TC03200

Appeal number: LON/2004/07042

CUSTOMS DUTY – anti-dumping duty – import from Turkey of colour TVs of Korean origin – whether entry in the accounts precluded by Article 220(2)(b) of the Community Customs Code – whether failure to enter amount of duty legally due a result of an error by the customs authorities – whether error could not have been reasonably detected by appellant - whether duty should be remitted under Article 239 – whether there was a "special situation" – whether gross negligence

FIRST-TIER TRIBUNAL
TAX CHAMBER

BEKO PLC
(formerly BEKO (UK) LIMITED) **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE ROGER BERNER
DR CAROLINE SMALL

Sitting in public at 45 Bedford Square, London WC1 on 10 – 11 December 2013

Frederick L Lukoff, EU/WTO Trade Consultants, and Izzet M Sinan, Morgan, Lewis & Bockius LLP, for the Appellant

Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is a long-standing dispute over anti-dumping duties ("ADDs") and import VAT that, with respect to this appeal, relates to two post-clearance demands ("C18s") issued by HM Customs and Excise ("HMCE") on 4 June and 15 July 2003 in the total sum of £552,246.98, but which for its historical context begins as far back as 1992.

2. This appeal is against the decision of HMCE on review dated 13 September 2004, refusing the claim of the Appellant, then Beko (UK) Limited, and now Beko PLC ("Beko UK"), that the entry of the ADDs in the account be precluded under Article 220(2)(b) or that the ADDs be remitted by virtue of Article 239 of the Community Customs Code, Council Regulation (EEC) No 2913/92 of 12 October 1992 ("the Customs Code"). It is accepted by Beko UK that, but for the application of either of these provisions, the sums required to be paid under the C18s are legally due; consequently the only issues before us are the application of Articles 220(2)(b) and 239.

3. As HMCE no longer exists, but has been subsumed into the larger HM Revenue and Customs, which are now the Respondents to this appeal, we shall refer to the Respondents as HMRC, whatever stage in the history we are addressing.

The facts

4. We received a number of witness statements, both on behalf of Beko UK and HMRC, but had oral evidence only from two witnesses for Beko UK, Mr Clayton Witter, formerly commercial director and general manager of Beko UK, and Mr Ahmet Celebi, formerly head of the intellectual properties department of Beko Elektronik AS, a Turkish company in the wider Beko Group (we shall refer to the wider group as "the Beko Group" or simply as Beko). We have had regard to the oral evidence we received, which was subject to cross-examination, but we have placed little reliance on the other witness evidence; we shall refer to such limited reliance when recording our findings of fact.

5. There was little dispute over the material facts, particularly those related to the historical background, much of which was a matter of record. We had a comprehensive bundle of documents. From the evidence we have considered, we find the following facts.

Background

6. Beko UK is a company incorporated in the UK which at all material times has been an importer of consumer electronic goods produced by its parent company in Turkey, Bekoteknik Sanayi AS ("Beko AS"). In the course of its business, Beko UK imported and sold colour television receivers ("CTVs") for the domestic consumer market. At all material times, relevant supplies of CTVs were sourced by Beko UK from Beko AS or its subsidiary or affiliated companies in Turkey.

7. Between 7 June 2000 and 18 October 2001, Beko UK imported into the UK a number of consignments of CTVs manufactured by Beko AS. Import declarations made by Beko UK in respect of these consignments declared that the origin of the goods was Turkey. However, the origin of certain of the consignments had been determined to be Korea.

8. The consignments were accompanied by contemporaneous A.TR.1 certificates, issued by the Turkish customs authorities, certifying that the goods could be lawfully circulated in the European Community pursuant to the Association Agreement between the EU and Turkey. The entry declarations were accepted by HMRC, and the goods were released for free circulation. Materially for the purpose of this appeal, the A.TR.1 certificates in each case included the words "Goods are of Turkish origin and manufactured in Turkey".

Anti-dumping proceeding 1992 – 95

9. In November 1992, the European Commission announced the initiation of an anti-dumping proceeding concerning imports into the Community of CTVs exported from or originating in Malaysia, China, South Korea, Singapore, Thailand and Turkey. The proceeding was initiated following a complaint by the Society for Coherent Anti-Dumping Norms (SCAN) on behalf of CTV producers established in the Community. With respect to Turkey, Beko AS was one of the producers investigated. The investigation period was the period from 1 July 1991 to 30 June 1992.

10. At the conclusion of the investigation, Commission Regulation (EC) No 2376/94 of 27 September 1994 imposed a provisional anti-dumping duty on imports of CTVs originating in Malaysia, China, South Korea, Singapore and Thailand (OJ 1994 L No 255 p50, 1.10.94) ("the 1994 Provisional ADD Regulation"). In relation to imports from Korea, the Commission set a level of provisional ADD at various rates for individual producers, and at a residual rate 18.8%.

11. In relation to Turkey, the investigation concluded that, for reasons including changes in circumstances as a result of Community and Turkish government action, and a considerable decline in exports of CTVs from Turkey to the Community, there were not sufficient elements to impose provisional measures against Turkey.

12. In its discussion of origin, at recital (24) of the 1994 Provisional ADD Regulation, the Commission observed:

> "At the outset of the investigation it was known that CTVs frequently incorporate components and parts originating in countries other than the country of manufacture and assembly of the finished product, with the result that CTVs may be considered as originating in a country other than the country of manufacture and assembly."

13. At recital (26) the Commission noted that it had addressed the question of origin in the light of the provisions of Commission Regulation (EEC) No 2632/70 of 23 December 1970 on determining the origin of radio and television receivers, replaced

on 1 January 1994 by Article 39 of and Annex 11 to Regulation (EEC) No 2454/93, as amended by Regulation (EC) No 2193/94 ("the Implementing Regulation"), laying down provisions for the implementation of the Customs Code and the detailed information regarding the origin and cost of CTV components, as well as processing costs, supplied by the exporters.

14. The Commission made its findings as to origin in relation to Turkey at recital (31):

> "In Turkey, of five cooperating companies, only one was found to be exporting CTVs of Turkish origin. Virtually the total output of three companies was found to originate in Korea, while the fifth company's output did not originate in any of the countries included in the complaint or in the proceeding."

15. Accordingly, although provisional measures were not imposed against Turkey itself, at recital (146) ADD was imposed on Beko AS, at the provisional rate of 7.7% in respect of CTVs assembled in Turkey, but having an origin of Korea.

16. The 1994 Provisional ADD Regulation was followed by Council Regulation (EC) No 710/95 of 27 March 1995 imposing a definitive ADD on imports of CTVs originating in the applicable territories, including Korea. (OJ 1995 L No 73, p3, 1.4.95) ("the 1995 Definitive ADD Regulation").

17. Having confirmed the position taken under the 1994 Provisional ADD Regulation in respect of CTVs of Turkish origin, recital (16) of the 1995 Definitive ADD Regulation dealt with the particular situation of Beko AS in the following way:

> "One Turkish exporter of Korean origin sets, for which a dumping margin was established for the purposes of the provisional regulation, had its normal values revised. This arose because of changes to the normal value of comparable sets manufactured and sold on the Korean market and upon which the exporter's margin was based. As a consequence of these changes it was determined that no dumping margin was applicable to this producer's exports of own-assembled Korean origin sets."

Accordingly, pursuant to Article 1 of the 1995 Definitive ADD Regulations, the rate of ADD applicable to Beko AS in respect of CTVs originating in Korea was set at 0%.

Anti-dumping proceeding 2000 -2001

18. In June 2000, the Commission received a complaint from the Producers of European Televisions in Co-operation ("POETIC") acting on behalf of Community producers of CTVs. POETIC alleged that there had been injurious dumping in imports of CTVs originating in or exported from Turkey. The Commission initiated an investigation, and in the course of that investigation carried out a visit to the premises of Beko AS in Turkey and to the premises of one of its related sales

companies. It also carried out inspections at various related importers in the Community, including Beko UK.

19. That prompted a letter to the Commission of 22 December 2000 from Mr Lukoff, at that time a partner in Stanbrook & Hooper s.c., on behalf of Beko AS. In that letter, Mr Lukoff referred to Article 24 of the Customs Code and the provision that goods whose production involves more that one country shall be deemed to originate in the country where they underwent the last, substantial, economically justified processing or working, and to Annex 11 of the Implementing Regulation, which contains a product-specific origin rule for CTVs. Mr Lukoff's letter concluded that, on the basis of tabulated data from Beko AS supplied by way an annex to the letter, the VAROO, that is the sum of the parts and labour originating in Turkey, did not exceed 45% of the ex works price of the CTV, and that the Beko CTV could not on that basis be treated as having Turkish origin.

20. Mr Lukoff then proceeded to examine the origin of the CTVs by application of the test of whether the value of parts from any other country exceeded 35% of the ex works price. The letter explained that Beko had looked first at the colour picture tubes ("CPTs") incorporated in the CTVs, since in many cases the ex works cost of those parts alone would exceed 35% of the ex works price, and thus as a practical matter be determinative of origin. Based on the data, this gave rise to the conclusion that, in almost all cases, the CTVs exported by Beko were of Community origin. In almost all cases, except for 33 inch CTVs, Beko AS had acquired its CPTs from EU manufacturers.

21. This was followed, on 30 January 2001, by a non-confidential summary filed by POETIC with the Commission of a submission concerning dumping and injury, responding to what it termed "Exporters' Distortion of Information". However, this submission did not refer to the arguments put forward on behalf of Beko as regards origin (the letter of 22 December 2000 had been marked "confidential"); it was responding to an earlier submission of 20 November 2000, which argued (so it appears, although we have not seen the November 2000 letter) that there had been no dumping and no injury to Community producers.

22. The Commission itself responded to Mr Lukoff on 6 April 2001. In its letter it reiterated the rules of origin applicable to CTVs, agreeing with Mr Lukoff's own description of the rules. It commented:

> "Given that CTVs frequently incorporate components and parts of several origins and that the major part of a CTV – the colour picture tube – does not originate in Turkey, the origin of all the CTVs exported from Turkey was examined as part of this anti-dumping investigation.
>
> This examination has shown that all CTVs exported from Turkey to the Community were declared as being of Turkish origin. However, when applying the special origin rules it was established that the origin of a large number of these CTVs could be other than Turkish.
>
> Indeed, the preliminary findings of this examination have shown that the very low export prices would allow the colour picture tubes to

> define the origin of the CTVs. However, the origin examination is still ongoing. In particular, with regard to the purchases/imports of basic parts of the CTVs. Thus it is not possible, at this stage, to determine accurately the origin of the CTVs exported from Turkey."

The Commission's letter concluded by saying that, in consequence, it was not intended to adopt any provisional anti-dumping measures, but that this did not pre-judge the outcome of the proceedings.

23. On 1 August 2001, the Commission issued to Beko AS a specific disclosure document in relation to the proceedings. In that document the Commission discussed its findings regarding the origin of CTVs exported by Beko AS to the Community. It concluded that the origin of those CTVs was "virtually determined by the origin of the CPT". Its finding was that Beko AS had been found to be exporting certain CTVs of Malaysian and Korean origin, and that it had therefore been considered appropriate to attribute to Beko AS dumping margins under Malaysia and Korea. The dumping margins for both were found to have been significant, and in excess of the dumping margins established for those countries in previous investigations.

24. The Commission's findings resulted in it adopting Commission Decision of 28 September 2001 terminating the anti-dumping proceeding concerning imports of CTVs originating in Turkey (OJ 2001 L No 272, p37, 13.10.2001) ("the 2001 Decision"). After referring to the rules for establishing the origin of goods, the 2001 Decision stated, at recitals (11) and (12):

> "(11) When applying the specific non-preferential origin rules in the present investigation, it was established that the origin of all CTVs exported to the Community between I July 1999 and 30 June 2000 (investigation period or IP) was other than Turkish. Exports to the Community were instead found to have their origin in the exporting countries subjected to the review investigations mentioned in recital 5 [*Our note: this included a review investigation regarding the anti-dumping measures applicable to imports of CTVs originating in Korea*], the Community or other third countries not subject to any investigation. In particular, it was found that for the exports of the investigated companies which correspond to all exports of the CTVs from Turkey to the Community during the IP, the 45% added value rule was not met. Thus the origin had to be determined on the basis of the 35% value rule of the non-originating parts/materials.
>
> (12) On the basis of the 35% value rule of the non-originating parts/materials, it was established that the origin of the cathode-ray colour television tube (CPT) virtually determined the origin of the CTVs, since the ex-works price of the CPT represented, in all cases, at least 35% of the ex-works price of the CTV. It should be noted that there is no production of CPTs in Turkey and, therefore, all CPTs are imported. Accordingly, the origin examination concluded that the CTVs exported from Turkey during the IP were of the origins of the CPTs used in their assembly."

OLAF investigation 2002 - 2003

25. The Commission therefore concluded that the anti-dumping proceeding should be terminated without the imposition of anti-dumping measures. But as a result of the findings, the European Anti-Fraud Office ("OLAF") commenced an external investigation into the importation of CTVs from Turkey. The investigation was opened on 23 January 2002 under Regulation 1073/99. The aims of OLAF's mission were described as follows:

> "Establish and verify the total quantities of colour picture tubes (CPTs) imported into Turkey from China, Korea and Malaysia by [Vestel Foreign Trade Co and Beko AS] between 2000 and 2002.
>
> Establish the quantities of these CPTs incorporated into finished colour televisions (CTVs) exported to the EU market.
>
> Establish the extent of the EU customers' knowledge of the origin of the CPTs given that the CPT generally determines the origin.
>
> Make listing of consignments per Member State where non-preferential origin is confirmed as Chinese or Korean, on the basis of which Member States can initiate recovery actions for anti-dumping duties evaded.
>
> Agree these facts in a report countersigned by both company and Turkish customs."

26. The OLAF mission visited Beko AS between 29 April and 2 May 2003. For Beko AS, those present included Mr Lukoff and also Mr Celebi, from whom we heard evidence. As part of Mr Celebi's presentation to the meeting on 29 April 2003, he explained that Beko AS was ranked fourth among the 50 largest private industrial companies in Turkey, and fourth within the Koç Group. It was at that time a company with some 3,200 employees. Beko AS had subsidiaries in the UK, Germany, Spain, Italy and France.

Expiry review 1999 - 2002

27. In the meantime, following publication in 1999 of a notice of impending expiry of the anti-dumping measures in force on imports of CTVs originating in, amongst others, Korea, POETIC had requested an expiry review. This culminated in Council Regulation (EC) No 1531/2002 of 14 August 2002 imposing definitive ADD on imports of CTVs originating in the various countries, including Korea. A dumping margin of 21.2% was applied to non-cooperating producers in Korea, and it having been confirmed that significant dumping was taking place, the same dumping margin of 21.2% was attributed to Beko AS. This resulted in ADD of 12.3% being imposed on exports of Beko AS CTVs assembled in Turkey but of Korean origin. The 2002 Regulation entered into force on 30 August 2002.

The ATR1 certificates

28. We were shown examples of A.TR.1 certificates (movement certificates) which, although not themselves relating to the CTVs in question in this appeal, we accept are

indicative of the origin wording employed. In each case, in box 10, which asks for a description of the goods and other identifying information, the words "Goods are of Turkish origin and manufactured in Turkey". At box 13 there is a declaration by the exporter: "I, the undersigned, declare that the goods described above meet the conditions required for the issue of this certificate" and the declaration is certified, in box 12, by customs endorsement.

29. We accept the evidence of Mr Celebi that the only reason the origin statement appeared in the A.TR.1 certificates was because this was a requirement of the Istanbul Chamber of Commerce, which had to stamp the A.TR.1 to validate it. Mr Celebi's evidence was also that Beko AS never doubted that the statement was correct. Our finding in that respect, based on Mr Celebi's evidence, is that no-one at Beko AS took any steps to verify the accuracy of the origin statement in any case.

30. The position of the Istanbul Chamber of Commerce can be ascertained from a letter dated 6 January 2006, intended for submission to HMRC in connection with these proceedings, from the Deputy General Secretary of that organisation. Having confirmed the practice of requiring the origin statement to be included on A.TR. certificates, and that the practice had ceased with effect from 1 July 2002, the Chamber explained the position as follows:

> "A.TR Circulation Certificates are issued at the time of exporting goods in free circulation in Turkey to EU countries. In accordance with the regulation governing the matter, in order to identify whether the commodity is in free circulation or not, the country of origin of the said commodity must also be known. For this reason, in previous applications filed with our Chamber for approval of A.TR Circulation Certificates, our Chamber has required entry on Circulation Certificates of the country of origin, for instance 'Made in Turkey' or 'of Turkish origin' if it were, for instance, a matter of Turkey as a country."

31. This letter makes no mention of any instructions given to the Istanbul Chamber of Commerce by the Turkish customs authorities. However, although we heard no oral evidence from Mrs Filiz Tamer, the clerk who was responsible within Beko AS for preparing the export documentation, we are prepared to accept that, in the course of the 2000–2002 anti-dumping investigation, Mr Lukoff having questioned why such a statement had been made on the forms A.TR.1, Mrs Tamer had been informed by the Chamber that "Ankara" had told the Chamber to insist on this requirement.

32. Although we accept that this was the explanation given to Mrs Tamer, we do not accept that it was correct. The true position, we find, is explained in a letter dated 1 November 2002 from Mr Ercan Saka, Acting Director General for the EC and External Relations to Irwin Mitchell, acting at that time for Beko UK. Irwin Mitchell had specifically asked whether the Turkish customs authorities had instructed Beko AS, or its related sales company, to include the origin statement in the A.TR.1s. In reply the Turkish authorities said:

> "The A.TR Movement Certificates do prove the free movement status of the goods, but not their origin. Neither CCC [EC-Turkey Customs

> Cooperation Committee] Decision No 1/2001 nor Turkish legislation on A.TR Movement Certificates involves provisions for indication of origin information on the Certificates. However, the statement written on the certificates with regard to the origin information has stemmed from the wrongdoing of the Istanbul Chamber of Commerce. The Turkish Customs Authorities never instructed the Chambers of Commerce to put origin indication on the certificates. In line with the legal obligations, even if there is an origin indication on a certificate, the Turkish Customs officers do not take such declarations into consideration while endorsing an A.TR Movement Certificate. The only criterion that is strictly controlled by the customs is free circulation status of the goods. Once they are satisfied with information in relation to free circulation principle the customs officers endorse the certificate.
>
> Istanbul Chamber of Commerce, without knowing the proper application, had led the companies to declare origin information in box 10 of the A.TR Movement certificates. It has been found that the statement "The goods are of Turkish Origin and manufactured in Turkey" used to be stated in box 10 of the certificates. The box 10 requires the operator to fill in the information concerning the marks, numbers, quantity, kind of packages and the normal trade description of the goods, but not something related with origin. We think that the origin statement was not put for customs purposes, but to facilitate opening of bank accredits. The Chambers of Commerce have been instructed with the correct information by the Undersecretariat of Foreign Trade, and would therefore not let such an implementation occur again."

33. That instruction had been made by letter dated 29 August 2002, whereby Mr Recai Sen, Acting Director General for the EU and External Relations of the Turkish Undersecretariat of Customs, issued a circular to various companies setting out various aspects of the customs law in Turkey. It made the following comment in relation to A.TR certificates:

> "Both the Decision No 1/2001 and Regulation on A.TR Movement Certificates are in force as of 01.01.2001. Neither Decision No 1/2001 nor Regulation on A.TR Movement Certificates involves provision for indication of origin information on the certificates. Thus, an A.TR Movement Certificate is used to prove the free circulation status of the goods. Therefore, there is no legal basis for searching origin information on the certificate.
>
> In line with the above-mentioned statements, even if there is an origin declaration on a certificate, the Turkish Customs officers do not take such declarations into consideration while endorsing an A.TR Movement Certificate. The only criterion that is strictly controlled by the customs, is free circulation status of the goods. Once they are satisfied with information in relation to free circulation principle the customs officer endorses the certificate."

Witness evidence: further findings of fact

34. From the evidence we received, both from Mr Celebi and from Mr Witter, we make the following further findings:

(1) Beko UK is purely a distribution company. It imports and resells the products produced in Turkey by related companies, including Beko AS. It also provides after-sales service for the products in question.

(2) The Turkish companies provided all the documentation required to export the products, together with any further information required by UK customs brokers and freight forwarders for import of the products into the UK in the context of the EU/Turkish customs union. This included preparation of the A.TR movement certificate.

(3) Beko UK simply took the data as it received it. It had no expertise or ability in practice to verify the data. No-one at Beko UK questioned the origin statement on the A.TR.

(4) In relation to the A.TR.1s, since these were required documents for the free movement of goods, Beko AS did not ask any questions; it simply provided the statement of origin that the Istanbul Chamber of Commerce required.

(5) Although Mr Pritchard invited us to find, in respect of Mr Celebi's evidence, that the Beko Group (and consequently Beko UK, as a wholly-owned subsidiary) knew that the A.TR.1s were not "certificates of origin" and therefore that the declaration that had been written on the A.TR.1s by Beko AS staff was, so far as Beko were concerned, simply "not relevant" to the question of country of origin, we do not consider that the evidence supports this for the relevant period. Mr Celebi's evidence was certainly to the effect that the A.TR.1s were not relevant to the question of origin, but this was something that he himself had learned in the course of these proceedings. On the other hand, whilst we are unable to make a finding of knowledge in this respect, there is on the other hand no evidence that Beko AS directed its mind to the relevance of the origin declaration, and accordingly, to the extent that Beko did not know at the relevant time that the origin declaration on the A.TR.1s was irrelevant, we find that this was because they had not addressed that question.

(6) Beko AS operated a "buy European" policy. However, we understand from Mr Celebi's evidence, and so find, that this was not directed at obtaining European origin for its CTVs; it was essentially to attempt (misguidedly as it turned out) to reduce the risk of a European producer bringing an anti-dumping complaint.

The UK proceedings

35. Member states were obliged to apply Regulation 1531/2002. Accordingly, on 4 June and 15 July 2003, the C18s were issued to Beko UK. By letter from Stanbrook-Hooper dated 24 June 2003, Beko UK sought a review on a number of grounds, including for the ADDS to be precluded under Article 220(2)(b) and for remission of the ADDs under Article 239.

36. HMRC issued the review letter on 13 September 2004. It dealt with the arguments put forward under Articles 220(2)(b) and 239 in the following way:

(1) *Article 220(2)(b)*. It had been submitted by Stanbrook-Hooper that there were grounds under Article 220(2)(b) as there was a clear error on the part of the Istanbul Chamber of Commerce in erroneously endorsing the relevant A.TR certificates with the words "Goods of Turkish origin". The review decision was that, even if the endorsement on the A.TR certificates was to be considered an error, Beko was a large multinational group which could have been expected to have detected the error. It was pointed out that the A.TR certificate was not (and had never been) an origin certificate, and that any experienced operator should know that. A company such as Beko UK should have been aware of the origin rules set out in Annex 11 of the Implementing Regulation.

(2) *Article 239*. The review pointed out that for remission to be granted, there must be a "special situation". It had to be established that the person in question is in an exceptional situation compared with other persons engaged in the same business and that, if that situation had not existed, he would not have been disadvantaged by entry into the accounts of the duties. The review concluded in this respect that, since Beko UK was not the only importer to have received demands relating to importations of CTVs from Turkey, it could not be in an exceptional situation nor have been disadvantaged.

The law

EU legislation

37. We shall recite the provisions of Articles 220(2)(b) and 239 of the Customs Code when we consider the application of those provisions.

38. The starting point is the Customs Code itself, Article 22 of which, in relation to non-preferential origin of goods, includes provision for tariff measures, including ADDs. Article 24 of the Customs Code provides that goods whose production involves more than one country are deemed to originate where they underwent their last, substantial, economically justified processing or working.

39. More substance is given to Article 24 by Article 39 of the Implementing Regulation, which sets down particular origin rules for particular products listed in Annex 11. The relevant part of Annex 11 is as follows:

CN Code	**Description of products**	**Process or operation carried out on non-originating materials that confers the status of originating products**
ex 8528	Television receivers, (excluding videotuners, television projection	Manufacture where the increase in value acquired as a result of assembly

	equipment and video monitors), whether or not combined, in the same housing, with radio-broadcast receivers or sound recording or reproducing apparatus, but not with videorecording or reproducing apparatus	operations and, if applicable the incorporation of parts originating in the country of assembly represents at least 45% of the ex-works price of the products When the 45% rule is not met, the apparatus shall be treated as originating in the country of origin of parts whose ex-works price represents more than 35% of the ex-works price of the apparatus When the 35% rule is met in two countries, the apparatus shall be treated as originating in the country of origin of parts representing the greater percentage value.

Jurisdiction

40. An appeal to this Tribunal lies under s 16 of the Finance Act 1994 ("FA 1994"). Under s 16(5) the Tribunal has the power to quash the decision of HMRC on review, and power to substitute its own decision for any decision quashed on appeal.

41. Unless we dismiss this appeal, then to the extent that we uphold it, our power does not extend to the quashing or remittal of the ADD itself. In those circumstances, the provisions of the Customs Code – in relation to Article 220(2)(b), Article 871, and in relation to Article 239, Article 905 - will apply, and the case will need to be transmitted to the Commission in accordance with the special provisions set out in the Customs Code. This is the case, having regard, firstly, to the fact that the circumstances of the case are related to the findings of a Community investigation, and secondly that the amount of the ADD in question is at least EUR 500,000.

Discussion

Article 220(2)(b)

42. Article 220 of the Customs Code is essentially the provision under which post-clearance demands may be made. Where an amount of duty lower than that which is

legally owed has been entered in the accounts, a subsequent entry can be made. However, a subsequent entry is precluded in certain cases, including, by virtue of Article 220(2)(b), where:

> "the amount of the duty legally owed was not 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 …"

43. There are a number of elements of Article 220(2)(b) that fall to be considered:

(1) Was there an error?

(2) Was the error made by the "customs authorities"?

(3) Was the failure to enter in the accounts the amount of duty legally owed *a result of* the error?

(4) If (1), (2) and (3) are established,

(a) Is it the case that the error could not reasonably have been detected by the person liable for payment?

(b) Did that person act in good faith?

(c) Did that person comply with all the provisions laid down by the legislation in force as regards the customs declaration?

44. Mr Lukoff based his case on Article 220(2)(b) on the error, as he put it, of the Istanbul Chamber of Commerce in requiring a statement of Turkish origin in the A.TR.1 certificates. He argued that, and we are prepared to accept for this purpose, other chambers within Turkey had not imposed the same requirement. Nor was the error that of the central Turkish authorities.

45. Mr Lukoff submitted that the error could not reasonably have been detected by Beko UK. He referred to HMRC's review decision rejecting this argument on the ground that Beko "is a large multinational group with extensive experience in the manufacture and export of CTVs" as having been made without consideration of the facts. When those facts had been taken into account, argued Mr Lukoff, it could be seen that Beko UK could not reasonably have been expected to detect the error.

46. Mr Lukoff based this submission on three main factors. First, he pointed to the fact that the requirement to make the Turkish origin statement on the A.TR.1 was something that had been in place for many years and for all products. As it was made on each of the thousands of export shipments made each year, it was not subject to extensive reflection each time it was used. It was simply part of a routine administrative procedure.

47. Secondly, Mr Lukoff contended that the application of the product-specific origin rule was never crystal clear. It was Mr Lukoff himself who had, in December 2000, put forward the arguments supporting the position that the origin of the CPTs

was decisive, and that accordingly the origin of the CTVs could not be Turkey. It took the Commission seven months to accept that argument, and there has been considerable dispute since by other manufacturers. As a practical matter, Mr Lukoff submitted that the data to do the relevant calculations had not been readily available; it had not been apparent from the data from the suppliers of components, but had been obtained from quality control data.

48. Finally, Mr Lukoff referred to the lack of relevant expertise within the Beko Group. He pointed to the absence of an internal legal department, or in-house lawyer, and the purely administrative functions performed by Mrs Tamer.

Legitimate expectation

49. As Mr Pritchard submitted, Article 220(2)(b) is intended to protect the legitimate expectation of the person liable to the customs duties that all the information and criteria on which the decision whether or not to proceed with the recovery of customs duties is based are correct (see ***R v Customs and Excise Commissioners ex p Faroe Seafood Co Ltd and another***; ***R v Customs and Excise Commissioners ex p Smith***, Joined Cases C-153/94 and C-204/94, ECJ, 14 May 1996). As the Court in *Faroe Seafood* said, at [91]:

> "… it follows from the wording of [Article 220(2)(b)] itself that the legitimate expectations of the person liable attract the protection provided for in that article only if it was the competent authorities 'themselves' which created the basis for those expectations. Thus, only errors attributable to acts of the competent authorities confer entitlement to the waiver of post-clearance recovery of customs duties …"

50. The Court went on to find that this condition could not be regarded as fulfilled where the competent authorities have been misled, in particular as to the origin of the goods, by incorrect declarations on the part of the exporter whose validity they do not have to check or assess.

Customs authority

51. There was no argument before us concerning the status of the Istanbul Chamber of Commerce as a "customs authority" for this purpose. In this context, the question of the definition of "customs authorities" or "competent authorities" has been considered by the ECJ, the case law of which includes within this description not only the authorities competent for taking action for recovery but any authority which, acting within the scope of its powers, furnishes information relevant to the recovery of customs duties and which may cause the person liable to entertain legitimate expectations. This would therefore include both the Turkish central customs authorities and the Turkish customs authorities which issued the A.TR.1 certificates (***Ilumitrónica – Iluminação e Electrónica Ldª v Chef da Divisão de Procedimentos Aduaneiros e Fiscais and others***, Case C-251/00, ECJ, 14 November 2002. at [40] – [41]).

52. We are content to accept that, in principle, the Turkish Chamber of Commerce may qualify as a "customs authority" for this purpose. We say "in principle", because it appears to us that there is a question whether, in the circumstances of this case, the Chamber was indeed acting within the scope of its powers in requiring any declaration as to the origin of the goods, and that in any event the question is bound up with whether the information might have caused Beko UK to entertain legitimate expectations.

53. In this connection, for completeness, we should mention a decision to which we were referred of the Irish Commissioner found on similar facts to those of this appeal that the Istanbul Chamber of Commerce was not an authority for applying customs rules. As that submission was not made to us, we do not need to consider it further.

Error

54. It is plain to us, on the facts, that the Istanbul Chamber of Commerce did not make any error as regards identifying the origin of the CTVs. The Chamber was not concerned with questions of origin. The A.TR.1 was accepted by both parties as not comprising a certificate of origin. The letter from the Turkish authorities of 1 November 2002 made quite clear that the certificate was concerned only with free circulation of goods, and that the customs officials did not take declarations of origin into account when endorsing a certificate.

55. On the other hand, we find that there were errors by the Istanbul Chamber of Commerce, firstly in considering that a declaration of origin was required to be made in the A.TR.1, and secondly, as appears from the evidence, in believing that this was the result of instruction from the central Turkish customs authorities.

56. We do not consider the fact that Beko AS itself made the incorrect declaration of origin is decisive of the question whether the customs authority made an error. We accept that, according to Article 199 of the Implementing Regulation, it is for the declarant to ensure that its declarations are correct, and that on the basis of *Faroe Seafood* at [94] the mere certification of declarations of origin by the competent authorities is not sufficient for there to be an error on the part of those authorities, but it is equally the case (*Ilumitrónica*, at [45]) that it is not sufficient to rely on an incorrect declaration by the exporter in order to exclude any possibility of an error by the competent authorities.

Was non-collection due to the error of the competent authorities?

57. It is not sufficient that there be an error on the part of the customs authorities. It is necessary that the non-collection of the duty legally due should have been due to that error. It is only when it is the error of the customs authority that has the causative effect that the proper duty is not collected that Article 220(2)(b) can have effect. As *Faroe Seafood* makes clear (at [91]), the protection of Article 220(2)(b) arises only where the person liable has legitimate expectations that have been created by the competent authorities.

58. We find that if Beko UK harboured any expectation that the CTVs in question (those which were of Korean origin) were in fact of Turkish origin, such an expectation could not have arisen from the errors of the Istanbul Chamber of Commerce in requiring Beko AS to make the declaration of origin. There was, as we have found, no error on the part of the Chamber as regards the origin itself, and to the extent Beko UK relied on that declaration in the A.TR.1, that reliance could not create a legitimate expectation by reference to an error of the Chamber.

59. Although we have not made a finding that Beko itself knew that the A.TR.1 was not a certificate of origin, and that the Turkish customs authorities would take no steps to verify a declaration made by Beko AS, this is something that Beko should, in our judgment, reasonably have been expected to know. The A.TR.1 certificates were common features of the day-to-day trading activity of Beko AS and other companies in the group, including Beko UK, and steps should have been taken to understand the nature of the relevant customs documentation. The administrative nature of the task of completing the A.TR.1 certificates, or the absence of technical expertise on the part of the person delegated this task, does not detract from the reasonable requirement to appreciate the significance of the customs documents connected with the Beko group's transactions.

60. Our finding in this respect therefore is that, to the extent that Beko UK relied on the A.TR.1, its reliance was on an error made by Beko AS and not by the Turkish authorities.

Conclusion on error

61. We accordingly conclude that there was no error of the customs authorities which resulted in the non-collection of the ADDs legally due in this case. For that reason, Article 220(2)(b) cannot apply.

62. In those circumstances, it is not necessary for us to consider the remaining conditions for the application of Article 220(2)(b), but as we heard full argument on those matters, and in case this appeal goes further, we shall now address those questions.

Whether Beko UK acted in good faith, and whether it would have reasonably been able to detect the error of the customs authorities

63. In arguing that Beko UK would not reasonably have been able to detect the error of the customs authorities, Mr Lukoff focused his attention on the origin of the CTVs. In other words, this argument was based on the assumption that relevant error was made by the Istanbul Chamber of Commerce in insisting on the Turkish origin being noted in the A.TR.1s, and in stamping the forms with such a declaration. In considering this submission, therefore, we shall proceed on the same assumption.

64. The burden of Mr Lukoff's argument in this respect was that the facts showed that the understanding of the position regarding origin had evolved over time, and that it was not reasonable, at the material time for these proceedings, for Beko UK to have

known that the statement on the face of the A.TR.1 certificates that the CTVs were of Turkish origin was wrong. Mr Lukoff pointed to his own analysis that had given rise to his letter to the Commission in 2000, the paucity of information on which Beko could itself ascertain the origin, and the fact that, despite knowing that there was no CPT production in Turkey, POETIC had in 2000 filed its complaint on the basis of CTVs being of Turkish origin. Mr Lukoff referred further to the time it had taken the Commission to verify and agree with Mr Lukoff's analysis. He also reiterated the lack of relevant expertise within the Beko group.

65. In our view the Beko group, and Beko UK, ought reasonably to have detected that the origin statement on the A.TR.1 certificates was incorrect. Any exporter and importer of goods must take care to understand the origin of the goods in which it is trading. The rules for the origin of the particular goods in question were clearly spelled out in Annex 11 of the Implementing Regulation. It cannot, in our view, be argued that it is unreasonable to expect an exporter and importer of goods specified in Community legislation to have in place processes to identify the origin of goods by reference to the criteria set out in those regulations.

66. The reference by Mr Lukoff to the complexity of the rules, and the practical difficulties for Beko in ascertaining the position from information available to it, fall into this category. If Beko AS, and through it Beko UK, did not have in place procedures for capturing relevant origin information, and for analysing its products to check the correct origin under Annex 11, then in our view, it is reasonable to expect that they should have done so, with the result that they would reasonably have been able to detect that the CTVs in question were not of Turkish origin.

67. The fact that the Commission took time to accept the view of Mr Lukoff expressed in his December 2000 letter does not assist Beko UK. The Commission was not in a position to reach a conclusion on the matter without being provided with documentation and analysis from traders such as Beko AS. It was those traders which had, or should reasonably have had, information enabling them to ascertain the origins of goods imported and exported, and it is of no avail to point to the deliberations of the Commission, which is not in the position of such a trader.

68. We agree with Mr Pritchard, when he points to the 1994 Provisional ADD Regulation as having made it clear that goods assembled in Turkey could have a non-preferential country of origin that was not in Turkey, and referring to Annex 11 of the Implementing Regulation. We also agree that traders have a responsibility to be aware of the contents of the Official Journal and to act accordingly (see *Covita AVE v Elliniko Dimosio (Greek State)*, Case C-370/96, ECJ, 26 November 1998). The response of Beko AS to adopt a "buy European" policy might have been reasonable only if its adoption had been designed in a way that ensured that, either there was no possibility of the goods having a non-European origin, having regard to the provisions of Annex 11, or other measures had been put in place to identify those cases where, notwithstanding the policy, the CTVs in fact had a different origin. In fact, as we have found, the "buy European" policy was not designed to ensure a particular origin of the goods, but in a vain attempt to forestall complaints from European producers.

69. In our view, the argument that Beko AS did not have the relevant expertise is a powerful one, not in favour of Beko UK's position, but against it. It was in our view not reasonable for a company such as Beko, engaged as it was in regulated interenational trade, and in the knowledge that questions of origin had been raised in the context of anti-dumping duties, not to have put in place the appropriate infrastructure to enable it to detect errors in the origin classification of its goods.

70. Accordingly we find that the entry in the accounts, on which the post-clearance demands for ADD were based, is not precluded by Article 220(2)(b).

Article 239

71. Article 239 of the Customs Code provides for duties to be repaid or remitted in certain circumstances including those:

> "resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The 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."

72. In this case the application for remission is made with reference to Article 905 of the Implementing Regulation, which provides:

> "Where the application for repayment or remission submitted under Article 239(2) of the Code 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 the decision-making customs authority belongs shall transmit the case to the Commission …"

73. For a case in this respect to be transmitted to the Commission, therefore, there has to be found:

(1) a "special situation"; and

(2) that situation must result from circumstances in which no deception or obvious negligence may be attributed to Beko UK or any person involved with the completion of the customs formalities relating to the goods concerned, or who gave the instructions necessary for the completion of those formalities (Article 899(3)).

Special situation

74. The nature of a "special situation" for these purposes can be ascertained from *SCI UK Ltd v European Commission,* Case T-239/00, ECJ, 4 July 2002. That decision, which concerned anti-dumping duty in the context of certain price undertaking documents that had been used fraudulently by certain third party producers, made clear (at [44]) that the predecessor of Article 239, and consequently Article 239 itself, constitutes a general equitable provision designed to cover

situations other than those which arose most often in practice and for which special provision could be made when the regulation was adopted. It went on to say (at [50]):

> "According to settled case-law, [Article 239] is intended to be applied where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred."

75. In *Kaufring AG and others v European Commission* (Case T-186/97) *and others*, ECJ, 10 May 2001, the cases concerned the importation into the Community of CTVs assembled in Turkey. One of the importers was Beko AS. At the material time, CTVs manufactured in Turkey were imported into the Community under A.TR.1 certificates and thus qualified for exemption from customs duties, However, it was ascertained that the Turkish authorities were validating A.TR.1 certificates without any compensatory levy being collected. The A.TR.1 certificates were, accordingly, invalid.

76. At [218] the ECJ held:

> "The case-law indicates that the existence of a special situation is established where it is clear from the circumstances of the case that the person liable is in an exceptional situation as compared with other operators engaged in the same business (see Case C-86/97 *Trans-Ex-Import* [1999] ECR I-1041, paragraphs 21 and 22, and Case C-61/98 *De Haan* [1999] ECR I-5003, paragraphs 52 and 53) and that, in the absence of such circumstances, he would not have suffered the disadvantage caused by the error in the accounts *a posteriori* of customs duties (Case 58/86 *Coopérative Agricole d'Approvisionnement des Avions* [1987] ECR 1525, paragraph 22).

77. As Article 239 is a general equitable provision, it is not constrained by considerations of legitimate expectation in the same way as Article 220(2)(b). Thus, although the presentation of invalid certificates and a consequent error of the competent authorities are not sufficient to constitute a special situation, the cause of the error by those authorities (which in *Kaufring* was the inadequate monitoring of the relevant association agreement between the EEC and Turkey) may constitute a special situation.

78. As regards the nature of a special situation, we accept the submission of Mr Lukoff that this does not require that the situation be unique to the particular trader. It is sufficient, as was the case in *Kaufring*, that the situation has the effect of placing one or more persons in a special position in relation to other traders carrying out the same activity. This can be discerned from *Kaufring* at [302], where the deficiencies identified as attributable to the Commission and the Turkish authorities were held to have helped to bring about the irregularities which led to customs duties being entered into the accounts of the applicants in that case.

79. On the other hand, we do not accept that the insertion of the erroneous origin declaration in the A.TR.1 certificates, because of the requirements of the Istanbul Chamber of Commerce, can be a special situation within the meaning of Article 239.

To be such a special situation, it is not only necessary for the situation to be special, or different, that that applicable to other traders, the disadvantage to Beko UK must have been caused by the situation. As we have held in relation to Article 220(2)(b), the causative element is missing in this case; the origin declaration was of no relevance to the A.TR.1 certificate. The irregularity which in this case has led to ADDs being imposed on Beko UK is not the false statement of origin in the A.TR.1 certificates, but the fact that the CTVs were of Korean origin in circumstances where a dumping margin arose and ADD was accordingly imposed. The declaration on the A.TR.1 certificates had no effect, and did not lead to the entry in the accounts; all the conditions necessary for such an entry were present before the origin declaration was made. The position is very different from that in *Kaufring* where, if the compensatory levy had been paid, the duty would not have become due

80. On that basis, therefore, we conclude that the circumstances of the erroneous origin declaration in the A.TR.1 certificates did not give rise to a special situation for Beko UK in relation to Article 239. Before us, that was the sole ground on which Mr Lukoff sought to rely. Although Beko UK's statement of case put forward a number of grounds which, collectively, were said to give rise to a special situation, My Lukoff told us that no real reliance was placed on these. However, we will deal with them shortly.

81. It was argued that the country of origin rule is a very technical, product-specific, rule that focuses on a limited group. That cannot, in our view, create a special situation. Although, as we described earlier, it is not necessary for a trader to be in a unique position in relation to other traders, it is necessary, as *Kaufring* makes clear at [302], that the comparator group of traders must consist of those carrying on the same activity. In this case, that activity is the import of CTVs. The product-specific origin rule in Annex 11 of the Implementing Regulation is one that applies to all such importers. It therefore lacks any special characteristic in relation to Beko UK.

82. For the same reason, we also dismiss the argument that there is an evolution in the manufacture of the product in question that changes the impact of the origin rule over time. We agree with Mr Pritchard that the fact that the effect of a rule changes over time as the price of different components varies is merely reflective of how the rule as to country of origin is intended to work. That is something that affects all relevant traders equally, and cannot create a special situation.

83. Finally, as Mr Lukoff recognised, the fact that CTVs manufactured by the Korean producers of the CPTs were not, in the result, by virtue of Council Regulation (EC) No 2584/98 of 27 November 1998, subjected to definitive anti-dumping duties does not establish any special situation as regards any other CTV producer. The application of a 0% rate of duty in those cases simply reflected the individual circumstances of those producers, and cannot give rise to a special situation for a producer found to be subject to ADD.

Obvious negligence

84. On the basis of our finding that there was no special situation as regards Beko UK, that is sufficient to dispose of Beko UK's appeal in this respect.

85. If we were to assume that a special situation had arisen as a result of the circumstances in which the Turkish origin declaration was required to be made in the A.TR.1 certificates, we would make the following findings in respect of obvious negligence. (It was not argued by HMRC that there was any deception in this case.)

86. In relation to the meaning of "obvious negligence", we were referred to the case of *Firma Söhl & Söhlke v Hauptzollamt Bremen*, Case C-48/98, ECJ, 11 November 1999, from which the following principles can be discerned:

> (1) Repayment or remission of import and export duties constitutes an exception to the normal import and export procedure. Consequently, the provisions in that respect are to be interpreted strictly. Since a lack of "obvious negligence" is an essential condition of being able to claim repayment or remission of import or export duties, it follows that the term must be interpreted in such a way that the number of cases of repayment or remission remains limited (para [52]).
>
> (2) The condition that there be no obvious negligence is to be interpreted in the same way as the condition in Article 220(2)(b) that no error has been made by the customs authorities that could reasonably have been detected by the person liable (para [54]).
>
> (3) In determining whether there has been "obvious negligence" within the meaning of Article 239, account must be taken in particular of the complexity of the relevant provisions, and the professional experience of, and care taken by, the trader (para [56]).
>
> (4) As regards the professional experience of the trader, it is necessary to examine whether or not he is a trader whose business activities consist mainly in import and export transactions and whether he had already gained some experience in the conduct of such transactions (para [57]). As regards the care taken by the trader, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make enquiries and seek all possible clarification to ensure that he does not infringe those provisions.

87. Applying these principles, we reach the same conclusion regarding obvious negligence as we did in relation to the reasonable detection by Beko UK of the assumed error of the Istanbul Chamber of Commerce. Beko UK was a distributor of products imported from its Turkish parent, and other operating companies. It had experience of those transactions. However, in common with Beko AS, it failed to put in place the necessary infrastructure to check the origin of the goods it imported. It was, particularly having regard to the prior anti-dumping investigations and regulation, careless of its responsibilities in this area. It failed at the material time to make necessary enquiries and seek relevant clarification, either as regards the origin

of the goods, or of the Turkish authorities as to the procedure adopted by the Istanbul Chamber of Commerce in connection with the A.TR.1 certificates.

88. For all these reasons, if we had found that there was a special situation in the absence of which Beko UK would not have suffered the disadvantage caused by the error in the accounts, we would nevertheless find that the situation resulted from circumstances in which Beko UK and Beko AS were guilty of obvious negligence.

89. The claim for remission of duties under Article 239 must fail.

Decision

90. Accordingly, this appeal is dismissed.

Application for permission to appeal

91. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 10 January 2014