[2013] UKUT 0223 (TCC)
Appeal number FTC/59/2012

IMPORT DUTY – customs value – Articles 29 and 32 of Community Customs Code (Regulation 2913/92)

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

ASDA STORES LIMITED **Respondent**

TRIBUNAL: MR JUSTICE NEWEY

Sitting in public at the Rolls Buildings in London on 18 April 2013

David Bedenham, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Roderick Cordara QC, instructed by Bell Davies, for the Respondent

DECISION

Introduction

1. This case concerns the amounts on which the Respondent, Asda Stores Limited ("Asda"), must pay import duty in respect of goods it imports into the United Kingdom from outside the European Union.

2. Asda is, of course, a major retailer. Among other things, it sells footwear and clothing under its "George" brand. Clothes for this range are bought from suppliers outside the Customs Union. The clothes come with hangers and other ancillary items such as labels, swing tickets and size indicators, and Asda requires the clothing suppliers to source these from particular suppliers: hangers, for example, must be obtained from a specialist manufacturer called Mainetti. Asda not only tells its clothing suppliers where hangers (and similar items) must come from, but how much is to be paid for them. As the First-tier Tribunal explained in paragraph 3 of its decision ("the Decision"):

> "The clothing suppliers simply recharge to Asda, as part of the overall price which Asda pays for the finished clothing and without any markup, the price which they have paid to the hanger suppliers for the hangers. In effect, the cost of the hangers is therefore simply a 'pass-through' cost of the clothing suppliers which is closely controlled by Asda".

3. The net cost of the hangers (and other ancillary items) is, however, reduced by separate arrangements Asda has with the suppliers of those goods. Pursuant to these arrangements, which do not involve the clothing suppliers, the suppliers of the ancillary goods (which, for convenience, I shall simply refer to as "hangers") will make payments direct to Asda. The Tribunal said this about such payments (in paragraph 5 of the Decision):

> "This payment reflects the fact that the true value for the hangers is less than the price actually charged by the hanger suppliers to the clothing suppliers at Asda's direction (and subsequently included, without any mark-up, in the price charged by the clothing suppliers to Asda). Asda regards this payment as a rebate of part of its purchase price for the goods, to bring the price it actually pays into line with the proper value of those goods".

In paragraph 7 of the Decision, the Tribunal went on:

> "Asda and the hanger suppliers agree in advance on both the 'notional' selling price for the hangers which is charged to the clothing suppliers and the 'true' selling price which forms the basis of the Rebate calculation. Thus, in most cases, an artificially inflated price is initially charged by the hanger suppliers to the clothing suppliers and is then

passed through to Asda by the clothing suppliers. The subsequent price correction (the Rebate) is dealt with directly between Asda and the hanger suppliers. The clothing suppliers usually know that this arrangement exists but do not know the details of it".

4. This appeal arises out of imports between November 2005 and December 2007. Asda paid duty on the imports by reference to the amounts it paid to the clothing suppliers, without regard to the rebates it received from the hanger suppliers. It subsequently submitted a claim for repayment of £313,243 on the basis that the rebates fell to be deducted from the sums paid to the clothing suppliers when calculating the customs value of the imported goods. The Appellants, HM Revenue & Customs ("HMRC"), rejected the claim on the ground that a rebate did not represent a reduction in the price paid by the buyer (Asda) to the seller (the clothing supplier) for the items imported. Asda, on the other hand, maintains that the duty for which it is liable must reflect the net cost of the hangers.

5. Asda appealed to the Tribunal, and its appeal was allowed. In the Decision, released on 3 May 2012, the Tribunal concluded that the customs value of the imported goods should take account of the rebates from the hanger suppliers. HMRC now appeal against the Decision.

The Community Customs Code

6. The relevant legislative provisions are to be found in Regulation 2913/92 ("the Customs Code").

7. Article 29 of the Customs Code provides, so far as relevant, as follows:

> "1. The customs value of imported goods shall be the transaction value, that is, the price actually paid or payable for the goods when sold for export to the customs territory of the Community, adjusted, where necessary, in accordance with Articles 32 and 33, provided:
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> (a) …
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> (b) that the sale or price is not subject to some condition or consideration for which a value cannot be determined with respect to the goods being valued;
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> (c) …
>
> (d) ….
>
> 2 ….

3 (a) The price actually paid or payable is the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller. The payment need not necessarily take the form of a transfer of money. Payment may be made by way of letters of credit or negotiable instrument and may be made directly or indirectly.

(b) …".

8. Article 32 of the Customs Code is in these terms:

"1. In determining the customs value under Article 29, there shall be added to the price actually paid or payable for the imported goods:

(a) the following, to the extent that they are incurred by the buyer but are not included in the price actually paid or payable for the goods:

(i) commissions and brokerage, except buying commissions,

(ii) the cost of containers which are treated as being one, for customs purposes, with the goods in question,

(iii) the cost of packing, whether for labour or materials;

(b) the value, apportioned as appropriate, of the following goods and services where supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods, to the extent that such value has not been included in the price actually paid or payable:

(i) materials, components, parts and similar items incorporated in the imported goods,

(ii) tools, dies, moulds and similar items used in the production of the imported goods,

(iii) materials consumed in the production of the imported goods,

(iv) engineering, development, artwork, design work, and plans and sketches undertaken elsewhere than in the Community and necessary for the production of the imported goods ….

2. Additions to the price actually paid or payable shall be made under this Article only on the basis of objective and quantifiable data.

> 3. No additions shall be made to the price actually paid or payable in determining the customs value except as provided in this Article …".

9. I should also set out Article 78 of the Customs Code:

> "1. The customs authorities may, on their own initiative or at the request of the declarant, amend the declaration after release of the goods.
>
> 2. The customs authorities may, after releasing the goods and in order to satisfy themselves as to the accuracy of the particulars contained in the declaration, inspect the commercial documents and data relating to the import or export operations in respect of the goods concerned or to subsequent commercial operations involving those goods. Such inspections may be carried out at the premises of the declarant, of any other person directly or indirectly involved in the said operations in a business capacity or of any other person in possession of the said document and data for business purposes. Those authorities may also examine the goods where it is still possible for them to be produced.
>
> 3. Where revision of the declaration or post-clearance examination indicates that the provisions governing the customs procedure concerned have been applied on the basis of incorrect or incomplete information, the customs authorities shall, in accordance with any provisions laid down, take the measures necessary to regularize the situation, taking account of the new information available to them".

10. Articles 29 and 32 of the Customs Code are modelled on Articles 1 and 8 of the "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade" ("the Valuation Agreement"), which was originally negotiated during the Tokyo round of GATT trade negotiations in the 1970s. The "General Introductory Commentary" to the Valuation Agreement says this about Articles 1 and 8:

> "The primary basis for customs value under this Agreement is 'transaction value' as defined in Article 1. Article 1 is to be read together with Article 8 which provides, *inter alia*, for adjustments to the price actually paid or payable in cases where certain specific elements which are considered to form a part of the value for customs purposes are incurred by the buyer but are not included in the price actually paid or payable for the imported goods. Article 8 also provides for the inclusion in the transaction value of certain considerations which may pass from the buyer to the seller in the form of specified goods or services rather than in the form of money".

11. It is also relevant to note that the preamble to the Valuation Agreement refers to:

> "the need for a fair, uniform and neutral system for the valuation of goods for customs purposes that precludes the use of arbitrary or fictitious customs values".

The Decision

12. The principal argument advanced before the Tribunal by Mr Roderick Cordara QC, who was appearing for Asda (as he also did before me), was that Article 32 of the Customs Code provided a mechanism for bringing the customs value of the imports into line with their net cost to Asda. The Tribunal rejected that argument, but it accepted that Article 29 enabled account to be taken of the rebates Asda received from the hanger suppliers. The Tribunal was influenced in arriving at that conclusion by the decision of the European Court of Justice ("ECJ") in Case 183/85, *Hauptzollant Itzehoe v H J Repenning GmbH*. The Tribunal considered (see paragraph 80 of the Decision) that the *Repenning* case:

> "provides good authority for the proposition that where there is clear evidence that the actual value of the relevant goods on import is less than the amount actually paid by the buyer to the seller, the lesser value is to be adopted for customs value purposes, whether the reduction in value is reflected by a repayment from seller to buyer or by some other payment which the buyer receives from third party".

13. The Tribunal summarised its reasons for allowing Asda's appeal in these terms:

> "82. We reject Asda's argument that its initial import declarations should properly be adjusted under Article 32….
>
> 83. We find that the Rebates reflect a true reduction in the actual customs value on importation of the goods in question, based on the real commercial effect of the tripartite arrangements between Asda, the clothing suppliers and the hanger suppliers. It follows that if the amounts of the Rebates were not deducted from the payments actually made to the clothing suppliers by Asda, the resultant customs values would be 'arbitrary or fictitious'.
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> 84. We find that the ECJ's decision in *Repenning* requires us, as was done in that case, to interpret Article 29 so as to avoid such a result.
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> 85. We would add that even if it is not permissible for the wording of Article 29.3(a) to be interpreted or overridden in this way, then in the light of the requirement to avoid 'arbitrary or fictitious customs values' (as approved in *Repenning*), we would in the circumstances of this case interpret the references in Article 29.3(a) of the Customs Code to 'seller' as applying separately to the hanger suppliers (in

relation to the hangers) and to the clothing suppliers (in relation to the remainder of the goods), so that the Rebates received from the hanger suppliers should be taken into account in fixing the customs value of the goods sold for export by the hanger suppliers through the clothing suppliers.

86. Having reached the conclusion that the 'price actually paid or payable' should take account of the Rebate, the *Terex* and *Overland* cases provide clear authority that an adjustment can (and, at the request of the importer upon production of sufficient evidence to justify the adjustment, should) be made to the customs value pursuant to Article 78.3 of the Customs Code".

The Article 29 arguments

14. As already mentioned, the Tribunal decided in Asda's favour on the basis that the *Repenning* case required it to construe Article 29.3(a) in such a way as to prevent the customs values from being "arbitrary or fictitious", as would be the case (in the Tribunal's view) if the rebates were not deducted. Alternatively, the references to "seller" in Article 29.3(a) should be interpreted "as applying separately to the hanger suppliers (in relation to the hangers) and to the clothing suppliers (in relation to the remainder of the goods)".

15. The *Repenning* case concerned a consignment of frozen beef which had been damaged by thawing by the time it reached Germany from Argentina. The damage reduced the value of the shipment by 17%, but the importer had already paid the full purchase price and did not think it practicable to make a claim for damages against the supplier. It was instead indemnified by insurers. The ECJ concluded that the Customs Code in force at the time (Regulation 1224/80):

> "must be interpreted as meaning that where goods bought free of defects are damaged before being released for free circulation the price actually paid or payable, on which the transaction value is based, must be reduced in proportion to the damage suffered".

The ECJ noted that this accorded with:

> "the solution expressly adopted by Commission Regulation No 1580/81, which came into force on 16 June 1981, subsequent to the importation at issue in the main proceedings".

The ECJ also referred to (a) the preamble to the Valuation Agreement and (b) a provision in the then Customs Code catering for the position where the goods imported were part of a larger quantity of goods purchased in a single transaction.

16. It is HMRC's case that the approach that the Tribunal adopted to Article 29 is inconsistent with the Article's terms. In essence, Mr David Bedenham, who appeared for HMRC, argued as follows. Subject to any adjustment for which Article 32 provides, Article 29 equates "transaction value" with "the price actually paid or payable for the goods when sold for export to the customs territory of the Community", and Article 29.3(a) states that "[t]he price actually paid or payable" is:

> "the total payment made or to be made by the buyer to or for the benefit of the seller for the imported goods and includes all payments made or to be made as a condition of sale of the imported goods by the buyer to the seller or by the buyer to a third party to satisfy an obligation of the seller".

In the present case, the "imported goods" comprised the clothing and hangers, and they were sold to Asda by the clothing suppliers. In each case, accordingly, the "seller" was the clothing supplier, with the result that, unless adjusted pursuant to Article 32, the transaction value will encompass everything that Asda paid to the clothing supplier for the clothing and hangers. The rebates Asda received from the hanger suppliers are immaterial since they did not affect what the clothing suppliers were paid: the rebates involved Asda and the hanger suppliers, not the clothing suppliers.

17. With regard to *Repenning*, Mr Bedenham said this in his skeleton argument:

> "On its facts, *Repenning* concerned the importation of goods that were damaged in transit. By the time of the decision in *Repenning* (and as recorded in the ECJ's judgment), a Commission regulation expressly dealing with damaged goods had come into force. However, the date of that regulation coming into force was subsequent to the relevant importation. The ECJ therefore interpreted the relevant legislative provisions so as to give rise to the same result as was now (at the time of the ECJ decision) provided for by the Commission regulation. Such an interpretation was permissible because, as shown by the subsequent Commission regulation in relation to damaged goods, the underlying intention of the Code was clearly to allow damage to goods to be taken into consideration for customs valuation purposes and, in the absence of the ECJ adopting the interpretation that it did, the result would have been inconsistent with that underlying intention.
>
> It will be apparent, then, that *Repenning* is simply an example of the ECJ interpreting a specific legislative provision in a way that is consistent with the underlying intention of the wider legislative scheme relating to damaged goods".

18. For its part, Asda offered little support for the Tribunal's approach to the *Repenning* case. "Grounds of Appeal" filed on Asda's behalf observed that

"[t]he only merit of a referral to *Repenning* in this case is that it underscores the importance of identifying the amount paid by the buyer for the purposes of a final duty calculation". In the previous sentence, the Tribunal was said to have:

> "incorrectly used Article 29 and *Repenning* in justification of an approach, which (alas) cannot be used because Article 32 does not feature".

Before me, as before the Tribunal, Mr Cordara's preferred argument was based on Article 32.

19. Mr Cordara none the less advanced several arguments in support of the Tribunal's view that the rebates from the hanger suppliers can be taken into account under Article 29. He submitted that, insofar as Asda's payments were attributable to the hangers, they were not paid to the clothing suppliers for their own benefit and fell to be disregarded in consequence; in the context, Mr Cordara suggested, "total payment" refers to what a seller can take for himself. Alternatively, the hangers are to be treated as having been supplied by the hanger suppliers, and a clothing supplier is to be seen as the "seller" of just clothing, not hangers. A further possibility, Mr Cordara argued, is to disregard the words "to or for the benefit of the seller" in Article 29.3(a) on the strength of *Repenning*.

20. I am afraid that I do not find any of these arguments convincing. Having regard to the terms of Article 29.3(a), the "price actually paid or payable" must include anything paid "by the buyer to … the seller" for the relevant goods. In any event, a clothing supplier surely received the whole of the price of the imported goods for its own benefit, albeit that it had to pay the hanger supplier a sum equivalent to the hanger element. Further, the clothing supplier must in each case have been the "seller" of the hangers: as the Tribunal found, the hangers "are supplied to the *clothing suppliers*" (emphasis added) by the hanger suppliers, and the clothing suppliers, in turn, sell them on to Asda. With regard to *Repenning*, while I do not find it easy to reconcile that decision with the wording of what is now Article 29, I do not think it can have entitled the Tribunal to interpret (or override) the Article as it did: *Repenning* is probably best explained in the way suggested by Mr Bedenham. The Tribunal's approach in effect ignores the words "to or for the benefit of the seller", and that cannot, with respect, be right. The Tribunal, for understandable reasons, seems to me to have stretched Article 29 further than it will go.

21. In the circumstances, the "price paid or payable" for the purposes of Article 29 was, I think, the amount of the total payment made by Asda to the clothing suppliers. The rebates Asda received from the hanger suppliers cannot be taken into account under Article 29.

The Article 32 argument

22. As I have already mentioned, Mr Cordara's preferred argument was based on Article 32 of the Customs Code.

23. Mr Cordara focused on Article 32.1(b), which provides for the value of "materials, components, parts and similar items incorporated in the imported goods" to be "added" to the "price actually paid or payable for the imported goods" "to the extent that such value has not been included" where "supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale for export of the imported goods". Mr Cordara submitted that the hangers represented "materials, components, parts and similar items incorporated in the imported goods", that they had been supplied by Asda "free of charge" (since Asda funded the clothing suppliers' payments to the hanger suppliers) and that, in the context, "added" should be taken to allow adjustment upwards *or downwards*. Mr Cordara argued that such a construction needs to be adopted to prevent customs values from being "arbitrary" and "fictitious" (to quote from the preamble to the Valuation Agreement).

24. Mr Cordara stressed that the Customs Code, like other European legislation, must be construed purposively. In support of this submission (which Mr Bedenham did not dispute), Mr Cordara cited a passage from Robert Walker J's decision in *BSC Footwear Supplies Ltd v HM Commissioners of Customs and Excise*, 8 June 1995, by way of illustration. That case concerned Regulation 1224/50 on the valuation of goods for customs purposes. Having noted that the preamble to the Regulation referred to the aim of removing barriers to international trade by harmonising methods of customs valuation, Robert Walker J said:

> "I accept [counsel for Customs and Excise's] submission that I must attach a good deal of weight to this stated objective of harmonisation and that it reinforces the need for a broad, purposive approach to construction which would in any event be appropriate. [Counsel for Customs and Excise] referred me to what was said by Bingham J in *Customs & Excise v Aps Samex* [1983] 1 All ER 1042, [1983] 3 CMLR 194, at p 1056 of the former report (in the context of references to the Court of Justice)-
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> 'The interpretation of Community instruments involves very often not the process familiar to common lawyers of laboriously extracting the meaning from words used but the more creative process of supplying flesh to a spare and loosely constructed skeleton. The choice between alternative submissions may turn not on purely legal considerations, but on a broader view of what the orderly development of the Community requires'".

25. The Tribunal rejected Mr Cordara's Article 32 argument in these terms:

> "64. We recognise that it is superficially attractive to regard the hangers as 'assists' under Article 32, because if they had indeed been provided directly or indirectly by Asda free of charge or at a reduced cost to the clothing supplier then they would have fallen four square within Article 32.1(b). However, the fact of the matter is that they were not supplied free of charge or at reduced cost, and we consider that the language of Article 32 is strained beyond breaking point by any attempt to treat the hangers as what might be called 'negative assists'.
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> 65. We bear in mind that Article 32 is clearly worded in order to capture value that might otherwise be inappropriately lost from the customs value and not in order to remove value that might be regarded as inappropriately enhancing it. In our view, it requires a huge and entirely unsupportable leap of interpretation to treat Article 32 as bearing the meaning that Mr Cordara asks. It would require a wholesale redrafting exercise which in our view simply cannot be justified under the heading of 'purposive interpretation'".

26. I agree. The opening lines of Article 32.1 refer to sums being "added" to the price, and Articles 32.2 and 32.3 likewise speak of "additions" to the price. Further, the various sub-paragraphs of Article 32.1 are all concerned with situations in which it is appropriate to increase customs values. Article 32 is, as the Tribunal said, directed at capturing value that might otherwise not be taken into account. It does not provide for price reductions.

27. That might not matter if, in the present context, the "price actually paid or payable for the imported goods" were calculated exclusively by reference to the clothing itself, exclusive of the hangers. It would then make sense that the value of the hangers should be added to the "price actually paid or payable". However, the hangers were themselves imported goods, and the clothing suppliers were paid for them: the price of the hangers was, as the Tribunal found (and was entitled to find), recharged to Asda "as part of the overall price which Asda [paid] for the finished clothing". The hangers cannot be left out of account when assessing the "price paid or payable for the imported goods". As mentioned above, the "price paid or payable" will rather have encompassed everything that Asda paid to the clothing suppliers.

28. Further, I agree with the Tribunal that the hangers were not supplied "free of charge or at reduced cost". In the first place, there can be no question of Asda having provided the hangers to the clothing suppliers "at reduced cost". If Asda is to be seen as having charged the clothing suppliers at all, it must be taken to have charged a full price. The sums attributed to the hangers were in *excess* of their net cost to Asda, not a reduced figure. Secondly, I do not think that Asda can be considered to have supplied the hangers to the clothing suppliers "free of charge". The clothing suppliers *were* charged for the

hangers, albeit that the cost was passed on to Asda. Article 32.1(b) is in point where the price charged for imported goods is depressed because the importer has supplied elements at less than market value. In the present case, in contrast, the clothing suppliers were charged for the hangers, and the prices charged to Asda were increased correspondingly.

29. In short, even adopting a purposive approach to the construction of Article 32.1(b) (as I must), I cannot read it as applying in the present case.

Conclusion

30. Asda's case has an obvious appeal. It would make a good deal of sense for Asda to pay duty on the net cost of the clothing and hangers rather than the somewhat larger sums it pays to clothing suppliers. The Tribunal's decision has the merit of achieving this result.

31. In the end, however, I have concluded that the Tribunal's approach is not consistent with the terms of Article 29 and that Mr Cordara's construction of Article 32 is also unsustainable. Notwithstanding, therefore, the attractions of the Tribunal's decision, it seems to me that I must allow HMRC's appeal. Import duty was, in my view, payable on the full amounts Asda paid to the clothing suppliers, without any deduction for the rebates it received from the hanger suppliers.

Mr Justice Newey

RELEASE DATE: 08 May 2013