

CUSTOMS DUTY – Goods imported from Yugoslavia under form EUR1 – Preferential tariff treatment withdrawn from Yugoslavia – Form EUR1 therefore not valid – Appellant unaware of withdrawal of Yugoslavia – Post clearance demand for full amount of duty and import VAT – Whether debt entered into account at proper time – Whether duty and VAT should be repaid or remitted – Whether special situation arose – Council Reg 2913/92 EEC Arts 220, 239(1), (2) – Commission Reg 2454/93 EEC Arts 899, 904, 905 – Appeal dismissed

LONDON TRIBUNAL CENTRE

EUROPEAN TEXTILES LTD Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: ANGUS NICOL (Chairman)

K C MANTERFIELD FCA

Sitting in public in London on 21 September 2001

Slobodan Popovic, director for the Appellant

Owain Thomas, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

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DECISION

1. This appeal arises out of a post clearance demand note issued on 22 October 1999 in respect of the import of men's suits from Serbia. The demand is for £146,830 of duty and £230,450 VAT, on the stated ground of non-inclusion of value of cloth and trimmings and transport costs, relating to the period 1 January 1998 to 30 September 1999. In a letter dated 15 October 1999, following a visit by Customs officers on 6 October, Mr Slobodan Popovic, a director of the Appellant, who also appeared for the Appellant at the hearing of the appeal, explained what had happened:

"I have explained to you in fine detail how I conducted my trading, and I think that you realised, what confusion occurred, i.e. The mistake in procedure during import of goods, my lack of understanding for the requirement of OPR (Outward processing Relief), since I was under impression that, quite logically, for goods of UK as well as EC origin, no duty would be payable on importation, likewise for materials covered by EUR1 certificate. Materials were exported out of EC without an OPR."

Mr Popovic had not been aware that preferential trading arrangements with Serbia had been suspended since January 1998, nor that the forms EUR1 in respect of the imports were no longer valid. The cloth would only be entitled to preferential treatment if imported directly into the EC from Slovenia or Croatia, but it had in fact been delivered first to the Appellant's suppliers in Serbia. The cloth could have been imported under Outward Processing Relief ("OPR"), but the Appellant had not at that time applied for or been granted OPR. He made such an application and received OPR within a few days after 6 October 1999.

2. Following correspondence in which the Appellant had hoped to agree terms for paying the duty and VAT over a period of time, it became suddenly impossible for the Appellant to comply with any terms agreed, since its main customer went into administration owing the Appellant £850,626 including VAT.

Grounds of appeal

3. The grounds of appeal given in the notice of appeal were,

"The Customs duty and import VAT demand should be waived because the debt was not entered in this account at the proper time (Art 220.2(b) Council Reg'n 2913/92 refers). Further, and in the alternative, this Customs duty and import VAT should be remitted because no deception or negligence has been attributed to the Appellant (Art 239.1 Council Reg'n 2913/92 refers). The appeal lies by application of para 1(a) and (d), Sch 5 FA 1994."

The facts

4. Mr Popovic said that the Appellant buys cloth in Slovenia and Croatia and trimmings in the United Kingdom, all of which are sent to Yugoslavia for making and then reimported into the United Kingdom, duty being paid. He had thought that everything was being done in accordance with United Kingdom customs law. But when the cloth and trimmings were sent directly to Serbia and reimported thence to the United Kingdom the goods lost their origin. He had thought that the import was covered by form EUR1, and that no further duty was payable. Customs pointed out to the Appellant that he required OPR, and this he had immediately applied for and been granted. Even then, Mr Popovic said, you have to pay further duty, though much less. What had happened was a pure mistake. The Appellant then tried to arrange a retrospective OPR, but was told that that was not possible. An arrangement was agreed for the Appellant to pay the duty and VAT over three years. Then the Appellant's main customer went into administration owing in excess of £850,000, and the administrator said that the Appellant would be paid about 8 per cent. The Appellant was therefore unable to meet the payments agreed. There had been no Romalpa clause in the contract with the customer, so that the property had passed and the administrator would not return the goods.

5. Mr Roderick Lear, an Inland Customs officer in the valuation department, gave evidence for the Commissioners. He said that the invoices in respect of the goods were only cut and make invoices, and did not include the cost of cloth and trimmings. There was a preferential trading agreement with Poland, but if goods were sent direct to Serbia that did not apply; materials lose their identity of origin when they pass out of the European Union. The transport element had also been omitted; the factory in Serbia was not allowed to pay money outside Serbia, and the Appellant therefore paid separately for the transport, which was therefore related to the import.

6. In order to be covered by form EUR1, which is a movement certificate, Mr Lear said, goods must be manufactured in the country with which the preferential trading agreement exists. The cloth having been sent direct to Serbia, the EUR1 did not apply. The Appellant believed that because it had a EUR1 the cloth was not dutiable, as would have been the case had it been imported from Slovenia or Croatia. The preferential trade agreement with Serbia was withdrawn on 1 September 1998, and at that time goods imported from Serbia became liable to the full rate of duty. The only thing that the Appellant could have done was to import the cloth and trimmings from Slovenia and Croatia to the EU, and then export them under OPR to Serbia.

The law

7. So far as it bears upon the present appeal, Article 220 of Council Regulation 2913/92 EEC 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 became aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts)....

2. ... subsequent entry in the accounts shall not occur where -

(a) . . .

(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;...."

The remission of duty where no negligence or deception has been attributed to the taxpayer is provided for in Article 239(1), which provides:

"(1) Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237 and 238—

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

— resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. Situations in which this provision may be applied and the procedures 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 12 months from the date on which the amount of the duties was communicated to the debtor.

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

The Committee procedure referred to is set out in Section 1 of Chapter 3 of Commission Regulation 2454/93 EEC (the Implementing Regulation). Article 899 provides:

"Without prejudice to other situations to be considered case by case in accordance with the procedure laid down in Articles 905 to 909, where the decision making Customs authority establishes that an application for repayment or remission submitted to it under Article 239(2) of the Code —

— is based on grounds corresponding to one of the circumstances referred to in Articles 900 to 903, and that these do not result from deception or obvious negligence on the part of the person concerned,

'The person concerned' shall mean the person or persons referred to in Article 878(1), or their representatives, and any other person who was involved with the completion of the Customs' formalities relating to the goods concerned or gave the instructions necessary for the completion of these formalities,

— is based on grounds corresponding to one of the circumstances referred to in Article 904, it shall not repay or remit the amount of import duties concerned."

So far as is relevant to this appeal, Articles 904 and 905 provide:

"Article 904

Import duties shall not be repaid or remitted where the only grounds relied on in the application for repayment or remission are, as the case may be —

(c) presentation, for the purpose of obtaining preferential tariff treatment of goods declared for free circulation, of documents subsequently found to be ... not valid for that purpose, even where such documents were presented in good faith.

Article 905

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 to 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."

Finally, Yugoslavia was withdrawn from the list of countries enjoying preferential tariffs by Council Regulation (EEC) No 3302/91 (published in OJ No L 317, page 46, 15 November 1991), and restored with effect from 9 May 1997 by Council Regulation 825/97 (OJ L 119, 8 May 1997). The preference was withdrawn again with effect from 1 January 1998 by Council Regulation 2636/97 (OJ L 356, 31 December 1997).

The Commissioners' contentions

8. Mr Owain Thomas, for the Commissioners, first pointed out that it was not correct to say, as Mr Popovic had, that it was only the want of OPR which made the duty and VAT payable. The EUR1 was not valid for importing cloth from Serbia, and had the Appellant had OPR it would have had to change its method of doing business, by importing all materials from Slovenia and Croatia into the EC and then exporting it back to Serbia.

9. The first of the Appellant's grounds of appeal came under Article 220(2)(b) of the Customs Code. To succeed under that ground, the Appellant must be able to shew that there had been an error by the Commissioners. Mr Thomas contended that there had been no such error: this was a post clearance demand. Secondly, it could not be said that the Appellant could not reasonably have found out about the increased duty consequent on the withdrawal of Yugoslavia from preferential treatment, since it was published in the Official Journal. The Appellant had not complied with the ordinary import regulations. There was, therefore, no ground of appeal under Article 220. Mr Thomas referred to *Covita v Greece* (Case C-370/96 ECJ), in which the court stressed the importance for a trader whose activities involved import and export of consulting the Official Journal, and held that a trader with some experience of import and export and who was aware of the imminent risk of a countervailing charge being introduced could not, if such a charge were in fact introduced, benefit from the provisions of Article 5(2) of Regulation 1696/79 or Article 13 of Regulation 1430/79, since that trader could have informed himself as to the introduction of the charge by consulting the Official Journal. Similarly, Mr Thomas contended, the Appellant could have discovered the withdrawal of Yugoslavia from preferential tariff treatment by consulting the Official Journal. See also *Customs and Excise Commissioners v Invicta Poultry Ltd* (1997) (Decision No.C00022) [1997] V&DR 56 Ch D; [1998] V&DR 128 CA.

10. As to the second ground of appeal, that the duty should be remitted because no deception or obvious negligence had been attributed to the Appellant, Mr Thomas contended that Articles 236, 237 and 238, which dealt with situations in which duty shall be repaid did not apply in this case. It had not been contended by the Appellant that the situation fell within Articles 900 to 903, but Mr Thomas contended that they had no application here, since they dealt with situations which had not arisen in this case. Article 904(c) did apply where the relevant documents, in this case the EUR1s, were found to be not valid. Article 904 did therefore apply in this case, and the Commissioners were obliged not to remit the duty. Mr Thomas referred to *Avalon Steels Ltd v Customs and Excise Commissioners* (2000) (Decision No C00129), in which the Tribunal had outlined the repayment or remission process. In that case also the trader's principal

customer had gone into administrative receivership, and the trader was unable to deliver the goods. But no indemnity for the duty was provided by the legislation.

11. Nor did the case fall within Article 905, since no special situation arose. Mr Thomas referred to *Reiner Woltmann v Hauptzollamt Potsdam* (Case C-86/97 ECJ), a case in which large quantities of cigarettes were stolen from the trader's warehouse, and the customs and other duties were claimed from the trader. The trader brought an action against the assessment, which was dismissed, and another for annulment of the duty before the *Finanzgericht*, which found that there was no special situation within Article 905(1) of Regulation 2454/93. The Court of Justice said, in paragraph 21,

"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."

There was no evidence in this case that the Appellant was in any worse position than, or in any exceptional situation as compared with, other operators in the same business. Mr Thomas submitted that a reasonably competent importer would not have continued to claim preferential tariff treatment notwithstanding the withdrawal of such treatment by the Regulations. The Appellant's case did not fall within Article 905. In any case, *Woltmann* decided that it was not for the national court to decide whether or not there was a special situation, but for the Commission (see also *Align Rite Ltd v Customs and Excise Commissioners* (2000) (Decision No C121).

The Appellant's further contentions

12. Mr Popovic contended that this was a case in which the Appellant was in a special situation, since the result was a total disaster for the company. Since the going into administration of its principal customer, it was unable to meet the terms agreed with the Commissioners for payment, and would probably have to go into liquidation.

Conclusions

13. There was no dispute as to the facts of this case, and we accept the evidence given by Mr Popovic.

14. It was never alleged by the Appellant that there had been any error on the part of the Commissioners in entering the debt into the accounts. However, we looked at the facts to see whether there had been. We were unable to discover anything in the nature of an error. This was a post clearance demand where, in the admitted events which occurred, the Appellant had failed to discover that preferential tariff treatment had been withdrawn from Yugoslavia, and had submitted documents which were not valid. The result was that it failed to account for the full amount of duty for which it was liable. In the absence of any such error, Article 220(2)(b) cannot apply. It is also the case that the Appellant could have discovered that Yugoslavia had once again been withdrawn from the list of countries enjoying preferential tariff treatment by consulting the Official Journal. We consider that *Covita* is authority for the proposition that it is the responsibility of a trader engaged in import and export trade to keep himself informed by consulting the Official Journal as to what regulations affect his

business. Covita was concerned with countervailing charges, but although the subject-matter was different, the principle remains the same.

15. The Appellant invoked Article 239(1) of the Code. It was not clear that an application under Article 239(2) had been submitted in time, nor that time had, if necessary, been extended. However, we considered the point de bene esse, on the assumption that it had. It was clear to us that Articles 900 to 903 did not apply to the present case, nor was it contended by the Appellant that they did. However, it was clear to us that Article 904(c) did apply, since the Appellant had submitted documents for preferential tariff treatment which were not valid, namely the forms EUR1. From 1 January 1998, by reason of Regulation 2636/97, the EUR1 was not valid in the case of goods imported direct from Serbia. That being so, under Article 904, the Commissioners were obliged not to repay or remit duty. It might also be thought that the Appellant's failure to consult the Official Journal had an essence of negligence in it.

16. Article 905 provided that if there is some evidence that a special situation exists, such as would give rise to a repayment or remission of duty, the Member State is obliged to transmit the case to the Commission to decide. It follows that neither the Commissioners nor this Tribunal can make such a decision. Even if we were empowered to do so, it does not appear to us that any special situation can exist here. The liability to duty arose through the erroneous submission of the forms EUR1 after the withdrawal of Yugoslavia from preferential tariff treatment, which, as we have found, the Appellant could have discovered by consulting the Official Journal. The later disaster which befell the Appellant did not cause the liability to duty, and in any case was the kind of disaster which is not entirely uncommon in the field of commerce. We would not have thought that any of those circumstances amounted to evidence of a special situation.

17. For the above reasons, we are obliged to dismiss this appeal. We do so not without expressing some sympathy with the Appellant, which has suffered gravely as the result of one mistake and a major defaulting customer. However, later correspondence before this appeal was heard suggests that its situation may be recoverable.

18. No application was made for costs at the hearing. If either party wishes to be heard on the matter of costs, or in default of agreement as to costs, we grant liberty to both parties to apply to the Tribunal. Any such application should be made not later than 42 days after the date of release of this decision.

ANGUS NICOL

CHAIRMAN

RELEASED:

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