



[2020] UKFTT 0099 (TC)

TC07593

ANTI--DUMPING DUTY – import of solar panels from China – Post Clearance Demand Notice – 11 invoices declared invalid – direct effect of Implementing Regulation 2017 – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/04892

BETWEEN

SUNSHINE SOLAR LIMITED

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE GUY BRANNAN
MR JULIAN STAFFORD**

Sitting in public at Norwich on 22 November 2019

Mr Michael Charville and Mr John Clark, Directors, for the Appellant

Ms Priti Patel, litigator of HM Revenue and Customs' Solicitor's Office, for the Respondents

DECISION

INTRODUCTION

1. This appeal concerns Anti-dumping Duty (“ADD”), Countervailing duty (“CVD”) and VAT. ADD is a customs duty on imports, it provides protection against the dumping of goods in the EU at prices substantially less than the normal value. CVD is a customs duty imposed on goods which have received government subsidies in the originating or exporting country.
2. Sunshine Solar Limited (“the Appellant”) appeals against the decision dated 14 March 2018 by the Respondents (“HMRC”) to issue a C18 Post Clearance Demand notice (ref C18264643) for ADD, CVD and VAT in an amount of £115,252.07. The notice concerned the import into the UK of solar panels from a supplier in China called Shenzhen Topray Solar (“Topray Solar”).
3. The C18 notice, in the total amount of £115,252.07, comprised £83,157.07 (ADD), £12,886.32 (CVD) and £19,208.68 (import VAT).
4. It was not in dispute that the rate of ADD and CVD were 41.30 % and 6.4% respectively.

THE FACTS

5. There were 11 invoices which were the subject of the C18 notice. They were as follows:

EPU	Entry number	Entry date	Invoice number
071	047382W	27/04/2015	XD2015032001
071	041353L	16/06/2016	XD2015052201
071	001953M	03/08/2015	XD2015062702
071	045549X	16/10/2015	XD2015091803
071	031865W	16/11/2015	XD2015101601
150	000477B	04/01/2016	XD2015112602
071	025832R	12/02/2016	XD2015123102
071	035493A	16/05/2016	XD2016042002
155	007248E	22/06/2016	XD2016052002
155	010708E	22/08/2016	XD2016072702
071	053962P	24/10/2016	XD 2016092601

6. On 30 January 2018 HMRC wrote to the appellant in the following terms:

“As you may be aware the European Commission (“the Commission”) monitors the compliance of exporters of solar panels to ensure that they are issuing valid undertakings which exempted their goods from anti-dumping duties. The Commission have recently verified information provided by [Topray Solar] in respect of the undertakings issued by them. The results of this verification have been published in Commission Implementing Regulation (EU) 2017/1408.

This information was also published on our website as Anti-Dumping Duty Notice number AD2219.

As a result of this investigation the Commission concluded that products covered by the undertaking were sold together with products not covered by

the undertaking to the same customer and where undertaking invoices were issued for the sales of products not covered by the undertaking [Topray Solar] were in a position to conceal the excess of the parallel sales limit. Therefore the Commission have decided that this constituted a breach of the undertaking and the issue of such individual undertaking invoices.

The Commission have therefore in accordance with Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013 and Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013 declared a number of invoices issued by Topray Solar as being invalid. As a result national customs authorities have been instructed to collect the debt incurred at the time of acceptance of the declaration for release to free circulation.”

7. The letter enclosed details of the invoices declared invalid by the Commission.
8. As a subsequent letter from HMRC dated 5 February 2018 explained:

“The exemption of anti-dumping and countervailing duties on imports into the EU of solar panels that [sic] is subject to exporting producers submitting a price undertaking to the EU Commission. Acceptance of an undertaking imposed a number of conditions on the exporting producer¹ and allowed the Commission to conduct activities to verify that these conditions were complied with.

Unfortunately, during the course of these verifications, it became possible that your supplier [Topray Solar] had breached the conditions of the undertaking.

If judged by the Commission, a breach can seriously and repeatedly harm the Union industry and distort the Union market, resulting in the withdrawal of the undertaking. In addition, if breaches could be linked to individual undertaking invoices, the Commission can take further steps to invalidate those invoices, resulting in a customs debt being incurred on companies’ imports.

We are unable to comment on assurances that you may have sought as it is the responsibility of the exporting producers to ensure they satisfy the conditions of the undertaking. A failure to do so does not affect the fact debt exists, and steps must be taken to recover the duty due.”

9. HMRC carried out a statutory review of the decision in the letter dated 30 January 2018 to issue the C18. The results of that review were communicated to the Appellant by a letter from HMRC dated 16 July 2018. The reviewing officer upheld the original decision stating:

“Article 1 of Commission Implementing Regulation 2017/1408 effects the withdrawal of the acceptance of undertakings from [Topray Solar] and related companies in both the People’s Republic of China and in the EU.

Article 2(1) of the same Regulation states that the invoices listed in Annex 1 of the Regulation are declared invalid. Article 2(2) states that the duties (ADD & CVD) associated with the invalid invoices which were due at the time of acceptance of the customs declaration, under Article 3(2)(b) of Implementing Regulation 1238/2013 and Article 2(2)(b) of Implementing Regulation 1239/2013, shall now be collected by the customs authorities in the member state.

Sunshine [the Appellant] has been identified as the consignor for eleven of the invoices invalidated pursuant to Article 1 of Commission Implementing Regulation 2017/1408. The reasons for the Commission’s decision to invalidate undertaking certificates and invoices issued by [Topray Solar] are

¹ Contained in Implementing Decision 2013/707/EU.

stated in recitals 43 to 48 and recital 58 details the invoices which have been invalidated.

Consequently, pursuant to Article 2 of the same Regulation, the ADD and CVD, suspended at the time of acceptance of the customs declarations, are now due and HMRC has issued a C18 to collect this debt.

As previously stated above ..., HMRC must enforce any Regulation implemented by the EU Commission. This particular Regulation concerns the withdrawal of the acceptance of the undertaking for two exporting producers, one of which is your supplier. Failure to collect the duties which now fall due as a consequence would ultimately be a detriment to UK taxpayers.

As such, the debt notified to you in C18264643 is legally due and enforceable.

You have requested that HMRC conduct its own investigations into the 11 invoices which have been invalidated by the Commission. Commission Implementing Regulation 2017/1408 follows from the Commission's own investigations into [Topray Solar] and its determination following those investigations is binding on all EU member states.

You should be aware of the associated risks with accepting an undertaking from your suppliers. An undertaking does not absolve the trader of the liability to pay duties which are suspended at the time the customs entry is accepted. A breach of the Regulations results in those suspended duties being due to the customs authorities in the importing EU member states.

Where there has been a breach, such as that affected by [Topray Solar], the suspension of duties is lifted following the withdrawal of accepting an undertaking from [Topray Solar] and invalidation of the undertaking invoices listed in the Commission Regulation. The effect of that is to revert all customs entries concerning imported goods covered under the undertakings, which have been accepted by the customs authorities, as if those imported goods were never entered under an undertaking and instead are subject to the regular obligation to pay ADD and CVD at the full rate. Upon payment of those duties, the situation is regularised.

...

I agree with Officer Watts's decision that the ADD and CVD (including the additional import VAT) which was suspended at import in regard to the 11 invalidated undertaking invoices, are now due.

Consequently, the decision to issue C18264643 is **upheld** and the amount notified is now due."

10. As will be apparent from the above correspondence, the EU Commission accepted joint price undertakings from certain producers in connection with the anti-dumping of solar panels produced in China. The exemption from ADD and CVD on imports of solar panels was subject to exporting producers submitting an Export Undertaking Certificate and a Commercial undertaking invoice accompanying the goods.

11. In Implementing Decision 2013/77/EU, Topray Solar, the Appellant's supplier, was accepted as a company from which undertakings were accepted (TARIC additional code B880). However, by Implementing Regulation 2017/1408 ("the Implementing Regulation 2017"), the Commission withdrew the acceptance of undertakings by Topray Solar. Accordingly, certain undertaking invoices issued by Topray Solar were invalidated with the result that ADD and CVD was released from suspension for all related imports thereby placing the customs authorities of member states under an obligation to collect the duty.

12. In relation to Topray Solar, the Implementing Regulation 2017 stated:

“(43) In addition to modules [i.e. solar panels), the Implementing Regulation 2017 sold big [sic] quantities of so-called consumer products like solar fountains and briefcase charges. These products are not covered by the undertaking. No undertaking invoice should be issued for these products. However, Topray Solar unilaterally defined these products as product covered by the undertaking and issued undertaking invoices to the same customers which contained both: products covered and products non-covered by the undertaking. Moreover, the value of the product not covered by the undertaking was in excess of the parallel sales limit to the same customers. In addition, Topray Solar did not consult the Commission contrary to the obligations set out in recital (31).

(44) Apart from the sales referred to in recital (43), Topray Solar sold additional products not covered by the undertaking (e.g. solar charge controllers) to the same customers without reporting the sales to the Commission. These sales further increased the parallel sales limit access referred to in recital (43) and constitute a breach of the reporting obligations referred to in recital (29).

(45) The Commission analysed the implications of this pattern of trade and concluded that there is a high risk of cross-compensation of the MIP², namely if products covered and products not covered are sold to the same customers in excess of the parallel sales limit. The Commission concluded that the identified pattern of trade renders the monitoring of Topray Solar’s undertaking impracticable.

(46) Topray Solar also sold significant quantities of products not covered by the undertaking (e.g. solar charge controllers) to its related importer in the Union. Topray Solar could not demonstrate that these products were ultimately not sold to a customer which purchased modules in parallel. The Commission analysed the implication of this pattern of trade and concluded that a high risk of cross-compensation exists in so far as Topray Solar’s related importer may sell products not covered by the undertaking to the same customers that purchased modules in parallel from Topray Solar. Such trade pattern renders the monitoring of Topray Solar’s undertaking impracticable. Topray Solar also failed to report these transactions to the Commission, thus breaching the obligations as described in recital (29).

(47) The Commission also found that Topray Solar accounted the sales to 2 importers under joint customer account. In its quarterly reports to the Commission, however, Topray Solar declared these customers as different entities, hence putting into question the correctness of the reports, as referred to in recital (29).

(48) Topray Solar also failed to notify the Commission about the acquisition of two related companies in the Union, in breach of the requirement set out in recital (33) above. In addition, a minor sales transaction to one of these companies was reported as sales to an unrelated importer, in breach of the obligations mentioned in recital (29).

...

(53) Interested parties were granted the opportunity to be heard and to comment pursuant to Article 8 (9) of the basic anti-dumping Regulation and Article 13 (9) of the basic anti-subsidy Regulation....

² minimum import price.

...

(55) The Commission examined whether there are reasons to invalidate individual undertaking invoices issued by [Topray Solar] pursuant to Article 3 (2) (b) of Implementing Regulation (EU) No 1238/2013 and Article 2 (2) (b) of Implementing Regulation (EU) No 1239/2013.

...

(57) Regarding Topray Solar, the Commission considered the cases where products covered by the undertaking were sold together with products not covered by the undertaking to the same customer and where undertaking invoices were issued for the sales of products not covered by the undertaking. The Commission considered that Topray Solar, by issuing undertaking invoices in these cases, was in a position to conceal the excess of the parallel sales limit. Therefore, the Commission concluded that there is a direct link between the trade practise [sic] constituting a breach of the undertaking and the issue of such individual undertaking invoices.

13. The Implementing Regulation 2017 then listed the undertaking invoices issued by Topray Solar which were linked to the sales transactions referred to in recital (57). These invoices included the 11 invoices referred to in the C18.

14. The Implementing Regulation 2017 continued:

“(59) The Commission disclosed the reasons for invalidation and the list of invoices to Topray Solar and to the importers concerned as reported by Topray Solar in its periodic reports. The Commission granted certain extensions to both Topray Solar and several importers to submit their comments upon recent justification.

(60) Topray Solar made general statements that it had mistakenly reported the solar products not covered by the undertaking and that such mistake would not be sufficient to trigger the invalidation of undertaking invoices. It also submitted that it had no intention to breach the undertaking. Topray Solar further submitted that it had a misunderstanding of the solar products not covered by the undertaking.”

15. At recital (62), the Commission rejected Topray Solar’s arguments.

16. The Implementing Regulation 2017 stated further:

“(63) Topray Solar also contested the invalidation of invoices. It claimed that Article 8 and 10 (5) of the basic anti-dumping Regulation and Article 13 and 16 (5) of the basic anti-subsidy Regulation do not contain an empowerment to invalidate undertaking invoices. It claimed that the Commission cannot impose duties/order customs to levy duties on imports released for free circulation before the date of the withdrawal of the acceptance of the undertaking if imports have not been registered. The claim is based on an understanding that the Commission may decide to impose provisional duties before withdrawal of the acceptance of the undertaking. According to Article 8 (10) of the basic anti-dumping Regulation and Article 13 (10) of the basic anti-subsidy Regulation, a provisional duty may be imposed in case where the investigation that led to the undertaking has not been completed. That is not the case in the case at hand where the investigations have been completed with the imposition of definitive anti-dumping and countervailing duties. Moreover, the empowerment to invalidate undertaking invoices stems directly from Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013 and Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013. Consequently, in accordance with Article 8 (9) of the basic anti-dumping

Regulation and Article 13 (9) of the basic anti-subsidy Regulation, in case of breach or withdrawal of the acceptance of the undertaking by the Commission, the definitive duties shall automatically apply. The claim is therefore rejected.

(64) In addition, six importers submitted comments concerning the invalidation of undertaking invoices.

(65) Two importers claimed that they had traded in good faith with Topray Solar and could not be in position to know that Topray Solar did not respect the undertaking. The first importer also claimed that the products not covered amounted to a small fraction compared to the solar modules purchased from Topray Solar. In addition, the first importer submitted that the invalidation of invoices would be devastating and that it would become liable for circumstances beyond its control. The second importer claimed to have only one commercial transaction with Topray Solar in August 2013 and it did not know about the acceptance of the undertaking at that time.

(66) The Commission recalls that importers should be aware that a customs debt may be incurred, as a normal trade risk, at the time of acceptance of the declaration for release into free circulation as described in recitals 11 and 12 even if an undertaking offered by the manufacturer from whom they were buying, directly or indirectly, has been accepted by the commission.... The Commission also notes that the product not covered purchased by the first importer did not represent a small fraction: it was well beyond the parallel sales limit. In addition, the Commission points out that Decision 2013/423/EU was published prior to the conclusion of the sales transaction claimed by the second importer. The Commission also notes that none of the importers contested that the undertaking invoices were issued for products not covered by the undertaking. The arguments of the two importers are therefore rejected.

...

(68) The fourth importer claimed that it cannot be hold [sic] responsible for the breach of Topray Solar and the undertaking invoice was issued for solar panels, which are product covered by the undertaking....

(69) the Commission first recalls that the “product covered” by the undertaking are only those solar panels that are explicitly referred to in recital (6). The MIP is not applicable for products not covered by the undertaking, in particular for solar panels falling outside the scope defined in recital (6). It is meaningless to compare the sales price of the product not covered by the undertaking to the alleged MIP. These products were not subject to the investigation; hence their price cannot be verified and compared to the alleged MIP. Topray Solar should not have issued undertaking invoices at all for products not covered by the undertaking. By issuing these undertaking invoices in breach of the undertaking, Topray Solar was in position to conceal the excess of the parallel sales limit.

(72) Therefore, in accordance with Article 3(2)(b) of Implementing Regulation (EU) No 1238/2013 and Article 2(2)(b) of Implementing Regulation (EU) No 1239/2013, these invoices are declared invalid. The customs debt incurred at the time of acceptance of the declaration for release for free circulation should be recovered by the national customs authorities under Article 105 (3)-(6) of Regulation (EU) No 952/2013 of the European Parliament and of the Council when the withdrawal of the undertaking in relation to exporting producer enters into force. The national customs authorities responsible for the collection of duties will be informed accordingly. ”

17. The Implementing Regulation 2017, in Article 1, then provided that acceptance of the undertaking in relation to Topray Solar was “hereby withdrawn” and, in Article 2, provided that “the undertaking invoices listed in Annex 1 to this Regulation³ are declared invalid.” Article 4 provided that the The Implementing Regulation 2017 entered into force on the day following that of its publication in the Official Journal of the European Union (i.e. on 3 August 2017). Finally, The Implementing Regulation 2017 provided:

“This Regulation shall be binding in its entirety and directly applicable to all Member States.”

18. The Appellant appealed the C18 to this Tribunal on 25 July 2018.

ANTI-DUMPING DUTY AND COUNTERVAILING DUTY

19. The ADD and CVD Regulations followed on from Regulation (EU) No 513/2013 (“the Provisional Regulation”) imposing provisional anti-dumping duty on such imports. The Provisional Regulation included a list of cooperating suppliers which were exempt from anti-dumping duty providing conditions were met. Commission Decision 2013/423/EU confirmed the acceptance of undertakings in respect of provisional ADD. Commission Regulation 748/2013 amended the Provisional Regulation to include further cooperating suppliers. Topray Solar is listed as a cooperating supplier in the two Regulations and the Commission Decision.

20. Council Implementing Regulation (EU) No 1238/2013 (“the ADD Regulations”) and Council Implementing Regulation (EU) No 1239/2013 (“the CVD Regulations”) imposed ADD and CVD on imported solar modules (crystalline silicon photovoltaic modules and key components) originating from China.

21. Commission Implementing Decision 2013/707/EU confirmed the acceptance of an undertaking offered in connection with anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components originating in or consigned from the People’s Republic of China for the period of application of definitive measures. Again, Topray Solar is listed in the Annex to this Decision.

BURDEN OF PROOF

22. Pursuant to section 16(6) Finance Act 1994 (“FA 1994”), the burden of proof is upon the Appellant to satisfy this Tribunal that it has established the grounds on which it relies.

CUSTOMS DEBT

23. The decision in this case to issue a post-clearance demand (a C18) charging duty is a relevant decision pursuant to section 13A(2)(a)(i) & (ii) of the FA 1994.

‘13A— Meaning of “relevant decision”

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions—

(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union] 2, as to—

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;

³ these included all the 11 invoices to which the C18 referred.

(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;

.....’

50. The decision of HMRC to uphold the duty charged, following a review taking place under section 15 of the FA 1994, is an appealable decision under per section 16(1) of the FA 1994. Section 16(5) sets out the Tribunal powers on an appeal:

‘(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.’

24. The limitation period for charging the customs debt is three years as set out in Article 103(1) of the Union Customs Code, Council Regulation (EU) No.952/2013.

‘Article 103 Limitation of the customs debt

1. No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred.

.....’

25. For imports prior to 1 May 2016 the appropriate provision, Article 201, contained in the Council Regulation (EEC) 2913/92 (the Community Customs Code) sets out that the misclassification of imported good to free circulation incurs a debt.

26. For imports after 1 May 2016 the appropriate provision, Article 77, contained in the Union Customs Code (“UCC”) Commission Regulation (EU) no. 952/2013 sets out that the misclassification of imported goods to free circulation incurs a debt.

SUBMISSIONS AND DISCUSSION

27. Essentially, the appellant submitted that it had known nothing about Topray Solar’s alleged transgressions until shortly before the C18 was issued. The C18 related to 11 invoices which covered a three-year time period. The appellant could not understand why all 11 invoices were invalidated because they were compliant. The appellant understood what Topray Solar’s alleged breaches were, but maintained that all its invoices were compliant. Moreover an HMRC officer (Mr Watts) had visited the appellant twice and found the invoices to be in order. None of the invoices related to products which were not covered by the undertaking.

28. Ms Patel submitted that The Implementing Regulation 2017 was binding on HMRC and on this Tribunal. The Implementing Regulation 2017 can only be challenged before the CJEU. Ms Patel referred to the decision of the European Court of Justice in *Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199 at [17]. This case concerned a preliminary reference to the CJEU asking whether a national court could review the validity of a European Union “act” (in this case, the adoption of a decision by the Commission). The Court’s ruling was clear: whilst a national court was entitled to reject a contention of invalidity regarding an act of the European Union, it was not entitled to accede to such a contention and declare the act to be invalid. The CJEU had exclusive jurisdiction to declare void an act of an institution of the European Union, and if a national court (even a court of first instance) was not able to reject a contention of invalidity, it was obliged to make a preliminary reference.

29. This Tribunal was, Ms Patel submitted, bound by The Implementing Regulation 2017 and had to enforce it.

30. In relation to the Appellant's assertion that Mr Watts had previously, on two occasions, found the 11 invoices to be compliant, Ms Patel submitted that it was the EU that monitored compliance with anti-dumping and countervailing duty provisions. HMRC did not have the wider picture which was known only to the Commission.

31. Reference was made by the Appellant to a possible legal challenge by 10 suppliers, although it was not clear exactly which provision of EU law was being impugned. There were, however, no details of this challenge. In any event, the Appellant accepted that this possible legal challenge may not affect The Implementing Regulation 2017.

32. We have considerable sympathy with the Appellant. It faces a considerable financial cost in respect of, as far as we could gather, circumstances outside its control and brought about by its supplier.

33. Nonetheless, we consider the law to be clear. The Implementing Regulation 2017 is binding upon us (*Foto-Frost v. Hauptzollamt Lübeck-Ost* [1987] ECR 4199 at [17]) and HMRC must enforce it. It follows, therefore, that this appeal must be dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

34. 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.

**GUY BRANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 18 FEBRUARY 2020