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OMYA UK LIMITED V THE COMMISSIONERS OF CUSTOMS & EXCISE[1] REFUNDS OF OVERPAID CUSTOMS DUTIES

Peter Young[2]

1 Introduction

In a similar fashion to VAT, overpaid customs duties can only be reclaimed within three years of being paid to customs authorities. "Overpaid" in the context of this article means not legally owed to HM Customs & Excise ("Customs"). Outside this three year time limit, Art. 236 of the Community Customs Code[3] ("the Code"), which is directly applicable in the UK, provides as follows:

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

Import duties or export duties shall be remitted in so far as it is established that when they were entered into the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

No repayment or remission shall be granted when the factors which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned.

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1 (2001) (Unreported).

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3 Council Regulation EEC No. 2913/92.

2 Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor.

That period shall be extended if the person concerned provides evidence that he was prevented from submitting his application within the said period as a result of unforeseeable circumstances or force majeure.

Where the customs authorities themselves discover within this period that one or other of the situations described in the first and second sub-paragraphs of paragraph 1 exists, they shall repay or remit on their own initiative.

The exact scope of the time limit and the meaning of exceptions listed have never been tested before the ECJ, and no clear guidance has been offered by the UK courts. The VAT and Duties Tribunal recently passed up such an opportunity after hearing the *Omya* case. The judgment does however, contain discussion as to:

(a) what constitutes a valid application for repayment, and if a valid application is made, whether it prevents time running against overpayments made on all future imports by the same importer of the same product,

(b) whether if Customs both change the classification of imported goods and refuse to repay duties which were not legally owed, that is unforeseeable circumstances or force majeure within the meaning of Art. 236(2) second indent of the Code, and

(c) where Customs are in possession of all the facts which should lead them properly to conclude that duty has been overpaid, whether that stops time running and they become under a continuing duty to repay the overpaid Customs duty.

2 The Background

From the 1980s the Appellant had been an importer of "Hydrogloss 90 Slurry", a suspension of Kaolin in water ("the Goods"), into the UK. In March 1990 the Commissioners determined that the Goods should be entered under Community Code No. 32064990, with duty payable at a rate of 6.9 per cent. In April 1990 the Appellant challenged that decision by letter, contending that the Goods should be

entered under Chapter 25 of Section V of the Code with zero duty payable, in conformity with the position in Germany. The Commissioners rejected that challenge, and confirmed their classification of the Goods. Thereafter the Appellant imported the Goods and paid duty on the basis of Customs' classification. In December 1997 the German customs authorities issued a binding tariff information ("BTI") classifying the goods under Chapter 25, i.e. at a zero duty rate, which the Appellant brought to the attention of Customs. In February 1999 the Customs issued a BTI confirming the German classification of the Goods, and the Appellant submitted an application for repayment of duty covering the duties paid from 1990 to 1998. Customs agreed to treat the claim as having been made on the date of the issue of the BTI, but disallowed the claim insofar as it related to goods imported before February 1996 relying on the time limit imposed by Art. 236 of the Code.

The case came before the Tribunal on 17th November 2000, before Chairman Mr Lawson.

3 The Arguments

The parties both agreed that the import duties were never legally owed, although it should be noted that it is arguable that new BTI's do not have retrospective effect[4]. The only issue was therefore whether Customs could rely on the three year time limit imposed by Art. 236.

The Appellant advanced three arguments, relying upon the stated exceptions in Art. 236.

3.1 The First Argument

The Appellant argued that in 1990 it had submitted a valid application, albeit informal, for the repayment of overpaid duties, and that application was sufficient to prevent time running in respect of all subsequent imports by the Appellant of the same product. In this regard, the Appellant referred to the earlier Tribunal decision in *Anristu Wiltron Ltd v Comrs of Customs & Excise*[5]. In that case, the taxpayer submitted an application for repayment of duties, but not on an official form. The application was held nevertheless to be a valid one. Customs asserted that *Anritsu* was distinguishable on its facts from this, and the Tribunal accepted the contention

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4 See Art. 12(2) of the Code.

5 (1999) (Unreported).

without expanding on its reasoning. Regrettably, the Tribunal did not answer the second part of the argument, namely if a taxpayer is importing goods on a continuous basis, and contends that it is overpaying duty, will an application for repayment cover subsequent imports of the same product?

It is interesting to note that in 1990 there was no formal procedure against classification decisions by Customs. Appeals to the Tribunal on this issue only became possible in 1994. The only official methods of appeal at the time were judicial review (a notoriously difficult and expensive process), and a request for a new BTI. On the facts of the case, it was obvious that in 1991 any request for a new BTI by the Appellant would not have been worthwhile. Of course, one could argue that the Appellant should have pursued the matter further in 1994, but in practical terms, how many traders are absolutely up to date with new legal developments, including new rights of appeal?

3.2 The Second Argument

The Appellant argued that where Customs' authorities themselves are in possession of facts which should lead them to conclude that duty has been overpaid they become under a continuing duty to repay pursuant to the third indent of Art. 236(2). That duty is independent of Customs duty to repay in response to any application of the importer.

Curiously, this particular argument appears not to have been considered, either by the Tribunal, or by Customs.

3.3 The Third Argument

The Appellant argued that in the event that the Tribunal was unable to construe the correspondence of 1990 between Customs and the Appellant as an application for repayment, then the Tribunal should extend back the time limit on the grounds that the Appellant was unable to submit its application earlier as a result of unforeseeable circumstances. It could not reasonably have been foreseen that the Commissioners would both change their classification of the clay slurry at a later date and seek to deny that the Appellant's earlier request constituted an application for repayment.

It is well established by cases such as *Denkavit*[6] that force majeure means unusual circumstances, beyond a trader's control, which could not have been avoided even if all due care had been exercised. The Tribunal simply accepted the

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6 *Denkavit Belgie NV v Belgium* [1987] ECR 565.

Commissioners' argument that it was entirely foreseeable that Customs might change the classification of the Goods, and that the matter was not beyond the Appellant's control, who could have (albeit with some difficulty) challenged Customs' decision. It therefore seems that extreme difficulty in remedying a situation will not constitute force majeure in the context of extending the three year time limit.

4 A Purposive Approach?

Interestingly, in a previous Tribunal case, *Niko Surgical v Cmrs of Customs & Excise*[7], the same Chairman was drawn into discussion on the interpretation of EC legislation. In that case a UK Company tried to rely on a BTI issued to an associated company by the customs authorities in Denmark. The UK company had overpaid duty, if it could rely on the BTI issued to the Danish company, and it was attempting to reclaim those duties. Time limits were not an issue. The strict wording of Art. 10(3) of Regulation 1715/90 provides that only the holder of a BTI can rely on it. The taxpayer argued that the aim of customs union is for consistent treatment of customs duties throughout the Community. The Chairman was persuaded correctly in the writer's opinion that the Tribunal should apply a purposive approach to interpreting the relevant regulation, in line with case law such as *Franz Grad v Finanzamt Traunstein*[8] [1970] ECR 825 and *Commission v Netherlands*[9] [1983] ECR 1195. Customs did not dispute this approach, but sought to argue the purpose of the regulation in dispute. In the event, the Tribunal decided that the associated company could rely on the BTI. It appears that the overwhelming requirement for fairness and even application of import rates was sufficient in the *Niko* case to persuade the Tribunal to construe the very clear wording of the Regulation in question in a purposive manner. It is strange that in the *Omya* case the Tribunal expressly said that Customs were actually under some sort of moral obligation to make an ex gratia payment to the Appellant, yet still felt unable to interpret the three year repayment rule in such a way as to produce an equitable result.

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7 (2000) (Unreported).

8 *Franz Grad v Finanzamt Traunstein* [1970] ECR 825.

9 *Commission v Netherlands* [1983] ECR 1195.

5 Conclusion

The message is therefore, that traders who regularly import goods from outside the EU should review the status of their imports at least once every three years and if there is any doubt as to the correct classification of the goods, appropriate advice should be taken.