C00130

CUSTOMS DUTY – Post-clearance demand – Incorrect declaration – Confectionery from Mexico – Whether incorrect entry resulted from error by Customs within Article 220.2(b) of Code – Effect of delay in notifying post-clearance demand – Failure to notify Appellants that samples being taken under Art 69.2 – Community Customs Code (Council Reg (EEC) No.2913/92, Art 69.2, 220.1, 220.2(b) – Adjourned on Art 69.2 issue – Appeal dismissed on other issues

LONDON TRIBUNAL CENTRE

VIVA MEXICO (a firm) Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MR THEODORE WALLACE (Chairman)

Sitting in public in London on 8 January 1998 and 14 September 2000

Mr Fernando Jordan, partner, for the Appellants

Mr Hugh Davies, Counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. This appeal by Viva Mexico, a partnership, concerns a post-clearance demand in respect of a consignment, consisting of a number of different items of confectionery in one container, entered on 25 April 1996 by Cory Bros Shipping Ltd, as agent for the Appellants. The demand was for £4,149.14, of which £28.96 was ad valorem import duty, £3,509.32 was agricultural component and £610.86 was VAT.

2. The demand was issued on 3 March 1997 on the footing that certain of the items had been incorrectly classified and consequently duty and tax had been underdeclared. The appeal is against the decision on review confirming the demand.

3. The appeal was adjourned after an initial hearing on 8 January 1998 to await the decision of the Court of Justice in Covita AVE v Greece (Case C-370/96) and a

Tribunal appeal in Anchor Sea Foods. The Covita decision was given on 26 November 1998 but has yet to be reported. The appeal in Anchor Sea Foods was withdrawn in June 1999. The matter was relisted for December 1999 but vacated with a direction that statements of any further witnesses be served. The Appellants served no statement.

4. The appeal was on the basis (1) that the incorrect classification was based on advice by the Commissioners, (2) that the Appellants were not informed that samples were being taken and (3) that they were not informed of the demand until nearly a year later when it was too late to pass the cost on.

5. Although the Appellants were not professionally represented, Mr Jordan, who appeared before me and gave evidence, displayed considerable knowledge of customs' procedures.

6. He accepted that the original classification was incorrect but said that the correct duty failed to be entered as a result of an error on the part of the customs authorities which he could not reasonably have detected, see Article 220(2)(b) of the Community Customs Code (Council Reg (EEC) No. 2913/92).

7. He also said that he was not informed when the goods were examined and samples taken with the result that his right to be present under Article 69.2 of the Code could not be exercised.

8. He further said that the Commissioners failed to enter the correct duty in the accounts within 2 days as required by Article 220.1 and did not make the post-clearance demand until nearly a year later, in March 1997, by which time the goods had been long since sold.

The evidence and the facts

9. There were two witnesses, Mr Jordan, and Leslie Malcolm Webb, Surveyor of HM Customs and Excise, the reviewing officer. Both were clearly witnesses of truth; Mr Jordan was transparently honest and clearly believed what he said.

10. In addition the Commissioners put in a bundle of documents which included material supplied by the Appellant and a statement by Mr Webb exhibited further documents.

11. I find the following facts.

12. Mr Jordan traded in partnership with his wife. They imported and distributed Mexican foods and handicrafts. They also imported from other countries. They had no employees in 1996. Turnover in 1999 was some £850,000.

13 They used two clearing agents, one of which was Cory Bros Shipping Ltd. They had used them for about five years. On average the Appellants imported five containers a month. They sell to a number of well-known firms including McDonalds, Kentucky Fried Chicken and Burger King.

14. The dispute concerns eleven items of sweets which were part of a single consignment in one container, bought from two separate sources. They had never imported sweets before.

15. One invoice dated 2 March 1996 for $4,290.66 showed goods under four different types (with the English description): pasa confitido (candied raisins), cacahuate confitado (candied peanuts), cacahuate japones (toast soy peanuts) and palanqueta cacahuate (candied bar peanuts). The prices varied from $1.48 per kilogram to $2.10.

16. The other invoice dated 8 March 1996 for $17,119.28 showed nine different types without the English description apart from spearmint: colacion, goma surtida, goma caja naranja, goma carazon, goma cereza roja, goma limon verde, goma pina amarilla, huevo merengue and hojas spearmint (gomas). The unit price was $10.50 per 30lb for calacion, $12.30 per 35lbs for four of the gomas, $19.80 per 33lbs for huevo merengue and $20.74 per 44lbs (20 kilos) for the other three gomas.

17. As soon as he received the invoices and the Generalised System of Preference ("GSP") documents, Mr Jordan faxed copies of the documents to Cory Bros. The man there asked under what tariff codes he should enter them. It was the first time the Appellants had imported sweets although they had imported exotic foods.

18. Mr Jordan phoned the Customs office at Croydon and asked for advice. He told me that he had had many problems in the past and they had helped him a lot. Mr Jordan had the invoices in front of him. He said that he told a lady that there were jellies made out of starch, chocolate covered peanuts, raisins with a sugar coating and nut brittle or candied peanuts. He did not mention Japanese peanuts (cacahuate japones) and could not remember whether he mentioned mixed clusters (colacion); he did not mention giant green beans or mixed beans and yellow beans which were all jellies.

19. He said that within five minutes the lady faxed a number of sheets under the tariff circling four commodity codes of eight figures. Whatever she circled had been entered.

20. Mr Jordan did not keep any of the sheets nor did he keep any note of the conversation which lasted about five minutes. He told me that the lady obviously assumed that he would know which items fell under which circled code.

21. On the basis of the conversation Mr Jordan told Cory to enter the goods under four codes: 17049065, 17049075, 18069050 and 20081192.

22. The goods were declared at Thamesport by the Appellants' agent at 7.00am on 25 April 1996 under entry Number 065 0035398 by computer input. The declaration showed 1377 packages and consisted of coated peanuts and raisins entered under 1806 9050 00 7006, toast soy peanuts under 20081192 00, peanut brittle under 17049075 00 7006 and gum confectionery and jelly confectionery under 17049065 00 7006. A copy GSP certificate was attached. Duty of £1,833.52 and VAT of £3,559.50 was declared.

23. The "00" figures were purely statistical; the "7006" entries were an additional code relating to agricultural products. Mr Jordan told me that he was not given these by the lady at Croydon and did not know how they came to be entered.

24. Samples in duplicate were taken at Thamesport early on 27 April, two days after arrival. These were referred to the Laboratory of the Government Chemist for an opinion on the proper classification. The container itself was released immediately.

25. The Appellants themselves were not informed that the goods were to be sampled and therefore did not have the opportunity to be present. When the goods were released they realised that the sealed container had been opened, however Mr Jordan said that this was usual. There was no evidence that their agents were informed of the sampling. Mr Webb in his Review accepted that Customs did not appear to have notified the agents.

26. Four Notices of Goods Sampled for Further examination (Form C796) were sent to Mr Jordan dated 9 May 1996, one each in respect of toast soy peanuts, coated peanuts and raisins, candied peanuts and gum and jelly confectionery. The Notices stated,

"The goods below have been sampled for further examination to check the entered description."

27. Mr Webb in his review decision wrote at page 6:

"I am concerned that Customs do not appear to have notified you or your agent of the decision to take samples until after they had been taken. In my view this could be regarded as compromising your entitlement to be present as set out in Article 69(2) the code. Nevertheless I do not consider that this omission is any more than unfortunate and cannot be regarded as compromising the integrity of the samples taken or their representative nature. Furthermore, as you say, you were aware that Customs were examining these goods".

28. The goods were not in a bonded warehouse but were in temporary storage until clearance was granted in a place to which the Commissioners had access. The containers would have remained sealed unless opened for examination. There was no evidence as to whether storage was in a customs warehouse pending clearance. No witness was called from Cory Bros.

29. The Laboratory reports stamped 23 and 24 May for 11 different samples showed coated peanuts and raisins entered as 18069050 7006 as being 18069019 00 7006 (filled chocolate) and 17049061 00 7004 (sugar coated raisins); candied peanuts entered 17049075 7006 as 17049099 00 7007 (peanuts brittle); gum confectionery and jelly confectionery all entered as 17049065 7006 as falling under the same eight figure code but under 7009 (mixed clusters and giant mixed beans), 7012 (green jellies, red jellies, orange jellies and mixed jellies) and 7013 (green beans and yellow beans, rather than under 7006.

30. The Appellants were not notified of the altered classifications until over six months later when Form C22 was issued on 8 December 1996; the notice stated that a post-clearance demand note would be issued.

31. The Post-Clearance Demand Note (C 18) was issued on 3 March 1997 showing £4,149.14 as due, made up of £28.96 ad valorem input duty, £3,509.32 agricultural levy and £610.86 VAT. Of this amount £3,309.82 of the levy and £579.21 of the VAT related to the gum confectionery and jelly confectionery which had been entered under the correct eight figure code but the incorrect additional code; this depended on the starch/glucose content of the jellies (which on analysis exceeded 25 per cent), the sucrose/invert sugar/isonglucose content of the mixed clusters and giant green beans (which was 70 per cent or more) and of the yellow and green beans (which was 50 per cent or more).

The Legal Requirements

32. I take the procedure for examination and sampling from Prof Snyder's, International Trade and Customs Law of the European Union (1998) at pages 77-8,

"If the authorities decide to examine the goods or take samples they must so inform the declarant or its representative (Implementing Reg, Art 242). Where they choose to examine part of the goods, the customs authorities must inform the persons concerned which items they wish to examine (ibid, Art 240.2). The goods will be examined in the places designated and during the hours appointed for that purpose by the customs authorities. The transport of the goods to the places where they are to be examined and the samples to be taken, and all the handling necessary for such examination or taking of samples, will be carried out by or under the responsibility of the declarant who must bear all the costs incurred."

33. Article 242.1 of the Implementing Regulation (Reg EEC No.2954/93) provides,

"Where the customs authorities decide to take samples, they shall so inform the declarant or his representative."

Article 69.2 of the Code provides,

"2. The declarant shall be entitled to be present when the goods are examined and when samples are taken."

34. Prof. Snyder continues as follows,

"If the samples taken are not destroyed by the analysis or more detailed examination, they must be returned upon request. ...

If only part of the goods covered by the declaration are examined, the results of the partial examination must be taken to apply to all the goods covered by that declaration. Nevertheless, the declarant may request a further examination of the goods if it considers that the results of the partial examination are not valid as regards the remainder of the goods declared.

If the conditions for placing the goods under the procedure in question are fulfilled and provided that the goods are not subject to any prohibitive or restrictive measures, the customs authorities must release the goods as soon as the particulars in the declaration have been verified or accepted without verification. Where the customs authorities take samples for analysis or more detailed examination, they must authorise the release of goods in question without waiting for the results of the analysis unless there are other grounds for not doing so."

35.. The statutory provisions governing post-clearance demands are contained in Articles 220 et seq of the Code. So far as is relevant, Article 220 provides,

"1. Where the amount of duty resulting from a customs debt ... has been entered in the accounts at a level lower than the amount legally owed, the amount of duty ... which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed ...

2. ... Subsequent entry in the accounts shall not occur where –

...

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

..."

Article 221.1 provides,

"1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures."

Article 221.3 provides that communication to the debtor (involving a demand) shall not take place more than three years from when the debt was incurred, except where crime is involved. Article 222 provides that the amount communicated under Article 221 shall be paid within specified periods.

36. I reproduce the relevant CN Code for 1704 90, which applied to most of the samples,

1704 Sugar confectionery (including white chocolate), not containing cocoa:

1704 10 - Chewing gum, whether or not sugar coated:

...

1704 90 - Other:

1704 90 10 - - Liquorice extract containing more than 10% by weight of

sucrose but not containing other added substances

1704 90 30 - - White chocolate

- - Other

1704 90 51 - - - Pastes, including marzipan, in immediate packages of a

net content of 1 kg or more

55 - - - Throat pastilles and cough drops

61 - - - Sugar coated (panned) goods

- - - Other

1704 90 65 - - - - Gum confectionery and jelly confectionery including

fruit pastilles in the form of sugar confectionery

1704 90 71 - - - - Boiled sweets whether or not filled

1704 90 75 - - - - Toffees, caramels and similar sweets

- - - - Other

1704 90 81 - - - - - - Compressed tablets

1704 90 99 - - - - - - Other

37. The matter came before the Tribunal on 8 January 1998 when it was adjourned after evidence from Mr Jordan and Mr Webb pending the decisions of the Court of Appeal in Customs and Excise Commissioners v Invicta Poultry Ltd and Customs and Excise Commissioners v Fareway Trading Ltd due to be heard in May 1998 and of the Court of Justice in Covita in which latter case there had been no hearing as yet. I also asked Mr Webb to check the figures which neither Mr Jordan nor I could understand.

Submissions

38. Mr Jordan submitted that the incorrect entry was as a result of an error by Customs in that he had given the wrong classifications on the telephone. Mr Jordan had two other arguments. He said that he was not told that samples were being taken and so had no opportunity to be present; furthermore he was not informed of the results until March 1997.

39. Mr Davies submitted that there had been no error by Customs within Article 220.2(b) and that in any event the other requirements of the Article were not satisfied.

He said that the delay by Customs in entering the correct amount in the accounts and in issuing the post-clearance demand did not affect its validity. Following Covita he said that the two day requirement under Article 220.1 was directed at the obligations of the Member State towards the European Communities.

40. He said that Cory Bros must have known that a sample was being taken. If they were informed that would have been sufficient to comply with Article 69.2 since Cory Bros was the Appellant's agent. However Mr Davies' submission conflicts with what Mr Webb wrote in his statutory review decision and I cannot accept it. It is true that the Appellant did not call a witness from Cory, with whom he does not apparently now deal; however Mr Webb's review was confirmed by him in evidence before the Tribunal and it seems to me that his statement that Customs do not appear to have notified the Appellant or his agent is admissible evidence as a statement against interest.

Conclusions

41. As to Mr Jordan's first point, that the incorrect entry resulted from an error by Customs, while I am satisfied that Mr Jordan is wholly honest in believing that he was misled, I am quite unable to accept that he gave sufficiently detailed information to the lady on the telephone for it to be possible properly to categorise her action in circling codes as an error, even assuming that the conversation lasted longer than the 5 minutes which he stated. If her attempt to assist him was to be described as "official error", it would be a major disincentive to Customs to give guidance without receiving very detailed information in

writing. More important, virtually all of the demand was based on the final four figures being the agricultural component which were not provided by the lady at Croydon at all. This was not pointed out to me during either hearing.

42. It follows that the interpretation of Article 220.2(b) of the Community Customs Code considered in Covita and in Customs and Excise Commissioners v Invicta Poultry Ltd and Fareway Trading Ltd [1998] V&DR 128 was not in the event relevant. In the present case if any error was not easily detectable to an attentive reader of the Official Journal, it is impossible to see how Customs could have been expected to give a answer on such limited information on the telephone in only five minutes. Covita is however also relevant to the late notification point.

43. I now turn to Covita, which has not yet been reported in the official European Court Reports nearly two years after the decision on 26 November 1998. I was provided with no copy before the adjourned hearing this September and did not have an English version of the Advocate-General's decision until afterwards.

44. Covita involved two issues potentially relevant to this case. The first was the interpretation of the predecessor to Article 220(2)(b), namely Article 5(2) of Regulation 1697/79, coupled with Article 13(1) of Regulation 1430/79 covering the remission of duty in special situations. The second issue was the effect of a delay by Customs in determining and collecting the duty undeclared.

45. Covita was an importer of fruit. The reference concerned cherries imported from Bulgaria. A Community regulation provided for a countervailing charge if the reference price for specified imports from outside the Community fell below a specified price for two consecutive days. On 22 June 1992 the Commission adopted Regulation 1591/92 applying a countervailing charge to cherries from Bulgaria; this was published in the Official Journal on 23 June and took effect from 24 June.

46. A few weeks earlier, on 28 May 1992 Covita began to import Bulgarian cherries for industrial processing. Aware of the possibility of a countervailing charge being imposed, Covita was in touch daily with the Customs office where the cherries were declared. On 3 July the Customs office informed Covita of Regulation 1591/92 and Covita ceased its importations. The Regulation was formally notified by the Commission to the Greek Agriculture Ministry on 29 June and forwarded to the Customs office on 2 July. On 21 December the Customs office raised a post-clearance demand to recover the countervailing charge on imports between 24 June and 1 July.

47. Although on my earlier finding there was no official error I cover the conclusions of the Court of Justice on the predecessor of Article 220(2)(b) because the judgment is not otherwise readily available.

48. The Court said that any waiver of post-clearance recovery by reason of Article 5(2) depended on three cumulative conditions, see Hewlett Packard France v Directeur Général des Douanes (Case C-250/91) [1993] ECR I-1819 and Olasagasti and Others v Amministrazione delle Finanze dello Stato (Case C-47/95 and others) [1996] ECR I-6579: the non-collection of the duties must have been as a result of an error made by the competent authorities themselves; the error must be such that it could not reasonably be detected by the person liable and, finally, the person liable must have complied with all the requirements for his declaration.

49. As regards the second condition the Court said this at paragraph 26,

"26. Next, the error made by the competent authorities must be such that it could not reasonably be detected by the person liable acting in good faith, despite his professional experience and the diligence shown by him. In this regard, it should be observed that it is mandatory for Community provisions introducing a countervailing charge to be published in the Official Journal of the European Communities. From the date of that publication no person is deemed to be unaware of that charge (see, to that effect, Case 161/88 Binder v Hauptzollamt Bad Reichenhall [1989] ECR 2415, paragraph 19). That is the case where a professional trader importing goods is aware of the imminent possibility that a countervailing charge might be introduced for those goods. Such a trader cannot expect each customs office to be immediately informed that the charge has been introduced, but must ascertain, by consulting the relevant issues of the Official Journal, the provisions of Community law applicable to the transactions he is carrying out. To impose such an obligation on traders to inform themselves does not constitute a requirement that is disproportionate to the objective pursued by the introduction of a countervailing charge, which is to obviate disturbances on the Community market, bearing in mind, moreover, the need to apply Community law uniformly."

50. In respect of the provision for remission of duty, the Court said that this depended on the existence of both a special situation and the absence of obvious negligence by the trader. The question whether the error was detectable within Article 5(2) was linked to the existence of obvious negligence for the purposes of remission of duties.

51. The Court answered the question regarding non-collection of duties or remission at paragraphs 33 and 34 and the time limit aspect at paragraphs 35-37:

"33. Accordingly, it clearly follows from paragraphs 25 and 26 above that a trader who, in a situation such as that of Covita, has not ascertained, by consulting the relevant issues of the Official Journal, the provisions of Community law applicable to the transactions which he carries out has been negligent, unless it is established that the Greek version of Regulation No.1591/92 was not available during the period in question.

34. The answer to the first question must therefore be that a trader who has accumulated some experience of import and export transactions and who is aware, in particular, of the imminent risk of a countervailing charge being introduced cannot, if that charge is actually introduced, benefit from the provisions of Article 5(2) of Regulation No.1697/79 or of Article 13 of Regulation No.1430/79 since he could have informed himself as to the actual introduction of the charge by consulting the Official Journal of the European Communities and failed to do so.

35. By its second question, the national court asks whether a trader may rely on the fact that the customs authorities taking action for the post-clearance recovery of the customs duties have not observed the time-limits laid down in Articles 3 and 5 of Regulation No.1854/89 and whether a lapse of time in excess of five months from the time when the customs authority was in a position to calculate the amount due nullifies the right of the customs authorities to take action for the post-clearance recovery of the customs duties.

36. The sole purpose of the time-limits laid down in Articles 3 and 5 of Regulation No.1854/89 is to ensure rapid and uniform application by the competent administrative authorities of the technical procedures for the entry in the accounts of amounts of import or export duties. Failure by the customs authorities to observe those time-limits may give rise to the payment of interest in respect of delay by the Member State concerned to the Communities, in the context of making available own resources, under Articles 10 and 11 of Council Regulation (EEC, Euratom) No.1552/89 of 29 May 1989 implementing Decision 88/376/EEC, Euratom on the system of the Communities' own resources (OJ 1989 L 155, p.1). It follows that those time-limits do not nullify the right of the customs authorities to take action for post-clearance recovery pursuant to the provisions of Regulation No.1697/79 since Article 2(1) of that regulation provides for a period of three years for the recovery of uncollected duties, calculated from the date of entry in the accounts of the amount originally required of the person liable for payment or, where there is no entry in the accounts, from the date on which the customs debt relating to the said goods was incurred.

37. The answer to the second question must therefore be that failure on the part of the customs authorities to observe the time-limits laid down in Articles 3 and 5 of Regulation No.1854/89 when taking action for the post-clearance recovery of the countervailing charge does not nullify the right of those authorities to proceed with such post-clearance recovery, provided that it is carried out within the time-limit laid down in Article 2(1) of Regulation No.1697/79."

52. It follows therefore from Covita that the fact of late notification of the demand does not preclude the issue of post-clearance demands, even where notification is very late indeed.

53. The final question raised by Mr Jordan is whether the right of the Customs authorities to issue post-clearance demands is precluded or nullified by their failure to observe the requirements of Article 69.2.

54. No cases were cited to the Tribunal on this issue. In contrast to the provisions in Article 220.1 regarding entry in the accounts, Article 69.2 was clearly enacted to confer rights on traders, c.f. the opinion of the Advocate-General in Covita at paragraph 37. However it is not clear what follows from failure to observe that provision.

55. In the present case the facts are unclear. Mr Webb accepted that neither the Appellant or his agent were notified in time. Presumably Customs ought to have known whether this was the case and Mr Webb should have been informed when carrying out his review. It seems surprising that Cory did not know. On the other hand it is very odd that Notice of Sampling was sent to the Appellants on 9 May nearly two weeks late.

56. I accept that neither Mr Jordan nor his wife was informed either when the samples were taken or when the goods which were in sealed containers were examined, although it appears from the review decision that they were aware at some stage that the consignment had been selected for examination.

57. Mr Jordan did not say that they would have had their own samples analysed if they had known. He did however complain that they were not given a sample until the first hearing.

58. It seems to me that when the goods were released immediately following taking of the samples they must have known that not only had the container

been opened but that some goods had been removed. Mr Jordan complained that if told of the result they could have sought to pass on the cost or held the goods pending the outcome. There was no evidence as to how price sensitive the market was. Nor was there any evidence as to the treatment of later similar consignments if there were any; there was no suggestion of any further post-clearance demands.

59. There are a series of possibilities arising from Customs' failure to observe Article 69.2. It may preclude the demand absolutely or it may do so conditionally or it may have no effect at all. This is a matter of Community Law on which I am unaware of any authority. It seems to me that the most logical result would be that the answer depends on whether the Appellants were prejudiced and on whether they exercised proper care.

60. I have concluded that the appeal on the Article 69.2 issue should be adjourned both for further evidence and for submissions. On the basis that there was a failure to observe Article 69.2, the Tribunal may have to consider making a reference to the Court of Justice.

THEODORE WALLACE

CHAIRMAN

RELEASED: 6th December 2000

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