C00140

CUSTOMS DUTY – Post-clearance demand – Incorrect declaration – Confectionery from Mexico – Failure to notify Appellants which parts of goods being examined under Art 240 of Implementing Reg - Failure to notify Appellants that samples being taken under Art 69.2 of Code – No evidence of prejudice - Community Customs Code (Council Reg (EEC) No.2913/92) Art 69.2, 220.1, 220.2(b), 239 – Implementing Regulation (Council Reg (EEC) No. 2454/93) Art 240 and 242.2 – Appeal dismissed

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 27 June 2001

The Appellants did not appear and were not represented

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

DECISION

1. This appeal comes back in relation to two matters – the failure to notify sampling and the composition of the demand. The main decision was released on 6 December 2000 (Decision C 130). The date of this hearing was notified two months ago following production of considerable additional material by the Commissioners. Much of the delay both in relisting and in the earlier hearings, was attributable to the Appellants, who failed to appear at an earlier hearing. Five days ago a fax from the Appellants stated that Mr Jordan would be unable to attend due to a business trip to Holland; no adjournment was requested. I proceeded in the absence of the Appellants under Rule 26(2).

2. I find the following additional facts.

3. The goods arrived at Thamesport in a container on 9 April 1996. Cory declared the goods electronically on the CHIEF system (Customs Handling of Import and Export Freight) using DTI (Direct Trader Input). At 9.26am on 25 April 1996 Customs sent the CHIEF Entry Acceptance Advice allocating the consignment to Route 1 which required a paper declaration, instead of a computer transmission. This was done.

4. At 1.12pm on the same day the container was selected for partial examination, which involved reselection to Route 2, and an Import Examination Advice ("IEA")

was transmitted by Customs electronically on CHIEF. This was received by Cory as well as by Customs' staff.

5. The IEA included "Description - CANDLES", "Packages - 1377", "Reason -FOR PARTIAL EXAMINATION" and "DO NOT START UNTIL OFFICER PRESENT". Cory passed this information to the Appellants. An internal Customs document produced at the same time asked "CFS GRAIN" to have "a look at this consignment with a view to possible sampling." There was no mention of sampling in the IEA.

6. The container was examined at Thamesport Isle-of-Grain between 7 and 8am on 27 April 1996. The container's seals were intact; samples were drawn for sending to the government chemist, the exercise being completed at 8am. Notice of Goods Sampled for Further Examination (C 796) was sent by post to Mr Jordan dated 9 May 1996 with a standard form warning as to possible additional duty. The tear off slip was not returned as requested. The tests were carried out on 23 May. The container had been released meanwhile so that it must have been apparent that samples had been taken.

7. The goods were bought by the Appellants in Mexico in March 1996 (see paragraphs 15 and 16 of the initial decision) for a total price of US $21,409.94. Taking the exchange rate on the CHIEF Entry Acceptance Advice this converts to £13,935.

8. The Appellants produced two sales invoices to a company in Warrington showing £28,325 plus VAT. These were dated 27 April 1996. They showed nine types of candles at unit prices of 59 pence and four at unit prices of 75 pence. I can find no consistent relationship between the price paid by the Appellants and that charged by them. Even allowing for freight and insurance costs, despite ample opportunity the Appellants have not satisfied me that they would have been able to pass the additional duty on to the purchaser. It does not seem that they can have sustained a loss on the transactions in question.

The legal requirements

9. Article 69.2 of the Community Customs Code gives a declarant a clear legal right to be present when goods are examined and samples taken. Such a right is academic if the declarant is unaware that the goods are to be examined and samples taken. Article 240 of the Implementing Regulation requires the authorities to inform the declarant or his representative if they elect to examine goods and, if they decide to examine part only, which part. Customs informed Cory of the examination but not which part; although the IEA advice referred to partial examination it did not state which part. It was suggested that the IEA referred to "candles" instead of "candies" this may have been the fault of the agent; I am doubtful that this is correct since the Declaration by Cory did not misdescribe the goods. However the Appellants did not see the IEA.

10. The Implementing Regulation contains a distinct requirement to inform the declarant or his agent when it is decided to take samples, see Article 242. Since the decision to take samples was apparently only taken on 27 April, the IEA sent two days earlier on 25 April could not have discharged Customs' obligation under Article 242. It would have been another matter if the IEA had stated that samples would be taken : it did not do so.

11. In my judgment there was a breach of the Appellant's rights under Article 69.2 of the Code and under Articles 240 and 242 of the Implementing Regulation.

It may be that the requirements of the Code and Regulations are inconvenient to Customs but that does not mean that they properly can be disregarded.

12. However, in the light of Covita AVE v Greece (1998) (Case C-370/96), I do not consider that this breach precludes Customs from pursuing the Post-Clearance Demand. The purpose of Article 69.2 is in my judgment to protect a trader in connection with the process of taking samples. It gives the trader the opportunity to see that the samples are properly taken, that they are not excessive, that they are fair and that unnecessary damage is not caused. If there had been a dispute as to the validity of the samples or as to the results of the analysis and classification based on them, the failure to notify might have been important. The classification is however not in issue.

13. The Appellants' case is that they were prejudiced not because they would have chosen to be present but because they would have been made aware of the risk of re-classification. Mr Davies submitted that this is irrelevant and he is probably correct. In the event I do not need to decide this because in spite of being given ample opportunity the Appellants have not produced to the Tribunal any real evidence of prejudice. If they had done so then it would have been necessary to consider whether a special situation arose for remission of duties under Article 239 of the Code. In the absence of any evidence as to real as opposed to theoretical prejudice I do not consider that the question of remission arises.

14. Finally on this aspect I would point out that there are a number of ways in which a trader can protect himself against his classification being incorrect. He can seek a Binding Tariff Information in advance, but in a case such as this would almost certainly have to provide a sample or an acceptable analysis. He can delay declaration on arrival until a sample has been taken. Both of these would no doubt involve delay and expense. He can obtain a warranty from the vendor as to the contents, and thus the classification, from the vendor. Finally, he can take the risk. What he cannot do is obtain the equivalent of a BTI by a short telephone call with inadequate information.

15. After the initial hearing in 1998, I asked Mr Webb the reviewing officer to check the calculations. This he did and the result was a reduction in the demand of £285.78. This has been repaid already. The original demand claimed too much agricultural levy and too little import duty. These were corrected within the three-year limit. The VAT element is of course available as an input if not already claimed.

16. Subject to the reduction of £285.78, the appeal is dismissed.

THEODORE WALLACE

CHAIRMAN

RELEASED: 10th July 2001

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