a decision which the Commissioners never had in the first place. In the second place, as a matter of community law, this Tribunal has no power to step into the shoes of and, in effect, usurp the authority of the Commission. This would be contrary to the policy behind Articles 899-909 of the Implementing Regulations. We note in this connection the opinion of the Advocate General in Woltmann (paragraphs 10-22 and 25). This was adopted by the Court (paragraphs 17 and 18-22) which decided that it was not for the national court to rule on whether there was or was not a special situation. Consequently it is implicit from the Woltmann decision, that there is no authority on this Tribunal to make an order for repayment.

43. For the reasons given above, we dismiss Align-Rite's appeal.

STEPHEN OLIVER QC

CHAIRMAN

Date Released : 4<sup>th</sup> August 2000

LON/ 99/7021-ALIGN.OLI