TC02037

Appeal number: TC/2009/10423

IMPORT DUTY – customs value – clothing imported together with hangers etc – hangers supplied to overseas supplier of clothing by separate overseas hanger supplier nominated by UK importer – price for hangers paid by overseas clothing supplier to overseas hanger supplier fixed by UK importer, who required clothing supplier to use nominated supplier of hangers – price of hangers recharged without mark-up to UK importer as part of invoice price of goods as imported – customs value of imported goods initially declared by UK importer on total price charged to it – sum subsequently repaid to UK importer by overseas hanger supplier equal to difference between price nominated by UK importer and lower value agreed between UK importer and hanger supplier – whether customs value of imported goods should be reduced to take account of amount so repaid – Articles 29 and 32 of EU Customs Code (Regulation 2913/92/EC) considered – held yes – whether excess duty paid should be repaid under Article 78 – held yes – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASDA STORES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE KEVIN POOLE (Chairman)
JUDGE TIMOTHY HERRINGTON
RICHARD LAW FCA CTA

Sitting in public at 45 Bedford Square, London on 9 and 10 February 2012 with subsequent written submissions

Roderick Cordara QC, instructed by Bell Davies for the Appellant

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

© CROWN COPYRIGHT 2012

DECISION

Introduction

1. This appeal is concerned with the appropriate customs value applicable to imports of goods for import duty purposes in a particular situation.

2. The Appellant ("Asda") buys large volumes of clothes from suppliers outside the EU (referred to as "clothing suppliers" in this decision) and imports them into the EU. It pays import duty on this importation. Hangers and other ancillary items such as labels, swing tickets and size indicators (together referred to as "hangers" in this decision) are included in what it buys and imports.

3. The hangers are supplied to the clothing suppliers by other overseas suppliers (referred to in this decision as the "hanger suppliers") which are nominated by Asda. Asda requires the clothing suppliers to source all the necessary hangers from the hanger suppliers, and fixes the prices to be paid for the hangers by the clothing suppliers to the hanger suppliers. 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.

4. If the matter ended there, there would be no dispute between the parties. It is agreed that the customs value for import duty purposes would be the price paid by Asda to the clothing suppliers (including the recharged cost of the hangers), as evidenced by the clothing suppliers' invoices to Asda.

5. A complication arises, however, because there is a separate agreement between Asda and the hanger suppliers. That agreement is a private matter between them which does not involve the clothing suppliers. Pursuant to that agreement, the hanger suppliers make a payment direct to Asda. This payment reflects the fact that, in the context of their overall commercial relationship, they have agreed 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. This payment is referred to in this decision as "the Rebate". We heard detailed evidence only in relation to the actual hangers themselves but we were told that similar arrangements existed in relation to the ancillary items as well.

6. The original purpose of this arrangement was to conceal from the clothing suppliers (and, ultimately, from the competitors of both Asda and the hanger suppliers) the real prices which Asda and the hanger suppliers have agreed for the "Asda" hangers which the hanger suppliers supply to the clothing suppliers. That pricing information is regarded as commercially sensitive, both for the hanger suppliers and Asda. To some extent as the market has coalesced into fewer and larger

suppliers, that original purpose has fallen away, but the arrangement itself is still firmly embedded in Asda's overall buying processes with the relevant suppliers (which are largely computerised).

7. 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.

8. It is commercially important to Asda to be able to require the clothing suppliers to buy the hangers from its nominated hanger suppliers. Partly this is because of the advantageous "net" prices that Asda can negotiate with the hanger suppliers by directing large volumes of business to them through a number of different clothing suppliers. Partly it is because it is easier for Asda to control overall quality if the clothing suppliers are required to use particular nominated hanger suppliers that Asda can "vet" easily. There are also other good commercial reasons for the arrangement (such as providing Asda with full control over its supply chain so it can ensure appropriate ethical, environmental and other standards are followed by all the suppliers in that chain). Arrangements such as this (involving rebates from third party suppliers) are, we were told, common in the market place.

9. The main difficulty with the arrangement, however, is that it does not sit easily with Council Regulation 2913/92 ("the Customs Code") which sets out the applicable law on valuing imports for customs purposes. As mentioned above, Asda regards the Rebate from the hanger suppliers as giving rise to a reduction in the customs value of the goods it has bought. It therefore seeks to recover from HMRC what it regards as the excess duty which it paid on the original purchase price (before deduction of the Rebate) from the clothing suppliers, which Asda declared on importation. HMRC do not however accept that such recovery is appropriate. Hence the present appeal.

The Facts

10. There is no material dispute about the facts of this appeal. The parties helpfully set out what they regarded as the key facts in an agreed statement of facts, which reads as follows:

> "1. The Appellant is a large retailer that sells, amongst other things, the "George" clothing range which encompasses items of footwear and textiles.
>
> 2. The Appellant purchases various goods for the "George" range from clothing suppliers situated outside the customs union. As part of the contract between the Appellant and the clothing supplier the clothing supplier is required to source the necessary packaging (specifically hangers and associated items e.g. swing tickets, size indicators and lozenges), from specified packaging suppliers. The packaging supplier

acting in agreement with the Appellant charges the clothing supplier a provisional price for such packaging. The terms of these agreements are unknown to the clothing supplier.

3. The Appellant subsequently purchases the goods from the clothing supplier who recovers in the price charged the amount paid to the packaging supplier.

4. The items are imported and declared for duty purposes using the price paid to the clothing supplier.

5. Under the terms of the agreement between the packaging suppliers and the Appellant, the Appellant is in due course entitled to receive a payment on such supplies to take account of the high volumes involved.

6. After the amounts were agreed and paid to the Appellant by the packaging suppliers the Appellant has attempted to finalise matters by also submitting a claim for repayment of the duty, in consequence overpaid, calculated by reference to the provisional and final values for the packaging concerned, totalling £313,243.00. This was rejected by the Respondents on the grounds that it does not represent a reduction in the price paid by the buyer (the Appellant) to the seller (the clothing suppliers) for the items as imported by the Appellant.

7. The Appellants claim that the duty amount to be paid must reflect the final price actually paid by the Appellant for the packaging."

11. We are concerned in this appeal with imports taking place between November 2005 and December 2007. Many (but not all) of Asda's imports of clothing during that period were subject to import duty. Asda no doubt also imported similar goods before November 2005 and after December 2007, but those imports are not the subject of this appeal.

12. The tripartite arrangements described above applied equally to imports of clothing from countries which were not subject to import duty. There is no suggestion that the arrangements were in any way designed with import duty in mind (indeed, the converse would appear to be the case); they had been the longstanding practice of Asda for many years and, as noted above, we were informed that similar arrangements are believed to be quite common amongst other large clothing retailers in the UK.

13. We were provided with much background evidence about the process which underpins the Appellant's purchasing arrangements. This took the form of documentary evidence showing how the arrangements worked in practice (including screen shots of various parts of the computerised ordering and administrative system) and oral evidence from representatives of Asda, a clothing supplier and a hanger supplier.

14. From that evidence (which was not challenged by HMRC in any material way), it is apparent (and we find as fact) that:

(1) both the "notional" and "true" values for every relevant supply from the hanger suppliers were agreed in advance, i.e. by the time the importation took place, Asda would have been able to calculate with certainty the amount of the Rebate it would in due course receive in relation to that particular consignment of goods. The only two qualifications to this statement are that (i) there was some suggestion that the lower prices might have depended upon the attainment of certain volumes of business, but we are satisfied that Asda was confident that it would be sourcing the forecast volumes of hangers and therefore was comfortable that it would receive the Rebate in full; and (ii) the amounts of the Rebate were calculated in foreign currency (in the evidence before us, the hangers and associated Rebate were initially priced in US dollars, Hong Kong Dollars and Singapore Dollars) but were converted into either UK currency or Hong Kong Dollars before being paid to Asda in those currencies, the rate of exchange applicable to such conversion being ascertained (save where Rebate calculated in Hong Kong Dollars was being paid in that currency) by reference to rates prevailing after the relevant importation had taken place; and

(2) there are some inconsistencies in the documents that were exchanged between Asda and the two hanger suppliers in question as to the nature of the payments. Whilst Mr Bowen of Asda (whose evidence we accept) was quite clear that Asda regarded the payment as a rebate of its overpayment for the hangers, its internal accounting processes included the description "Management Charge" on the invoices that it issued to the two hanger suppliers to request or acknowledge the relevant payments from them, and in relation to one of the hanger suppliers (which was a UK company, even though the hangers had been supplied by its overseas affiliate or establishment) Asda appears to have added VAT to the invoice (the correctness of which must be open to some doubt). Documentation received from the other hanger supplier (a Hong Kong company), however, clearly referred to the payment as a "rebate".

15. Notwithstanding the unfortunate inconsistencies in the documentation generated by Asda, we are satisfied (and find as a fact) that the relevant payments were made to it by the hanger suppliers by way of rebate of part of the purchase price paid by Asda, referable to the hangers, on its original importation of the clothing which incorporated those hangers.

16. HMRC do not dispute the calculation of "excess" import duty which has been carried out by Asda, resulting in the £313,243.00 claim in the present appeal. The only question for us to determine is whether that undisputed amount ought, in law, to be repaid or not.

The Law

17. The Appellant submitted that there are three relevant legislative provisions, namely Articles 29, 32 and 78 of the Customs Code. HMRC disputed the relevance of Articles 32 and 78, submitting that only Article 29 was relevant. It is common ground that the Customs Code has direct effect in the UK.

18. We set out below the text of the relevant parts of all three Articles of the Code which the Appellant relied on:

> "**Article 29**
>
> 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 –
>
> (a) ....
>
> (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;
>
> (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) ....
>
> ….
>
> **Article 32**
>
> 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.

....

Article 78

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 regularise the situation, taking account of the new information available to them."

19. It can readily be seen that Articles 29 and 32 contain substantive law on the matter of valuation, with Article 78 simply containing a mechanism whereby retrospective adjustments may be made to customs declarations.

Asda's submissions at the hearing

Introduction

20. Mr Cordara accepted that if a mechanical approach is taken to the interpretation of the above provisions and their application to the facts of this case, then the appeal would fail. He submitted however that the Tribunal should adopt a purposive

approach in interpreting and applying them, and that by adopting such an approach, a different result would be reached.

21. Apart from simply submitting that, in law, a purposive approach was the correct approach to interpretation, he referred us to two cases of the ECJ and to some other materials which he said supported this submission.

Aids to interpretation – International Agreement

22. First, he directed us to the provisions of the "Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade" ("the Implementation Agreement"), which is accepted as one of the foundations of EC law in this area. It was agreed between the contracting parties in the Tokyo round of GATT trade negotiations (1973-1979), including the EC. It was in accordance with this agreement that the EC adopted the current provisions of the Customs Code on customs value (including Articles 29 and 32) and the ECJ has referred to it in a number of cases for assistance in interpreting those provisions (see for example *Case 17/89 Hauptzollamt Frankfurt am Main-Ost v Deutsche Olivetti GmbH* [1990] ECR I-2301 at paras 17-18).

23. The Implementation Agreement includes the following text (with emphasis added to highlight the passages relied on particularly by Mr Cordara):

> "GENERAL INTRODUCTORY COMMENTARY
>
> 1. The primary basis for customs value under this Agreement is "transaction value" as defined in Article 1[1]. Article 1 is to be read together with Article 8[2] 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 of 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. Articles 2 to 7, inclusive, provide methods of determining the customs value whenever it cannot be determined under the provisions of Article 1.
>
> ....
>
> *PREAMBLE*
>
> *Having regard* to the Multilateral Trade Negotiations, the Parties to this Agreement (hereinafter referred to as "Parties");

[1] Article 1 of the Implementation Agreement, together with the associated "Interpretative Note" is followed very closely by the wording of Article 29 of the Customs Code.

[2] Article 8 of the Implementation Agreement is followed very closely by the wording of Article 32 of the Customs Code.

Desiring to further the objectives of the General Agreement on Tariffs and Trade (hereinafter referred to as "General Agreement" or "GATT") and to secure additional benefits for the international trade of developing countries;

Recognizing the importance of the provisions of Article VII of the General Agreement and desiring to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Recognizing **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***;*

Recognizing that the basis for valuation of goods for customs purposes should, to the greatest extent possible, be the transaction value of the goods being valued;

Recognizing **that customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply***;*

....

Hereby agree as follows:

…."

Following this preamble, the Implementation Agreement goes on to set out the agreed rule on customs valuation in terms which are, when the associated "Interpretative Notes" are taken into account, closely (though not exactly) mirrored in Article 29. The differences are minor and are not relevant to this decision.

24. Mr Cordara's submission was that the terms of this "General Introductory Commentary" and "Preamble" should be regarded as persuasive authority that a purposive approach should be taken in interpreting the "customs value" provisions. We should mention that Mr Bedenham, on behalf of HMRC, did not dispute the proposition that this material had some authority in interpreting Article 29, he simply took a different view as to the correct interpretation.

25. Mr Cordara submitted that the reference in the Preamble to "the need for a fair, uniform and neutral system for the valuation of goods .... that precludes the use of arbitrary or fictitious customs values" and to the intention that "customs value should be based on simple and equitable criteria consistent with commercial practices and that valuation procedures should be of general application without distinction between sources of supply" represented ample invitation to adopt a purposive approach, and moreover to do so whilst having due regard to evolving commercial structures and practices. He submitted that the commercial reality in this appeal is that the Appellant is paying a price for the goods which is reduced by the Rebate which it receives from the hanger suppliers, and that reduced price should be regarded as "based on simple and equitable criteria consistent with commercial practices".

ECJ Case law

26. Mr Cordara also referred us to two ECJ cases. The first was *Overland Footwear v HMRC* [2005] Case C-468/03. In that case, a buyer's commission payable by the importer had not been separately itemised on the purchase invoice relating to the sale on importation. The importer had initially declared and paid import duty calculated on the full purchase price (including the buyer's commission). Under Article 33(e) of the Customs Code, separately itemised buyer's commission would not be liable to import duty. The importer discovered its mistake and sought a refund of the overpaid duty from HMRC.

27. The ECJ decided that on the basis of the customs declaration actually made by the importer, the full duty had been properly charged and paid. However, Article 78 of the Customs Code provided a mechanism whereby that original error could be corrected and, if it was established that the import declaration had erroneously included the buying commission, HMRC were required under that Article to refund the overpaid import duty.

28. Mr Cordara submitted in effect that this case was an illustration of the principle that HMRC should look beyond matters of linguistic analysis, form and procedure to the substance of an issue and the underlying policy of the Customs Code, and Article 78 would then provide a mechanism (if one were needed) to reach a result consistent with that policy.

29. The second case he referred us to was in fact a combination of two different cases, *Terex Equipment Ltd* (Case C-430/08) and *F G Wilson (Engineering) Ltd and Caterpillar EPG Ltd* (Case C-431/08) [2010]. In those cases, goods had been imported under the inward processing relief procedure and incorporated with other goods into earth moving machinery which had then been exported. However, the appropriate declaration had not been made on export of the machinery, as a result of which a customs debt had crystallised on export of the goods which had been subject to inward processing relief. Even though the appropriate procedures could not now technically be followed to satisfy the requirements for exemption from customs debt, the ECJ held that Article 78 provided a route to "put matters right" so that the customs debt should not be recovered.

30. Mr Cordara referred to the passage in paragraph [56] of the *Terex* decision, where the ECJ specifically interpreted Article 78(3) on the basis of the "logic" that underlay it, i.e. effectively applying a purposive interpretation of it in preference to a strictly semantic interpretation. He emphasised the ECJ's ruling (confirming its earlier statement in *Overland*) that:

> "Article 78(3) does not make a distinction between errors or omissions which may be corrected and others which may not. The words "incorrect or incomplete information" must be interpreted as covering both technical errors or omissions and errors of interpretation of the applicable law"

31. Mr Cordara sought to persuade us that in *Overland* and *Terex* the ECJ effectively said it was permissible to "look through" the wording of (in *Overland*) Article 33 and (in *Terex*) Article 182(3) of the Customs Code to what he described as "the underlying intention" of the law to exempt buyer's commission from import duty and allow an obvious inward processing relief error to be corrected. We understood him as submitting that this was a general proposition, not limited to any particular Article of the Customs Code.

HMRC's Public Notice 252

32. Finally, Mr Cordara referred us to an extract from HMRC's Public Notice 252, paragraph 30.3, which included the following text (the passages he relied on particularly are emboldened):

> **"Situations may arise, whereby, for a variety of reasons, the price that you pay to the seller for the imported goods is revised or re-negotiated after the entry of the goods to free circulation. When this happens you must consider the customs valuation and customs duty implications.**
>
> Where, at the time of entry, there are contractual arrangements in place between you and the seller indicating the possibility of retrospective price adjustments, the invoice price for the goods concerned would, in effect, be provisional.
>
> This means that you cannot arrive at a final value for customs duty at the time of entry. Therefore you should make security arrangements (see paragraph 2.5). Alternatively you can ask us to agree an arrangement whereby you can pay customs duty outright at the time of entry. Such an arrangement would involve you giving an undertaking to notify us of any price adjustments. Then we would both adjust the customs duty payable upwards or downwards as appropriate, according to any agreed price adjustments subsequently notified.
>
> Where there has been a retrospective price increase, we will treat this as part of the total payment made by you to the seller for the imported goods. The fact that you agree to pay such a price increase is regarded as confirmation that the contractual arrangements implied or there was an implicit understanding between you and the seller that such an adjustment may occur, when the goods were ordered or purchased. Thus we will issue a demand (form C18) to you for the arrears of customs duty.
>
> **Where there has been a retrospective price decrease you may submit a claim for a refund of duty. Your claim must be accompanied by appropriate evidence including full details of the contractual arrangements as well as rebates received from and credit notes issued by the seller.**
>
> The key item of evidence is the contract between you and the seller. We accept that contracts may be verbal as well as written. However, in the case of a verbal contract we would seek alternative evidence, for example, reports of meetings, correspondence, etc between you and the

> seller. In cases of doubt we may request an affidavit from the parties to the verbal contract.
>
> Where we are satisfied that the price decrease stemmed from contractual arrangements in force at the time of entry of the goods concerned to free circulation, an appropriate refund of duty will be made (subject to the normal rules). In particular the refund claim must be lodged with us within three years from the date of each relevant entry."

33. Mr Cordara submitted that the paragraph (and particularly the sections highlighted) showed again a purposive approach to interpreting the Customs Code, and on its wording provided some direct authority for the proposition that refunds paid by a third party rather than by the original seller could found a reduction in the customs value.

Interpretation of Articles 29 and 32 of the Customs Code

34. Mr Cordara also made submissions on the proper interpretation of Articles 29 and 32 themselves. He submitted that the interpretation of those provisions should be approached in an overtly purposive way, as mentioned at [22] to [31] above.

35. He argued that the net price paid by Asda after receiving the Rebate was, in commercial terms, the price actually paid. As such, any other value would be "arbitrary" or "fictitious", which the Implementation Agreement disapproved of.

36. On the other hand, it would be "simple and equitable" to accept the "true" commercial price paid (after taking account of the Rebate) as the customs value, and this would be consistent with modern "commercial practices" as endorsed by the Implementation Agreement.

37. With these observations in mind, he referred to Article 32, upon which he based what he identified as his main argument. Article 32 provides for an addition to be made to the Article 29 "transaction value" in certain situations. A simple example will illustrate the point. Clearly where an importer provides (for example) components to his overseas supplier and the supplier has then incorporated those components into other goods which are then exported to the importer in the EU, there is scope for abuse. The parties could agree between themselves that the EU importer will not charge the overseas supplier for the components (or will undercharge him for them) if the supplier reduces the price of the finished goods to the importer by an equivalent amount. The result would be a reduction in customs value below what might be regarded as the "true" customs value, and a consequential loss of import duty to the EU. Article 32 is intended to counteract any such arrangement by adding to the Article 29 "transaction value" the value of any "assists" provided by the EU importer in this way.

38. Mr Cordara based his argument on the submission that the hangers should be regarded as "assists" in the present case, as they represent components provided to the clothing supplier on Asda's behalf by the hanger supplier. The language of Article 32 talks only in terms of <u>additions</u> to the Article 29 transaction value to reflect

underpayments for the "assists", but Mr Cordara effectively submitted that we should interpret it purposively as also allowing for the "addition" of negative amounts to adjust for overpayments for the "assists" – i.e. effectively allowing for deductions from the Article 29 transaction value to adjust for the excess price charged by the hanger supplier to the clothing supplier at Asda's instruction (and recharged by the clothing supplier to Asda). The logical consequence of his position on this would be that the sale price from the clothing supplier to Asda would have to be considered as an overstatement of the customs value from the outset, rather than becoming an overstatement when the Rebate was paid (as the payment of the Rebate was merely the working through of a set of financial arrangements that were already in place when the sale for importation took place).

Article 29

39. Mr Cordara said that he considered his argument on Article 29 less powerful than that on Article 32, indeed he referred to it as a "fallback" in case we were not attracted by his argument under Article 32. There were three main limbs to this argument.

(a) Disregard the "for the benefit of the seller" requirement in Article 29

40. He submitted that, on any sensible commercial view, the "price actually paid or payable for the goods when sold for export to the customs territory of the Community" (as provided by Article 29.1) was the net price after taking account of the Rebate.

41. He acknowledged however that Article 29.3(a) gave rise to a difficulty for him when it defined the "price actually paid or payable" as:

> "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."** *[emphasis added]*

42. He fully accepted that if the words of Article 29.3(a) were given their apparently plain meaning, the customs value of the goods in this case would have to be the amount paid by Asda to its clothing suppliers, without any deduction for the Rebates which had been received from third parties rather than from "the seller". However, he submitted that if his argument on Article 32 was rejected then the proper interpretation of Article 29.3(a) was effectively to disregard the requirement in it to have regard only to the sums actually paid between the "buyer" and the "seller". This, he submitted, was the only way in which Article 29.3(a) could be interpreted to make sense in the light of the obvious commercial fact that the "real" price paid by Asda excluded the Rebate amounts.

43. In support of his submission on this point, Mr Cordara asked the rhetorical question "how would the customs value provisions work if the payments were made in the other direction (i.e. if Asda made further payments to the hanger suppliers,

rather than the other way around)?" He submitted that if HMRC's view that Article 32 was irrelevant was correct, then any other interpretation of Article 29.3(a) would have the absurd consequence that no further duty could be levied on the increased price effectively paid by Asda, simply because it had paid the extra amount to a third party rather than to the seller. That, he submitted, could surely not be correct.

44. Linked to this submission were two slightly more subtle submissions on the interpretation of Article 29.3(a).

(b) Define "the seller" commercially rather than legally

45. The first relied on taking a commercial rather than a legalistic view of the transactions involved. In particular, it required a commercial rather than a legalistic approach to deciding who was "the seller".

46. Mr Cordara invited us to take the view that there might be more than one seller involved in this situation. He did not fully develop this line of argument, but it gives rise to some intriguing possibilities. The payments made by Asda to the clothing supplier could, in the particular circumstances of this case, be seen as comprising two parts. One part (the price excluding the hanger cost) would properly be regarded as a payment to the clothing supplier for its own benefit. As to the other part, the nature of the overall arrangements was such that it might be appropriate to regard the hanger supplier as the seller. Mr Cordara referred to the fact that the hanger cost was nothing more than a "pass-through" cost for the clothing supplier. What he was saying was tantamount to suggesting that we are here concerned with two separate sellers in respect of different elements of the overall transaction.

47. The clothing supplier would, on this analysis, be acting as merely a conduit from the hanger supplier and not as "seller" in its own right for the purposes of Article 29.3(a), insofar as the composite transaction concerned the hangers (and payment for them). Thus, the argument would run, the relevant part of the initial payment made by Asda should properly be viewed as a payment "to or for the benefit of" the hanger supplier, even though it was paid indirectly through the clothing supplier. Thus when the hanger supplier repaid part of that payment to Asda by way of Rebate, an adjustment to the "total payment made" by Asda to the hanger supplier for the purposes of Article 29.3(a) would result, justifying a claim by Asda for a refund of the relevant part of the duty. The remainder of the amount which Asda paid to the clothing supplier was paid to it as "seller" in its own right and therefore properly fell to be dutiable under the normal rules, without any need for adjustment as a result of the later Rebate payment (which did not, after all, commercially relate to the sale of the clothing, other than the hangers, in any way).

48. Helpfully, Article 29.3(a) provides that "payment may be made…. directly or indirectly", thus providing some flexibility to assist this possible analysis. In addition, Mr Wilde of Mainetti UK Limited (a hanger supplier to Asda) gave evidence that if a clothing supplier to whom it was supplying hangers on the instructions of Asda failed to pay Mainetti, then Mainetti would expect Asda to pay them. Although we did not hear any evidence from Asda on the point, this gave a clear indication that

Mainetti regarded their primary trading relationship, and possibly even their legal relationship, as being with Asda rather than with the clothing supplier.

(c) Payments between Asda and hanger supplier are "for the benefit of" the clothing supplier

49. In the alternative, Mr Cordara effectively sought to persuade us that the way Article 29.3 is worded makes it clear that it is intended to catch all "net payments" which could be said to be for the benefit of the seller (i.e. in our case, the clothing supplier); he argued that the words "actually payable" and "the total payment made" in Article 29.3(a) were grasping for this general concept. So repayments should effectively be netted off against payments, as long as there was a common thread of being referable to a "benefit" for the clothing supplier.

50. He submitted that the word "benefit" should be given a broad meaning in this context. He invited us to take the view that the effect of the relationship between Asda and the hanger supplier (and the payments made pursuant to it) was to make available to the clothing supplier a convenient and ready made supply of hangers which were known to be acceptable to Asda. The total payments made pursuant to this relationship were referable to a "benefit" for the clothing supplier. Accordingly, the payments from the hanger supplier pursuant to that relationship should be netted off against the payments from Asda to the clothing supplier in arriving at the "total payment made" for the benefit of the clothing supplier for the purposes of Article 29.3(a).

HMRC's submissions at the hearing

51. Mr Bedenham, on behalf of HMRC, submitted (to summarise his position) that this was a straightforward case. The provisions of Article 29.3(a) were clear and that disposed of the matter. The customs value was the amount of the total payments made by Asda to the clothing suppliers. That was the amount that had been declared and upon which duty had been paid and that was an end of the matter. Any later payments from the hanger suppliers to Asda could not be taken into account as they were payments by a third party, and therefore could not affect the "total payment" referred to in Article 29.3(a), which only encompassed payments between buyer and seller (i.e. Asda and the clothing supplier).

52. Mr Cordara's rhetorical question about how HMRC would expect to deal with matters if the payment had been made in the other direction (i.e. from Asda to the hanger suppliers) was met with the straightest of bats by Mr Bedenham. He observed that any such payment may well, depending on the facts, fall within Article 29.3(a) as being a further payment "for the benefit of the seller", but beyond that he could not speculate.

53. Article 32 was, he submitted, totally irrelevant as we were not here concerned with any additions to the price paid or payable.

54. The ECJ cases cited by Mr Cordara were not relevant either, as they were concerned only with the question of the mechanism for correcting errors or mistakes

and we were concerned in this appeal with deciding whether the Customs Code actually allowed for the adjustments which Asda were arguing for, rather than with deciding on the appropriate mechanism for adjusting some agreed error or mistake.

55. The Public Notice 252 also added nothing to Asda's case because it was only HMRC's commentary on what they thought the law was and in any event when read as a whole it did not provide any support for Asda's argument.

Consideration of arguments raised at the hearing

Purposive interpretation

56. We accept Mr Cordara's submission (which Mr Bedenham did not seriously dispute) that we should approach the interpretation of the Customs Code on a purposive basis, that is to say with a view to giving effect to its underlying intention. We regard that statement as axiomatic.

57. However, any attempt to discern the underlying intention of the Code must be based on the language of its provisions. To a degree, it may be possible to override or disregard wording which is clearly inconsistent with the underlying intention of the Code as a whole (as shown by a consideration of the wording of the Code as a whole and in the light of the relevant external factors, including the Implementation Agreement), but a point must come when the wording of a particular provision gives a perfectly clear picture of the intention underlying that provision which cannot be displaced by general assertions as to what the position "should" be or how the draftsman "would" have approached matters if he had thought of the factual matrix currently under consideration.

Effect of ECJ decisions in Overland and Terex

58. In relation to Mr Cordara's submission on the *Overland* case (see [28]), we comment as follows.

59. We accept that in *Overland* the ECJ effectively used Article 78 to cure the failure of the importer to separate out the buyer's commission from the sale price for the goods. However, Mr Cordara's submission begs the question of what the "underlying intention" of the law would be in the present situation. Therefore whilst we accept that in an appropriate case Article 78 will provide a suitable mechanism for correcting an error, it provides no assistance on the crucial question of whether an error has indeed arisen which is required to be corrected. To determine that question, one has to fall back on Mr Cordara's other submissions as *Overland* provides no useful authority on it.

60. Similar observations apply in relation to Mr Cordara's submissions on the *Terex, F G Wilson* and *Caterpillar* cases.

Public Notice 252

61. So far as Mr Cordara's submissions based on Public Notice 252 are concerned, we do not consider that they add anything. That notice has no legal force, it simply represents HMRC's view of the law. Such notices have from time to time been found to be incorrect.

62. Even if it had legal force we do not consider the extract, when read as a whole, does anything to advance Mr Cordara's case. The paragraphs he emphasised referred quite specifically to the price paid "to the seller" and rebates received "from the seller". We do not consider that anything else in the extract can be read as implying that it is HMRC's view that price adjustments which do not involve the seller should be taken into account for customs value purposes. In other words, we see nothing in the Notice which is inconsistent with the stance taken by HMRC.

Article 32

63. We turn now to what Mr Cordara described as his main argument, namely that Article 32 provided a mechanism for an adjustment to the customs value based on the "assist" concept. See [37] to [38] above.

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".

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".

66. In short, therefore, we agree completely with the short submissions of Mr Bedenham, but subject to one outstanding question. Given that we consider the provisions of the Customs Code are to be interpreted purposively, what is the appropriate effect of such an interpretation in relation to the provisions of Article 29, when applied to the facts of this case?

Submissions following the hearing

67. In considering that question following the hearing, the Tribunal's attention was caught by a decision of the European Court of Justice which appeared to be potentially relevant to this appeal, but which had not been referred to by either party in argument. We therefore considered it appropriate to seek written submissions from

the parties as to the potential effect of that decision in this case, and to defer the determination of the appeal pending receipt of those submissions.

68. The decision in question was in the case of *Hauptzollamt Itzehoe v H J Repenning GmbH* [1986] Case 183/85.

69. In that case, some goods had become damaged before they were imported into the EC, as a result of which their value had dropped by 17% compared to the contract price agreed between the seller and the importer/buyer. The importer was indemnified against this loss by its insurers, though no refund or rebate of any part of the price was paid or allowed by the sellers. The importer therefore paid the sellers the full amount of the invoice price but recovered the 17% loss from a third party, its insurers. It then sought to reduce its import duty liability by a corresponding amount.

70. The relevant provision of the customs code then in force which defined "transaction value, that is the price actually paid or payable" was similar to the current version of Article 29.3(a). It read as follows:

> "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. 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 instruments and may be made directly or indirectly."

71. As can be seen, the above provision included wording, similar to that included in Article 29.3(a), which tied the customs value to the amount of "the total payment made or to be made by the buyer to or for the benefit of the seller". If that wording had been applied literally, the customs value would have been assessed at the total price paid by the buyer to the seller, without giving any deduction for the drop in value of the goods (for which the buyer was compensated by receiving a payment from its insurers, a third party).

72. However, the ECJ held, in the light of *inter alia* the sixth preamble to the Implementation Agreement which disapproved of "arbitrary or fictitious customs values" 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."

Submissions from HMRC on Repenning

73. Mr Bedenham submitted that the significance of *Repenning* was limited to cases where goods were damaged before entry into free circulation. He repeated the wording of Article 29.3(a), which required only the total payment made "to or for the benefit of the seller" to be taken into account. He argued that the price paid to (or for the benefit of) the clothing supplier remained constant. That was therefore effectively an end to the matter.

Submissions from Asda on Repenning

74. Messrs Bell Davies, on behalf of Asda, submitted that the *Repenning* decision underlined the prime importance of the principle that import duty must be levied on the total amount actually paid by the importer.

75. They maintained that primarily this should be done through their preferred mechanism of treating the hangers as an "assist", to be dealt with under Article 32. The bulk of their submissions addressed how they said this should be done, and sought to provide further justification for doing so.

76. They did however also maintain that if they were wrong in viewing this as an Article 32 matter, then *Repenning* also showed that "Article 29 must be read to mean the primary factor is the amount ultimately paid or payable by the buyer".

Consideration of the effect of the Repenning decision

77. Clearly the facts of *Repenning* are not on all fours with the present case. The crucial point of general application that appears out of that case, however, is that the "price actually paid or payable", which forms the basis of the customs value in this case as in that one, can be reduced to reflect the true value of the goods on importation, even where there is no reduction in the amount paid by the buyer *to the seller*.

78. We are not persuaded that the *Repenning* decision provides any basis for changing our view on the "assist" argument under Article 32 raised by Asda.

79. We do however consider that case to be a very relevant example of the ECJ adopting a purposive interpretation of a provision in the 1980 Customs Code which is functionally indistinguishable from the parallel provision in the 1992 Customs Code. Moreover it is an interpretation which interprets or (it might be said) overrides the wording of the 1980 Code in a way which is very similar to the way in which Mr Cordara now invites us to interpret or override the wording of Article 29.3(a). The total sum paid by the importer to its supplier in *Repenning* was the full undamaged value of the shipment. There was no refund from the supplier, so the total sum paid by the importer "to or for the benefit of the seller" was the full original price. Yet the ECJ held that the proper value for customs purposes under the then version of Article 29 was the reduced value after taking account of the insurance compensation which the importer received from its insurers – who had no connection with the supplier.

80. We consider that the ECJ decision in *Repenning* 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.

81. We can see no reason why this proposition should not apply equally to the present case. We do not consider that there is any difference in principle between

goods whose value on importation is overstated by reason of physical damage and goods whose value on importation (as here) is overstated by reason of overall arrangements which have had the effect of artificially inflating the price paid by the importer to the seller, compensated for by a payment received by way of rebate from another party that participates fully in the overall arrangements.

Conclusion and decision

82. We reject Asda's argument that its initial import declarations should properly be adjusted under Article 32. Our view on this point immediately following the hearing (see [64] – [65]) was unchanged following the further submissions made on behalf of Asda after the hearing (see [78]).

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".

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.

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.

87. The appeal is therefore allowed.

88. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 3 May 2012