[2018] UKFTT 505 (TC)

# TC06707

**Appeal number: TC/2017/06753**

***CUSTOMS DUTY –- Application for reference to CJEU under art 267 TFEU – Validity of European Commission Implementing Regulation effectively overturning UK Supreme Court decision - whether appellant's arguments well founded that (a) the Regulation contains a "manifest error" and was* ultra vires *the Commission's powers and (b) the Regulation breaches the principle of sincere co-operation – reference made.***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

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|---|---|
| **AMOENA (UK) LTD** | **Appellant** |
| **- and -** | |
| **THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** | **Respondents** |

**TRIBUNAL: JUDGE RICHARD THOMAS**

**Sitting in public at Taylor House, London EC1 on 13 June 2018**

**David Scorey QC and Edward Brown, instructed by Clarkson White and Jakes Ltd, for the Appellant**

**Sarabjit Singh QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This was the hearing of an application by Amoena (UK) Ltd ("the appellant") for a reference to the Court of Justice of the European Union ("CJEU").

**Facts**

2. An "Agreed Statement of Facts" was produced to me. They give the background to the current application and I set them out here (almost) verbatim.

3. The appellant imports mastectomy bras ("MBs") marketed under the name "Carmen" into the UK.

4. In *Amoena (UK) Ltd v HMRC* [2016] UKSC 41 the Supreme Court unanimously held that the appellant's MBs should be classified under Chapter 90 of the Combined Nomenclature of the European Union ("CN") with tariff heading 9021 and CN case 9021 10 10. Accordingly customs duty was not payable on the MBs.

5. The judgment of the Supreme Court was delivered on 13 June 2016.

6. The judgment was based on the following findings of fact:

> (1) The appellant's MBs are designed to be worn with artificial breasts by women who have undergone surgical removal of one or both breasts.
>
> (2) The appellant's MBs are designed to be worn with an artificial breast form.
>
> (3) The appellant's MBs are objectively differentiated in design from "ordinary" bras.
>
> (4) The intended use of the appellant's MBs (ie to hold the artificial breast form) was apparent from the physical characteristics of the MB.
>
> (5) The appellant's MBs, in conjunction with the artificial breast forms which they are designed to hold and support, lessen the psychological impact of having had a mastectomy.

7. Further, it was (and remains) common ground that the artificial breasts themselves are categorised "as artificial parts of the body" for the purposes of sub-heading 9021.

8. On 1 July 2017, Commission Implementing Regulation (EU) 2017/1167 ("the CIR") was published in the EU Official Journal, and entered into force 20 days after publication. By the Annex to the CIR the MBs are required to be classified under Chapter 62 with tariff heading 6212 and CN Code 6212 10 90. The rate of duty on that Code is 6.5%. [See §14 below for the text of the CIR including the Annex. The Agreed Statement of Facts included the middle three paragraphs of the Annex.]

9. The CIR is inconsistent with the judgment of the Supreme Court.

10. On 1 August 2017 the appellant imported a consignment of MBs. The import was entered with CN Code 6212 10 90 and as a result customs duty was payable on the MBs at a rate of 6.5%.

11. On that day the appellant applied for a refund of import duties.

12. On 1 September 2017 the respondents ("HMRC") refused the appellant's application.

**The law and the process of legislation**

13. Paragraph (b) of the first sentence of Article 267 of the Treaty for the Functioning of the European Union ("TFEU") gives the CJEU the jurisdiction to give a preliminary ruling on the matter in dispute in this case. The Article provides:

> "Article 267
>
> The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:
>
> (a) the interpretation of the Treaties;
>
> (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union;
>
> Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.
>
> Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.
>
> If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."

14. The impugned legislation in this case, the CIR, is an act of the European Commission ("the Commission"), an institution of the European Union. The full text of the CIR is:

> "**COMMISSION IMPLEMENTING REGULATION (EU) 2017/1167**
>
> **of 26 June 2017**
>
> **concerning the classification of certain goods in the Combined Nomenclature**
>
> THE EUROPEAN COMMISSION,
>
> Having regard to the Treaty on the Functionig (*sic*) of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code, and in particular Article 57(4) and Article 58(2) thereof,

Whereas:

1. In order to ensure uniform application of the Combined Nomenclature annexed to Council Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.

2. Regulation (EEC) No 2658/87 has laid down the general rules for the interpretation of the Combined Nomenclature. Those rules apply also to any other nomenclature which is wholly or partly based on it or which adds any additional subdivision to it and which is established by specific provisions of the Union, with a view to the application of tariff and other measures relating to trade in goods.

3. Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.

4. It is appropriate to provide that binding tariff information issued in respect of the goods concerned by this Regulation which does not conform to this Regulation may, for a certain period, continue to be invoked by the holder in accordance with Article 34(9) of Regulation (EU) No 952/2013. That period should be set at 3 months.

5. The measures provided for in this Regulation are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS REGULATION:

Article 1

The goods described in column (1) of the table set out in the Annex shall be classified within the Combined Nomenclature under the CN code indicated in column (2) of that table.

Article 2

Binding tariff information which does not conform to this Regulation may continue to be invoked in accordance with Article 34(9) of Regulation (EU) No 952/2013 for a period of 3 months from the date of entry into force of this Regulation.

Article 3

This Regulation shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

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

Done at Brussels, 26 June 2017.

For the Commission,

On behalf of the President,

Stephen QUEST

Director-General

Directorate-General for Taxation and Customs Union"

15. The Annex contains in column 1 a description of an MB with images which the parties are agreed is a precise and correct description of the appellant's MB. Column (3) "Reasons" says:

> "Classification is determined by general rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 6212 , 6212 10 and 6212 10 90.
>
> The article has the objective characteristics (the form and the construction) of a brassière of heading 6212, which includes brassières of all kinds (see also the Harmonised System Explanatory Notes to heading 6212, second paragraph (1)).
>
> Although the article can also be worn by women following a mastectomy, classification under heading 9021 as an orthopaedic appliance or as a part or accessory of an artificial part of the body is excluded because, at the time of importation, the objective characteristics of the product are those of a brassière of heading 6212 and do not give any indication of the final use (for aesthetic or medical purposes).
>
> The side openings do not make the brassière a product of heading 9021 as they can serve both for the insertion of breast forms following a mastectomy and for the insertion of padding for the enhancement of breasts (aesthetic purposes). Similarly, the broad shoulder straps, centrally positioned over the breasts are a common feature for bigger cup brassières of heading 6212.
>
> Therefore, the article is to be classified under CN code 6212 10 90 as a brassière."

## The submissions of the appellant

16. For the appellant, the applicant in this hearing, Mr Scorey argued that national courts (including tribunals such as the First-tier Tribunal) have no jurisdiction to declare that acts of EU institutions are invalid, for which proposition he cites Case C-314/85 *Foto-Frost v Hauptzollamt Lübeck-Ost* ("*Frost*") [1987] ECR 4199 at [20], and that challenges to the validity of EU acts can be made under art 267 TFEU (*Frost* at [12]).

17. While a referring court usually has a broad discretion whether to refer, that is not the case where the validity or EU legislation is impugned. For this proposition Mr Scorey relies on Case C-344/04 *R (oao International Air Transport Association) v Department of Transport* [2006] ECR I-403 at [32]:

> "Consequently, the answer to the eighth question must be that, where a court against whose decisions there is a judicial remedy under national law considers that one or more arguments for invalidity of a Community act which have been put forward by the parties or, as the case may be,

> raised by it of its own motion are well founded, *it must stay proceedings* and make a reference to the Court for a preliminary ruling on the act's validity." [my emphasis]

18. The application is made on the basis that it is well founded: it is not made pursuant to the Tribunal's discretionary ability to refer.

19. The "well founded" test sets a low threshold. It has been expressed by English courts as equivalent to being "reasonably arguable". The appellant cites *R (on the application of Telefonica O2 Europe Plc & Ors) v Secretary of State for Business, Enterprise and Regulatory Reform* ("*Telefonica*") [2007] EWHC 3018 (Admin) at [4]:

> "The underlying question therefore is the validity or otherwise of the Roaming Regulation. There is no doubt that it has a significant direct and indirect affect on the business activities of the claimants. If satisfied that the challenge to its validity is reasonably arguable or, put negatively, not unfounded, I should refer the issue to the European Court and grant permission for the domestic challenge to the UK regulations." [Mr Scorey's underlining]

20. The appellant has two challenges to the validity of the CIR which it says are reasonably arguable and well founded (or not unfounded):

(1) The CIR is manifestly wrong in its classification of the MBs under Chapter 62 of the CN, and is *ultra vires* the Commission's powers.

(2) The decision to issue the CIR was reached in breach of the principle of sincere cooperation as set out in art 4(3) TFEU.

21. "Manifest error" is the test applied by the CJEU in determining the validity of a regulation interpreting the CN (C-463/98 *Cabletron Systems Ltd* ("*Cabletron*") [2001] ECR I-3495 and *VTech Electronics (UK) plc v Commissioners of Customs and Excise* ("*VTech*") [2003] EWHC 59 (Ch)). That test has also been expressed as whether it is reasonable for the Commission to consider particular goods fall within certain headings in the CN (Case C-401-93 *Goldstar Europe GmbH v Hauptzollamt Ludwigshafen* ("*Goldstar*") [1994] ECR I-5587 at [28].

22. The appellant submits that the CIR is manifestly wrong in purporting to classify the MBs under Chapter 62. The appellant adopts the decision of the Supreme Court as its case on this. The Customs Code Committee ("CCC"), the body made up of national experts, which assists the Commission gave reasoning for the CIR which does not even engage with the analysis of the Supreme Court or the relevant case law. The appellant then sets out four problems it finds with the CCC's reasoning.

23. In relation to the vires for the CIR the appellant submits that the CCC's discretion is not unfettered and does not extend to purporting to alter the chapter in the CN to which goods belong (as this is a matter of international law, not EU, law), but merely to altering the 8 digit subheading which is a matter of EU law (citing A-G Jacobs in *Cabletron* at [84] of his opinion).

24. The CIR is ultra vires the Commission's powers as it illegitimately narrows the scope of sub-heading 9021 in the CN (see Case C-267-94 *France v Commission* [1995] I-4845) ("*France*").

25. As to the principle of sincere co-operation, this places a duty on, among others, the European Commission to co-operate with domestic courts, a duty of "particular importance" (see *re Zwartveld* (C-2/88 Imm) [1990] ECR I-3365]. The Commission must not undermine the decisions of national courts (see *R (oao Newby Foods) v Food Standards Agency No. 7* [2014] EWHC 1340 (Admin) at [57].

26. The appellant submits that the Commission failed to accord full and proper respect to the Supreme Court's judgment, and indeed sought to undermine it.

**HMRC's submissions**

27. For the Commissioners, Mr Singh argued that the bar was not as low as the appellant suggested. It was only in cases where it was not reasonably open to, or was clearly wrong for, the Commission to do what it did in the CIR that a referral must be made. In other cases there was a broader discretion given to the national court.

28. There was no manifest error in the classification made by the CIR. The CCC discussed fully the issue of the correct classification, the UK arguing for 9021 in reliance on the Supreme Court decision. But the UK lost the argument by 27 to 1. The CCC's classification was a reasonable one for the reasons given in the Annex.

29. In response to Mr Scorey's submission that the CCC's reasoning does not engage with the analysis and the case law, the Respondents say that the minutes of the CCC's meetings are summaries and would not be expected to record full details of the discussion or recite legal authorities. There is nothing legally offensive in the CCC declining to follow the classification adopted by the Supreme Court. The CCC is not bound by a decision of the national court, but has a "broad discretion" (*VTech* at [20)]. A mere disagreement with the CCC, which is what the appellant's arguments come to, is not sufficient to establish invalidity.

30. There is nothing in the appellant's ultra vires arguments and it adds nothing to the argument about "manifest error".

31. Nor does the "sincere co-operation" point have any merit. The Commission had no obligation to agree with national courts. Its task is to promote the uniform application of the CN and therefore has to consult the CCC where a ruling of a national court, as in the decision of the Supreme Court, leads to divergent practice among the member states, as it did in this case. The CCC gave due respect to the decision of the Supreme Court.

**Conclusions**

32. There is, I agree with the appellant, a low threshold to surmount to show that an argument is well founded. This follows from *Telefonica*. In my judgment the appellant's argument on manifest error is well founded and surmounts that threshold. In particular *Goldstar* and *France*, cases on the CN and CIRs, are powerful support for the view that it is clearly arguable that the Commission, in adopting the opinion of the

CCC, or the CCC itself went beyond the limits of their role in interpreting the CN. It is certainly also arguable that they didn't, as the Respondents have demonstrated. But it is not my task to decide who is right.

33. I also agree, but with somewhat less conviction, that the appellant's point on sincere co-operation is arguable. If left to decide this issue on its merits I would be inclined to prefer HMRC's arguments, but that is by no means to say that the appellant's point is fanciful, and of course there would be much fuller argument in that event.

**Decision**

34. Under art 267, second paragraph, I consider that it is necessary that the CJEU gives a ruling on the question whether the CIR is a valid act of the Commission.

35. I therefore direct that these proceedings are stayed until after that ruling has been given.

36. In Mr Scorey's skeleton argument it is stated that the appellant will seek to agree with HMRC the wording of a reference (obviously that is only necessary if the outcome of this application is in its favour). As the outcome is in the appellant's favour I have made separate directions on this point.

**RICHARD THOMAS**
**TRIBUNAL JUDGE**

**RELEASE DATE: 07 SEPTEMBER 2018**