TC07954

Customs Duty – anti-dumping duty – preliminary issues – whether or not HMRC are required to repay the duty paid by Clarks – held no – whether or not HMRC are required to re-communicate the amount of the debt to Clarks – held no – whether or not the limitation period in Article 221(3) of the CCC was suspended by the lodging of an appeal – held yes – whether or not the limitation period has expired – held no – whether or not HMRC must repay any of the duty paid by Clarks – held no

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2013/02718P

BETWEEN

C&J CLARK INTERNATIONAL LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE PHILIP GILLETT

The Tribunal determined the preliminary issues in this appeal on 23, 24, 25 and 26 November without a hearing with the consent of both parties under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. A hearing was not held because it was considered that a face to face hearing was not appropriate during the pandemic and the Tribunal considered that the preliminary issues in dispute could be settled without the need for a hearing.

I received submissions from Sidley Austin LLP on behalf of the Appellant dated 1 September 2020, submissions from Mark Fell, counsel, on behalf of HMRC dated 22 September 2020 and a reply to those submission from Sidley Austin LLP dated 13 October 2020. In addition, I received an electronic bundle of documents of 494 pages and three bundles of authorities totalling 872 pages.

DECISION ON PRELIMINARY ISSUES

INTRODUCTION

1. These proceedings concern challenges, dating back to June 2010 and March 2012, in which the Appellant, C&J Clark International Limited, ("Clarks") alleges that anti-dumping duty it paid was not owed due to the invalidity of the underlying regulations and argues that it is therefore entitled to repayment.

2. Two references have previously been made in this appeal to the Court of Justice of the European Union ("CJEU"). These references resulted in an initial ruling in *C&J Clark International and Puma* (C-659/13 and C-34/14) ("*Clarks I*") that the original regulations imposing the definitive duty were invalid due to a procedural flaw. A second ruling in *C&J Clark International* (Case C- 612/16) ("*Clarks II*") determined that subsequent regulations issued by the EU Commission addressing the procedural flaw and re-imposing the duty at the same rate were valid.

3. There was also a reference from another member state, the case of *Deichmann SE* (Case C-256/16), which was determined after *Clarks I*, but before *Clarks II*, concerning the procedure set up by the EU Commission for addressing the procedural flaw and determining how much duty if any needed to be repaid pursuant to article 236 of Council Regulation (EEC) 2913/92, referred to as the Community Customs Code ("CCC"), which the CJEU ruled was valid.

4. Clarks now argues that HMRC are nonetheless under an obligation to repay the duty because the original regulations imposing the duty were found to be invalid. HMRC deny they are so obliged, because the procedural flaw giving rise to invalidity was addressed and duty was reimposed at the same rate in regulations which were found to be valid in *Clarks II*, under a procedure which was found to be valid in *Deichmann*.

5. Clarks also argue in the alternative that even if HMRC are right that there is no general obligation to repay the duty given the regulations re-imposing duty, HMRC are obliged to communicate again the amount of duty payable and they are now out of time to do so under article 221(3) of the CCC. HMRC deny that on the specific facts of this case they are under an obligation to recommunicate the amount of the duty, which remains the same pursuant to the re-imposing regulations, but even if they are so obliged, they are not out of time to do so, as the bringing of Clarks' appeal within the meaning of article 243 of the CCC suspended the running of time pursuant to article 221(3) of the CCC.

6. On 24 January 2020, following a joint application from the parties, the Tribunal, Judge Cannan, directed that the following issues of law be determined as preliminary issues:

> (1) Whether there is an obligation on the Commissioners to repay Clarks the duty, independent of the answers to questions (2)-(4) below.
>
> (2) If the answer to (1) is negative, whether the amount of duty resulting from the customs debt covered by the re-imposing regulations must be communicated to Clarks within the limitation period of Article 221(3) of the Community Customs Code ("CCC").
>
> (3) If the answer to (2) is affirmative, whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt was suspended by the lodging of an appeal within the meaning of Article 243 of the CCC for all, some, or none of the said customs debt.
>
> (4) If the answer to (2) is affirmative and taking into account the answer to (3), whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt has expired for all, some or none of the said customs debt.

(5) In view of the answers to (1) to (4), whether the Commissioners must repay all, some or none of the duty.

THE FACTS

7. The facts are essentially agreed between the parties and I find the following as matters of fact.

8. On 23 March 2006 the EU Commission adopted Regulation 553/2006 imposing provisional anti-dumping duty on various imports of footwear from China and Vietnam for two years ("the provisional regulation"). Subsequently, on 5 October 2006, the European Council adopted Regulation 1472/2006 imposing definitive anti-dumping duty on various imports of footwear from China and Vietnam for two years ("the definitive regulation"). This duty was extended to 31 March 2011 by Regulation 1294/2009 ("the prolonging regulation").

9. Between the start of July 2007 and the end of August 2010, Clarks imported various items of leather footwear from Vietnam and China ("the Imports"). The Imports were cleared into the UK, customs declarations were made, and Clarks paid anti-dumping duty imposed on the Imports pursuant to the definitive regulation and the prolonging regulation. It is not disputed that Clarks was notified at the time of the clearance of the Imports of the entry of the relevant amounts of duty into the Commissioners' accounts.

10. On 30 June 2010 Clarks filed a repayment request relating to the Imports which were cleared between July 2007 and April 2010 and on 2 March 2012 Clarks filed a further repayment request relating to the Imports which were cleared up to August 2010 (together, "the Repayment Requests"). The Repayment Requests referred to article 236 and/or 239 of the Community Customs Code ("CCC"). They also alleged that the provisional regulation and the definitive regulation were invalid on the basis of allegations made in proceedings to annul the definitive regulation, known as cases *Zheijiang Aokang Shoes* (C-247/10 P) and *Brossman Footwear (HK)* (C2-49/10 P) with the result that the duty was not owed. The Repayment Requests made clear that it was expected that HMRC would make a determination in response only after the CJEU had rendered its judgments in *Zheijiang* and *Brossman,* which Clarks maintained would show that the regulations underpinning the duty collected were invalid.

11. HMRC confirmed on 10 August 2010 that Clarks' claim would be protected pending the outcome of *Zheijiang* and *Brossman*.

12. On 13 March 2013, following the handing down of the decisions in *Zheijiang* and *Brossman*, HMRC rejected the Repayment Requests on the basis that the definitive regulation still extended to manufacturers and exporters not named in those proceedings so that it could not be said the duty was not owed. Clarks brought appeal proceedings before the Tribunal under s16 Finance Act 1994 on 11 April 2013.

13. Following a reference by the Tribunal in the present appeal, in *Clarks I*, the CJEU held, on 4 February 2016, that the definitive regulation and the prolonging regulation were invalid in so far as the Commission did not examine the "market economy treatment" (MET) and "individual treatment" (IT) claims by exporting producers that had not been sampled, which might have resulted in a lower rate of anti-dumping duty in relation to those exporters.

14. On 18 February 2016, the EU Commission published Regulation 2016/223 ("the implementing regulation"). The aim of the implementing regulation, according to the heading and recital 13, was to take the necessary measures to implement the judgment in *Clarks I*, by replacing the annulled acts with a new act in which the illegality identified by the CJEU in *Clarks I* was eliminated.

15. In *Deichmann*, the implementing regulation was held by the CJEU to be valid. It ruled that:

(1) Whilst it was settled that where the CJEU declares a regulation imposing anti-dumping duty invalid, such duty is considered as never having been lawfully owed [62], the scope of a declaration of invalidity by the CJEU must be determined not just by reference to the operative part of the judgment, but also to the grounds that constitute its essential basis.

(2) The scope of the declaration of invalidity in *Clarks I* in relation to the definitive regulation and the prolonging regulation was limited to the failure to assess the MET and IT claims [65].

(3) Accordingly, at most, the part of the anti-dumping duty collected pursuant to the definitive regulation and the prolonging regulation corresponding to the difference, if any, between the rate at which they should have been set if the MET and IT claims had been considered, had to be repaid [69].

(4) In those circumstances, the full and immediate repayment of dumping duty was unnecessary [70], and

(5) it followed that the Commission was empowered to direct in the implementing regulation that customs authorities should await the Commission's determination of the MET and IT claims and its publication of re-imposing regulations before deciding on any claims for repayment of duty [71].

16. On 18 August 2016 and 13 September 2016 respectively, the Commission published regulations 2016/1395 and 2016/1647, recording that it had examined the MET and IT claims of the relevant Chinese and Vietnamese exporting producers concluding that all should be denied, so that anti-dumping duty should be re-imposed at the same rate set by the definitive regulation and the prolonging regulation ("the re-imposing regulations").

17. Upon a further reference by the Tribunal in the present appeal, in *Clarks II*, the re-imposing regulations were held to be valid. In *Clarks II*, the CJEU ruled that:

(1) an examination had revealed nothing capable of affecting the validity of the re-imposing regulations [69].

(2) the rules on limitation laid down in article 221(3) of the CCC are applicable to the collection of duties established by the re-imposing regulations [86], and

(3) it is the task of the national authorities and courts to determine on a case-by-case basis whether communication under article 221(3) of the CCC can be made or whether it is time-barred, taking account of the date on which the debtor's customs debt arose and, in the event that the debtor has brought an appeal, the suspension of that period [85].

THE LAW

18. The definitive regulation, the prolonging regulation and the re-imposing regulations, were made under the specific EU legislation applicable to anti-dumping measures, ie, Regulation 384/96, Regulation 1225/2009 and Regulation 2016/1036 ("the anti-dumping measures"). The anti-dumping measures provide (in each case in article 14(1)) that antidumping duty is to be collected by Member States according to the criteria laid down in the measures imposing that duty. In the present case, those measures are the definitive regulation, the prolonging regulation, the implementing regulation and the re-imposing regulations. The effect of those measures is that the provisions of the CCC regarding the collection of customs duties will govern the collection of the relevant antidumping duty.

19. Article 201 of the CCC contains provision as to how and when a customs debt is "incurred" on importation:

"**Article 201**

1. A customs debt on importation shall be incurred through:

(a) the release for free circulation of goods liable to import duties, or

(b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. …"

20. Article 217(1) of the CCC provides for the calculation and entry of duty into the accounts of customs authorities, as below.

"**Article 217**

1. Each and every amount of import duty or export duty resulting from a customs debt, hereinafter called 'amount of duty', shall be calculated by the customs authorities as soon as they have the necessary particulars, and entered by those authorities in the accounting records or on any other equivalent medium (entry in the accounts)

..."

21. Importantly in the context of this appeal, Article 221 of the CCC imposes an obligation to communicate amounts of duty which have been entered into the accounts, and a time limit on that obligation.

"**Article 221**

1. As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

2. …

3. Communication to the debtor shall not take place after the expiry of a period of three years from the date on which the customs debt was incurred. This period shall be suspended from the time an appeal within the meaning of Article 243 is lodged, for the duration of the appeal proceedings.…"

22. Article 236 of the CCC contains provision regarding rights to be repaid duty, together with a time limit running from the date the amount of duties was communicated to the debtor:

"**Article 236**

1. Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed….

2. Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor…."

23. Article 1 of the implementing regulation, Regulation 2016/223, provides:

"**Article 1**

1. National customs authorities, which have received a request for reimbursement, based on Article 236 of the Community Customs Code, of anti-dumping duties

imposed by Regulation (EC) No 1472/2006 or Implementing Regulation (EU) No 1294/2009 and collected by national customs authorities, which is based on the fact that a non-sampled exporting producer had requested MET or IT, shall forward that request and any supporting documents to the Commission.

2. Within eight months of the receipt of the request and any supporting documents, the Commission shall verify whether the exporting producer had indeed lodged an MET and IT claim. If so, the Commission shall assess that claim and re-impose the appropriate duty by means of a Commission Implementing Regulation….

3. The national customs authorities shall await the publication of the relevant Commission Implementing Regulation re-imposing the duties before deciding on the claim for repayment and remission of antidumping duties."

DISCUSSION

24. The preliminary issues before me in this case were set out in directions from the Tribunal dated 24 January 2020, as follows:

(1) Whether there is an obligation on the Commissioners to repay Clarks the duty, independent of the answers to questions (2)-(4) below.

(2) If the answer to (1) is negative, whether the amount of duty resulting from the customs debt covered by the re-imposing regulations must be communicated to Clarks within the limitation period of Article 221(3) of the CCC.

(3) If the answer to (2) is affirmative, whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt was suspended by the lodging of an appeal within the meaning of Article 243 of the CCC for all, some, or none of the said customs debt.

(4) If the answer to (2) is affirmative and taking into account the answer to (3), whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt has expired for all, some or none of the said customs debt.

(5) In view of the answers to (1) to (4), whether the Commissioners must repay all, some or none of the duty.

25. To a large extent, these questions can almost all be determined by considering the seemingly simple question of whether the duties imposed under the re-imposition regulations are the **same** duties as those imposed originally under the provisional regulation, the definitive regulation and the prolonging regulation, as argued by HMRC, or if they are **new** duties, separate from and different to the original duties, as argued by Clarks. Unfortunately, this is not a simple question.

Clarks II* and *Deichmann

26. This case has been considered by the CJEU on two occasions, and another case, *Deichmann*, which is of direct relevance as regards the re-imposition of the duties, has also been considered by the CJEU. However, in none of these cases was the question regarding the legal status of the re-imposed duties put to the Court. I must therefore attempt to answer it by implication from what the Court said in those cases.

27. *Clarks I* was concerned with whether or not the original duties, ie, those imposed by the provisional regulation, the definitive regulation and the prolonging regulation, were legally imposed, and came to the conclusion that they were not. This is not therefore of direct relevance to the questions before me.

28. *Clarks II* and *Deichmann* are however directly relevant and both parties have pleaded them in support of their preferred outcome.

29. In *Clarks II* the questions referred to the CJEU for a preliminary ruling by the FTT were as follows:

> 1) Does a statute of limitations apply to the collection of the anti-dumping duty imposed by [the implementing regulations at issue], and, if so, on the basis of which legal provision?
>
> 2) Are the [implementing regulations at issue] invalid because they lack a valid legal basis, and as such violate Articles 5(1) and 5(2) TEU?
>
> 3) Are the [implementing regulations at issue] invalid because they violate Article 266 TFEU by failing to take the necessary measures to comply with [the judgment of 4 February 2016, C & J Clark International and Puma (C-659/13 and C-34/14, EU:C:2016:74)]?
>
> 4) Are the [implementing regulations at issue] invalid because they violate Article 10(1) of Regulation [2016/1036] or the principle of legal certainty (non-retroactivity) by imposing an anti-dumping duty on import of certain leather footwear originating in the People's Republic of China and Vietnam which took place during the period of application [of the regulations declared to be invalid]?
>
> 5) Are the [implementing regulations at issue] invalid because they violate Article 21 of Regulation [2016/1036] by re-imposing an anti-dumping duty without conducting a fresh Union interest assessment?

30. The CJEU answered those questions as set out below.

31. It answered question 2 at [43] as follows:

> "43 Last, it follows from settled case-law that, although those provisions do not expressly refer to the possibility of 're-imposing' anti-dumping duties following the delivery of a judgment annulling an act or declaring it to be invalid, those provisions are no less apt to empower the Commission to undertake such a re-imposition, after the Commission has resumed the proceedings that gave rise to the regulations annulled or declared to be invalid by the Courts of the European Union and has thereby, in accordance with the procedural and substantive rules applicable ratione temporis, remedied the illegalities identified (see, to that effect, the judgment of 15 March 2018, *Deichmann*, C-256/16, EU:C:2018:187, paragraphs 55, 73 and 74 and the case-law cited)."

32. Considering question 3, at [50], it said:

> "50 Last, as regards the third aspect of those doubts, the Commission did not err in law by failing to make any finding on all the claims for market economy treatment and individual treatment referred to in paragraph 18 of the present judgment, but confining itself to dealing with those submitted by the exporting producers whose products were affected, when they were imported into the European Union, by the anti-dumping duties the repayment of which has been subsequently requested from the national customs authorities."

33. Considering question 4, at [55] to [57], it said:

> "55 Accordingly, and as the Court has previously held, the validity of acts such as the Implementing Regulations at issue must be assessed, taking into account the period covered by the facts that were the subject of the regulations declared to be invalid, in the

light of Article 10(1) of Regulation No 384/96 (see, to that effect, the judgment of 15 March 2018, Deichmann, C-256/16, EU:C:2018:187, paragraph 77).

56 That being the case, the fourth question must be understood as meaning that the referring court seeks to ascertain whether the Implementing Regulations at issue are invalid on the ground that they infringe the general principle of non-retroactivity, as enshrined in Article 10(1) of Regulation No 384/96, by re-imposing anti-dumping duties on imports that were made during the period of application of the regulations declared to be invalid.

57 As regards the substance, and as is clear from the case-law of the Court, Article 10(1) of Regulation No 384/96 **does not preclude acts such as the Implementing Regulations at issue from re-imposing anti-dumping duties on imports that were made during the period of application of the regulations declared to be invalid** (judgment of 15 March 2018, *Deichmann*, C-256/16, EU:C:2018:187, paragraphs 77 and 78)"

34. On question 5, at [65] to [68], it said:

"65 In that regard, it must be noted that there is an explicit reference in Article 9(4) of Regulation No 384/96 to Article 21 of that regulation, so that it is plain that regulations concerning the imposition of anti-dumping duties constitute measures whose adoption requires that an assessment of the Community interest be undertaken.

66 However, it is apparent from paragraphs 22 to 25 of the present judgment that the Implementing Regulations at issue constitute measures **the object of which is not to impose anti-dumping duties, but solely to re-impose such duties**, while remedying the illegalities identified by the Court in the judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74). Further, and as stated in paragraph 47 of the present judgment, the illegalities identified by the Court did not at all relate to the assessment of the Union interest.

67 Having regard to the foregoing, it cannot be held, in the light of Article 9(4) of Regulation No 384/96, that Article 21 of that regulation should be understood as meaning that acts such as the Implementing Regulations at issue, which re-impose anti-dumping duties following the identification, by the Court, of illegalities that do not relate to the assessment of the Community interest, constitute measures whose adoption requires that a fresh assessment of the Community interest be undertaken.

68 In the light of the foregoing, the answer to the fifth question is that the Implementing Regulations at issue are not invalid on the ground that they infringe Article 21 of Regulation No 384/96 by re-imposing anti-dumping duties without conducting a fresh Union interest assessment."

35. The Court considered question 1 after considering the other questions and said, at [79] to [86]:

"79 However, the object of those Implementing Regulations **is not**, as has been stated in paragraph 64 of the present judgment, **to impose anti-dumping duties, but only to re-impose such anti-dumping duties** following the declaration, in the judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74), that regulations which had imposed them were invalid. They must therefore be construed taking account of that situation.

80 In that regard, the Court has previously stated that, taking account of the extent of the grounds that constitute the necessary support for the operative part of the judgment

of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74), according to which the regulations imposing those anti-dumping duties are invalid only in so far as they infringe certain specific provisions of Regulation No 384/96, the declaration of invalidity made in that judgment must be understood as relating exclusively to the provisions of those regulations relating to the imposition of certain anti-dumping duties and the setting of the rates applicable to those anti-dumping duties (see, to that effect, the judgment of 15 March 2018, *Deichmann*, C-256/16, EU:C:2018:187, paragraphs 64 to 69). **That declaration does not, therefore, affect the other provisions of those regulations.**

81 However, the provisions of the regulations declared to be invalid which were not affected by the declaration of invalidity made in the judgment of 4 February 2016 *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74) state, inter alia, that 'the provisions in force concerning customs duties shall apply', as is apparent from paragraphs 14 and 17 of the present judgment.

82 Consequently, those 'provisions in force concerning customs duties' are applicable to the anti-dumping duties that are re-imposed by the Implementing Regulations at issue, as from the date of entry into force of those regulations.

83 In that regard, the provisions in force concerning customs duties, in the version applicable to the Implementing Regulations at issue, contain rules with respect to limitation, which are applicable to the collection of the anti-dumping duties established by those acts.

84 More specifically, **that collection is subject to the limitation rule laid down in Article 221(3) of the Community Customs Code, which provides that the amount of the duties can no longer be communicated to the debtor after the expiry of the three-year period from the date on which that customs debt arose**, that period being however suspended as from the date of bringing an appeal, within the meaning of Article 243 of that code.

85 Accordingly, **it is the task of the competent national authorities and courts to determine on a case-by-case basis whether such communication can still be made or whether it is time-barred by reason of the expiry of that period, taking account of the date on which the debtor's customs debt arose** and, in the event that the debtor has brought an appeal, the suspension of that period (the judgment of 15 March 2018, Deichmann, C-256/16, EU:C:2018:187, paragraph 84).

86 Accordingly, the answer to the first question is that **the limitation rules laid down in Article 221(3) of the Community Customs Code are applicable to the collection of the anti-dumping duties** established by the Implementing Regulations at issue."

36. The questions addressed by the CJEU in *Deichmann* relate to the validity of Commission Implementing Regulation (EU) 2016/223, the implementing regulation which the Commission issued following *Clarks I*. Although the Court held that the regulation was indeed valid, it made a number of findings which are of relevance to the current case.

37. At [34] and [35] it said:

"34 Second, even assuming that, in the regulation at issue, the Commission was right to apply Regulation No 1225/2009, the referring court wishes to know whether the Commission was empowered to make the directions set out in Article 1 of the regulation at issue, in view of the wording of the first sentence of Article 14(1) of Regulation No

1225/2009, in the first place, and Article 236(1) of the Customs Code, in the second place.

35 Third, the referring court raises the question as to whether the regulation at issue was lawfully able **to resume the proceeding at the origin of the definitive regulation** and the prolonging regulation with the aim of reinstating the anti-dumping duties imposed by those regulations, taking into account, in the first place, the rules of non-retroactivity laid down in Article 10(1) of Regulation No 384/96 and Article 10(1) of Regulation No 1225/2009, and, in the second place, the time-bar laid down in Article 221(3) of the Customs Code.

38. At [49] to [52], the Court said:

"49 It is settled case-law that the need for a uniform interpretation of EU law prevents, in the case of doubt, the text of a provision of EU law from being considered in isolation and requires, on the contrary, that it be interpreted on the basis of the real intention of its author and the aim which the latter seeks to achieve in the light of, in particular, all language versions (judgments of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74), paragraph 122, and of 25 January 2017, *Vilkas*, C-640/15, EU:C:2017:39, paragraph 47)."

50 In the present case, it follows from recital 1 of Regulation No 1225/2009 that that regulation seeks essentially to codify Regulation No 384/96, without altering its substance.

51 In addition, it is apparent from the heading and the wording of Article 23 of Regulation No 1225/2009 that, in adopting that provision, the EU legislature sought to repeal Regulation No 384/96, while explicitly ensuring that the proceedings brought under that regulation remain valid, in order to allow the competent institutions to continue those proceedings. However, the EU legislature did not stipulate, in most of the language versions of Regulation No 1225/2009, that the provisions of Regulation No 384/96 would continue to apply to those proceedings.

52 Finally, it follows from case-law that acts of the European Union must, in principle, be adopted in accordance with the procedural rules in force at the time of their adoption (see, to that effect, judgment of 14 June 2016, *Commission v McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 40). It follows that, precisely due to the repeal of Regulation No 384/96 and having regard to the purpose of Regulation No 1225/2009, proceedings initiated on the basis of Regulation No 384/96 could, as from its repeal, be pursued only on the basis of Regulation No 1225/2009."

39. Further, at [62] to [64] it said:

"62 Indeed, it is settled case-law that, when the Court declares that a regulation imposing anti-dumping duties, such as the definitive regulation or the prolonging regulation, is invalid, such duties are to be considered as never having been lawfully owed within the meaning of Article 236 of the Customs Code and, **in principle, are required to be repaid by the national customs authorities under the conditions set out to that effect** (see, to that effect, judgments of 27 September 2007, *Ikea Wholesale*, C-351/04, EU:C:2007:547, paragraphs 66 to 69, and of 18 January 2017, *Wortmann*, C-365/15, EU:C:2017:19, paragraph 34).

63 However, the exact scope of a declaration of invalidity by the Court in a judgment and, consequently, of the obligations that flow from it must be determined in each specific case by **taking into account not only the operative part of that judgment, but also the grounds that constitute its essential basis** (see, to that effect,

judgment of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraph 49 and the case-law cited).

64 In those circumstances, **it is necessary to determine**, in the present case, **the exact scope of the declaration of invalidity** contained in the operative part of the judgment of 4 February 2016, *C & J Clark International and Puma* (C-659/13 and C-34/14, EU:C:2016:74), in the light of the grounds of that judgment that constitute its essential basis."

40. It also said, at [69] to [71]:

"69 It is only, at most, the part of the anti-dumping duties collected pursuant to those regulations corresponding to **the difference**, if any, between the rate at which they had set those anti-dumping duties, on the one hand, and the rate at which they should have been set if the illegalities found by the Court in its judgment of 4 February 2016, C & J Clark International and Puma (C-659/13 and C-34/14, EU:C:2016:74) had not been committed, on the other hand, **that had been wrongly imposed and, as such, had to be repaid to the parties concerned**. In that context, Article 236 of the Customs Code cannot be interpreted as prohibiting the Commission from directing that a ruling be made on the applications for repayment of those anti-dumping duties following a procedure with the specific aim of allowing it to calculate such a difference.

70 In those circumstances, in the light of the case-law cited in paragraphs 62 and 63 of this judgment, the full and immediate repayment of the relevant anti-dumping duties was not necessary.

71 Consequently, as the directions set out in Article 1 of the regulation at issue are not contrary to Article 236(1) of the Customs Code, the Commission was empowered to adopt them on the basis of the first sentence of Article 14(1) of Regulation No 1225/2009."

41. Finally, at [75] to [79] and [83] to [85], the Court said

"75 It follows from the foregoing that the regulation at issue could legitimately resume the proceeding at the origin of the definitive regulation and the prolonging regulation.

78 However, the wording of Article 10(1) of Regulation No 384/96 does not preclude such a resumption of the proceeding in a case in which the anti-dumping duties concerned have expired since that date, provided that such duties are re-imposed during their initial application period, and therefore, in the present case, with regard to goods put into free circulation after the entry into force of the definitive regulation and the prolonging regulation.

79 Accordingly, the resumption of the proceeding in the present case cannot be regarded as contrary to the rule of non-retroactivity laid down in Article 10(1) of Regulation No 384/96, on the ground that the anti-dumping duties imposed by the definitive regulation and the prolonging regulation had expired on the date of adoption of the regulation at issue.

…

83 As a result, **the time-bar set out in Article 221(3)** of the Customs Code **is not capable of preventing the Commission from adopting a regulation imposing or re-imposing anti-dumping duties** or, a fortiori, from opening or resuming the proceeding prior to such adoption, with each of those operations necessarily having to occur before

those by which the national competent authorities calculate the amount of duty to be levied pursuant to the regulation in question and communicate such amount to the debtor.

84 Thus, in the present case, it is only once the Commission has completed the proceeding set out in the regulation at issue, by re-imposing, at the appropriate rate, the anti-dumping duties imposed by the definitive regulation and the prolonging regulation, that national customs authorities will be able to determine the corresponding duties and communicate them to debtors. **It is, therefore, for those authorities, under the supervision of the competent national courts, to satisfy themselves, on a case-by-case basis, that Article 221(3) of the Customs Code has been complied with, by verifying that such a communication may still be made, taking into account the three-year time limit laid down in the first sentence of that provision and any suspension of that time limit in accordance with the second sentence of that provision**.

85 As a result, **resuming the proceeding is not contrary to the time-bar laid down in Article 221(3) of the Customs Code**."

Summary of Key Points from *Clarks II* and *Deichmann*

42. I think it is helpful at this point to summarise what I see as the key points emerging from these two judgements.

(1) It is settled case-law that the need for a uniform interpretation of EU law prevents, in the case of doubt, the text of a provision of EU law from being considered in isolation and requires that it be interpreted on the basis of the real intention of its author and the aim which the author seeks to achieve.

(2) The implementing regulations are valid.

(3) The object of the implementing and re-imposing regulations is **not to impose anti-dumping duties, but only to re-impose such anti-dumping duties**. This key element of the Court's approach flows through the whole of the judgement in *Clarks II* and is totally supportive of the argument that what has happened is the re-imposition of the **same** duties which were originally imposed and **not** the imposition of **new** duties.

(4) The **resumption** of the proceeding cannot be regarded as contrary to the rule of non-retroactivity laid down in Article 10(1) of Regulation No 384/96, on the ground that the anti-dumping duties imposed by the definitive regulation and the prolonging regulation had expired on the date of adoption of the regulation at issue.

(5) The declaration that some parts of the original regulations were invalid does not affect the other provisions of those regulations.

(6) Collection of the duties is subject to the limitation rule laid down in Article 221(3) of the CCC, which provides that the amount of the duties can no longer be communicated to the debtor after the expiry of the three-year period from the date on which that customs debt arose. It is the task of the competent national authorities and courts to determine on a case-by-case basis whether such communication can still be made or whether it is time-barred by reason of the expiry of that period, taking account of the date on which the debtor's customs debt arose. Resuming the proceeding is not contrary to the time-bar laid down in Article 221(3) of the Customs Code

(7) When the CJEU declares that a regulation imposing anti-dumping duties, such as the definitive regulation or the prolonging regulation, is invalid, such duties are to be considered as never having been lawfully owed within the meaning of Article 236 of the CCC and, **in principle**, are required to be repaid by the national customs authorities.

However, the exact scope of a declaration of invalidity by the Court in a judgment and, consequently, of the obligations that flow from it must be determined in each specific case by taking into account not only the operative part of that judgment, but also the grounds that constitute its essential basis.

(8) It is only, **at most**, the part of the anti-dumping duties corresponding to **the difference** between the rate at which those anti-dumping duties had been set and the rate at which they should have been set, that had been wrongly imposed and, as such, had to be repaid to the parties concerned. In those circumstances, the full and immediate repayment of the relevant anti-dumping duties was not necessary.

Preliminary Issues

43. I will now address the preliminary issues which I have been asked to answer.

(1) Is there an obligation on HMRC to repay Clarks the duty, independent of the answers to questions (2)-(4) below?

44. Article 1.3 of the implementing regulation states:

> "The national customs authorities shall await the publication of the relevant Commission Implementing Regulation re-imposing the duties before deciding on the claim for repayment and remission of antidumping duties."

45. The CJEU held that this was legally valid and, moreover, that the immediate repayment of the relevant anti-dumping duties was not necessary.

46. Counsel for Clarks argued strongly that, while the Commission, with Regulation 2016/223, temporarily suspended HMRC's obligation to repay the invalidated duties, this suspension lapsed with the publication of the Re-imposing Regulations. Indeed, they said that in *Clarks II* the Court confirmed that the Commission could suspend the repayment of the Invalidated Duties based on the Invalidated Regulations but only *until* the publication of the Re-imposing Regulations. They then argued that with the publication of the re-imposing Regulations on 19 August and 14 September 2016, the temporary suspension of HMRC's obligation to repay the invalidated duties lapsed.

47. With all due respect to Clarks' counsel this is not what Article 1.3 says. It says that the national authority should await the publication of the re-imposing regulations before deciding on the claim for repayment, presumably, on the basis of the CJEU's reasoning, waiting to see how much if any of the original duties needed to be repaid, since only the difference between the original duties and the re-imposed duties would need to be repaid.

48. In addition, based on their underlying argument that the re-imposed duties are new duties, they submitted that the status of the new duties should not affect that fact that the original duties have been declared invalid and that they should therefore be repaid in any case, irrespective of the treatment of the re-imposed duties. They argued that the two customs debts are not the same, and that the Court confirmed this in *Clarks II*, at [84] and [85], where it held that customs **must** communicate the **new** customs debt arising from the re-imposing Regulations, even though the Respondents had previously communicated the customs debt arising from the invalidated regulations.

49. Again, this is not, in my view, what the Court said. It did say, at [85]:

> "… it is the task of the competent national authorities and courts to determine on a case-by-case basis whether such communication can still be made or whether it is time-barred by reason of the expiry of that period, taking account of the date on which the debtor's customs debt arose…"

50. I cannot find anything in those words which say that HMRC must communicate the **new** duties. It simply states that HMRC must determine whether such a communication can still be made bearing in mind the time limitations imposed by Article 221(3) of the CCC. This is a very different proposition.

51. Furthermore, in recitals (24) and (25) to the implementing regulations the position is clearly explained as follows:

> "(24) The Commission will adopt Regulations establishing the assessment and re-imposing, where appropriate, the applicable duty rate. Those newly established rates will take effect as from the date on which the annulled regulation entered into force.
>
> (25) Therefore, the national customs authorities are obliged to await the outcome of such investigation before deciding on any repayment claim."

52. Clarks' counsel put forward a number of additional submissions, but they all rely fundamentally on the same concept that there are **old** duties which have been invalidated and are therefore no longer due and payable to HMRC, and **new** duties which require HMRC to go through the same communication and appeal process as they did for the original duties. I do not find these arguments persuasive because I do not believe that they reflect the approach of the CJEU to this issue.

53. In conclusion, I do not find the arguments of Clarks' counsel persuasive and my answer to the first question is no. There is no obligation on HMRC to repay the original duties.

(2) If the answer to (1) is negative, whether the amount of duty resulting from the customs debt covered by the re-imposing regulations must be communicated to Clarks within the limitation period of Article 221(3) of the CCC.

54. Clarks argued that it follows **explicitly** from *Clarks II* and *Deichmann* that HMRC **must** communicate the customs debt resulting from the re-imposing Regulations, assuming that such a communication is not time-barred, again referring to [84] of the judgement in *Clarks II*. Paragraph [84] incudes the words:

> "The national customs authorities **will be able** to determine the corresponding duties and communicate them to debtors."

55. This is not the same as an explicit statement that the national authority **must** communicate the corresponding duties. It is permissive, not instructive or mandatory.

56. Clarks' counsel also stated that:

> "in its pleadings before the Court of Justice in *Clarks II*, the Commission relied on *Deichmann* – just like the Respondents – to argue that "there is no need for a new communication of the customs debt" resulting from the Re-imposing Regulation because "the amount of customs debt has not changed." The Court of Justice rejected that argument explicitly and held that, in the facts at issue before the Tribunal, the Re-imposed Measures must be communicated to and collected from the Appellant within the limitation period of Article 221(3) CCC."

57. Again, they refer to paragraphs [84] and [85] in support of this contention, but I can find no such explicit rejection of that argument, let alone any instruction that the national authority must communicate the new duties to Clarks.

58. In response, HMRC argued that the judgement merely sets out the general position that any communication that is required must occur within the prescribed time limit (rather than finding that a fresh notification is required in the present case), and that the CJEU emphasises that the decision of national authorities and courts on notification must be made on a case by

case basis by those national bodies. I find this to be a much more accurate reading of the Court's decision.

59. In addition, HMRC submitted that the definitive and prolonging regulations imposed duty on imports up to March 2011. The re-imposing regulations came into force in 2016, which would mean that there is a gap of 5 years from the last import to which the duty could apply and the earliest date that any new debt arising under the re-imposing regulations could have been communicated. The result would be that, on Clarks' argument, ignoring the question of an appeal which suspended the running of time, a debt which arises solely from the re-imposing regulations will be automatically time barred and cannot be lawfully communicated.

60. I agree with HMRC that such an interpretation totally undermines the effectiveness of the re-imposing regulations. There would simply be no point in the Court even bothering to address this issue, especially if it is considered in conjunction with Clarks' argument that there has been no appeal against the new duties. This strongly suggests that re-communication of the debt is not required.

61. Clarks argued that these comments by the Court regarding time limits are of general application and suggested some possible circumstances in which the comments of the Court regarding time limits would have some meaning. However, the Court was answering the question about time limits in the context of the facts in this case, and clearly, if those comments mean what Clarks maintain they mean, ie that HMRC must communicate the new debt within three years of the debt arising, then they can have no effect in the current case. HMRC would be unable to communicate the new debts within three years of the debt arising.

62. As counsel for HMRC, Mr Fell, pointed out, it is important to bear in mind the fundamental absurdity and unfairness of Clarks' primary case on issues 3 and 4. On its primary case, time started running in August 2010. However, the re-imposing regulations were not made until August and September of 2016. So, Clarks' primary case entails that HMRC were and always would have been time barred from recovering the duty in question. That cannot be right.

63. I agree with Mr Fell on this point.

64. As Mr Fell also argued, when considering their case in the round, Clarks is arguing that it is able to challenge the duty it has paid, secure a delayed determination of that challenge while CJEU proceedings are ongoing which may benefit it and then argue that HMRC are out of time to fully implement the outcome of the process due to their agreeing to await the outcome of the CJEU proceedings, thereby delaying the launch of a Tribunal appeal. That also cannot be right.

65. Again, I agree with Mr Fell on this point.

66. In summary, in answer to the second issue, I find that there is no need for HMRC to communicate the amount of any debt resulting from the customs duty covered by the re-imposing regulations because it has already been communicated. Any alternative reading simply leads to a manifestly unfair result.

(3) <u>If the answer to (2) is affirmative, whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt was suspended by the lodging of an appeal within the meaning of Article 243 of the CCC for all, some, or none of the said customs debt</u>

67. I have decided that there is no need for HMRC to re-communicate a "new" debt to Clarks because they have already communicated the original debt, which has, in my view, simply been re-imposed by the re-imposing regulations. Strictly therefore, I do not need to answer this question. However, in case I am wrong on question (2) I will address it.

68. It is quite clear that if the time limit in Article 221(3) has not been extended by an appeal procedure then HMRC would have been out of time to communicate the "new" debt at the time the duties were re-imposed.

69. Clarks maintained that they have never appealed against the "new" duties because there has been no communication from HMRC against which to appeal. As such, they said that there has been no extension of the three year time limit, but, since in the absence of an appeal extending the time limit, HMRC were out of time to communicate the "new" duties this would, as stated above, have led to a very strange outcome. An outcome which I do not believe the CJEU would have intended or contemplated.

70. There is also the fact that, in *Clarks II*, the CJEU was considering an appeal against the "new" duties. It had already considered Clarks' appeal against the original duties, in *Clarks I*, and therefore *Clarks II* can only be said to be an appeal against the "new" duties.

71. The Tribunal accepted this second element of the original appeal as being merely a continuation of the original appeal, as did the CJEU, and, more importantly, as did Clarks. Had Clarks not believed that this was merely a continuation of the original appeal there would have been no appeal process for them to pursue. On Clarks' current argument they would more properly have requested that the case be struck out at that point because there was no open appeal. Once the position regarding the original duties had been settled, by the CJEU deciding that those duties were invalid, there was no further open appeal.

72. They did not do this however. Clarks treated this as a single ongoing appeal, starting when they had lodged the original appeal on 11 April 2013. All court proceedings since that date have proceeded on the same basis, which neither party has challenged, until now.

73. In my view the current proceedings are simply a continuation of the appeal which was commenced on 11 April 2013. The time limit prescribed in Article 221(3) of the CCC has therefore been suspended by the lodging of this appeal. Given that this appeal has not yet been settled HMRC are still within time to communicate the debt relating to the re-imposed duties should that prove to be necessary.

(4) <u>If the answer to (2) is affirmative and taking into account the answer to (3), whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt has expired for all, some or none of the said customs debt.</u>

74. Clarks' counsel argued that even if the present appeal could suspend the limitation period for communicating the customs debt resulting from the re-imposing regulations, then the limitation period was suspended only for those imports for which the limitation period had not yet expired on 11 April 2013, the date Clarks brought this appeal. They say that the present appeal could have suspended the limitation period only for imports for which the customs declaration was accepted on or after 11 April 2010, but not for those for which the customs declaration was accepted before 11 April 2010.

75. This argument is based on the idea that an appeal lodged on 11 April 2013 could not have extended the time limit under Article 221(3) in respect of imports which had taken place more than three years before the lodging of the appeal. They are therefore arguing that their appeal on 11 April 2013 was valid against all the anti-dumping duties in question but that it only extended the time limit in Article 221(3) for those goods imported after 11 April 2010.

76. This would produce the somewhat bizarre result that Clarks' appeal was valid in respect of earlier imports but that neither HMRC nor the Commission could do anything about the duties related to those earlier imports, ie, that in spite of the clear intentions of the CJEU that the Commission should be able to introduce the implementing regulations and the re-imposing regulations. This does not seem to me to be a logical or fair outcome.

77. Part of the problem in this argument is that Article 236 of the CCC introduces a three year time limit for **filing a repayment claim**, whereas the extension to the three year limit under Article 221(3) arises only where there is an appeal. Counsel for Clarks also argue that a repayment claim is not an appeal, a point with which I agree. However, this difference between the two articles opens up some surprising possibilities.

78. If this is indeed the case then counsel for Clarks have identified a lacuna in the legislation, meaning that Clarks can lodge a repayment claim, within the three year time limit in Article 236, and then lodge an appeal against HMRC's refusal to repay the duty, some years later, and then, even if they lose their appeal, HMRC can do nothing about recovering the debt due in respect of the earlier imports. This cannot be right.

79. In my view, the lodging of an appeal against HMRC's refusal to repay the anti-dumping duties must extend the time limit for all the duties under appeal. This is the only sensible outcome. It cannot have been intended by those responsible for drafting the CCC that this totally illogical lacuna should exist.

80. In summary then I find in response to the fourth issue that the time limit in Article 221(3) has been extended to cover all the anti-dumping duties paid by the lodging of the appeal on 11 April 2013.

(5) In view of the answers to (1) to (4), whether the Commissioners must repay all, some or none of the duty.

81. It is clear from my answers set out above that I do not consider that HMRC are under an obligation to repay all or any of the anti-dumping duties paid by Clarks.

DECISION

82. I make the following findings on the preliminary issues which were before me:

(1) Whether there is an obligation on the Commissioners to repay Clarks the duty, independent of the answers to questions (2)-(4) below.

I have decided that the answer to this question is no. HMRC are not obliged to repay the duty to Clarks.

(2) If the answer to (1) is negative, whether the amount of duty resulting from the customs debt covered by the re-imposing regulations must be communicated to Clarks within the limitation period of Article 221(3) of the CCC.

Again I have decided that the answer to this question is no. HMRC have already communicated the amount of the debt and the amount of this debt was not changed by the re-imposing regulations.

(3) If the answer to (2) is affirmative, whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt was suspended by the lodging of an appeal within the meaning of Article 243 of the CCC for all, some, or none of the said customs debt.

Having answered no to the previous question I do not need to answer this question but will do so in case I am wrong in my answer to question (2).

In my view the limitation period in Article 221(3) of the CCC was suspended by the lodging of the appeal dated 11 April 2013 in respect of the whole of the debt.

(4) If the answer to (2) is affirmative and taking into account the answer to (3), whether the limitation period of Article 221(3) of the CCC to communicate the said customs debt has expired for all, some or none of the said customs debt.

Again, I am not required to answer this question but will do so in case I am wrong in my answer to question (2).

In my view the limitation period in Article 221(3) has not expired in respect of any of the debt.

(5) In view of the answers to (1) to (4), whether the Commissioners must repay all, some or none of the duty.

Given my answers above I have decided that HMRC are not obliged to repay any of the duty paid by Clarks.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

83. This document contains full findings of fact and reasons for the preliminary decision. Any party dissatisfied with this preliminary 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. However, either party may apply for the 56 days to run instead from the date of the decision that disposes of all issues in the proceedings, but such an application should be made as soon as possible. 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.

PHILIP GILLETT

TRIBUNAL JUDGE

RELEASE DATE: 27 NOVEMBER 2020