[2021] UKFTT 0097 (TC)

TC08080

PROCEDURE – application to require European Commission to disclose a document - application refused

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/2030

BETWEEN

PUSH ENERGY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN QC

The Tribunal determined the application on 06 April 2021 without a hearing under the provisions of Rule 29 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 with the consent of the parties. A hearing was not held because the matter was capable of being determined on the papers, both parties had made their submissions in writing. The documents to which I was referred were contained in a bundle of document prepared by the Appellant consisting of 111 pages, an Authorities bundle consisting of 644 pages, the Appellant's written submission (29 pages) and a letter from the Respondents dated 11 January 2021.

DECISION

INTRODUCTION

1. This is an application made on behalf of Push Energy Limited ("**the Appellant**") pursuant to rule 5(3)(d) Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("**FTT Rules**") for a direction seeking disclosure from the European Commission ("**the Commission")** a copy of an undertaking issued by the China Chamber of Commerce for Import and Export Machinery and Electrical Products ("**the CCCME**") to the Commission dated 237 July 2013 reference Ares(2013)2766693 ("**the Undertaking**").

BACKGROUND

2. The appeal of which this application forms part concerns assessments raised by HM Revenue & Customs ("**HMRC**") to Anti-Dumping Duty ("**ADD**") and countervailing duty ("**CVD**") in the sum of £115,540.04 in connection with the importation by the Appellant of a single shipment of photovoltaic modules. The appeal also concerns a civil penalty in the sum of £1,250.

3. Following an investigation undertaken by the Commission Regulation (EU) No. 513/2013 ("**Regulation 513**") was introduced imposing a provisional ADD imports of crystalline silicon photovoltaic modules and key components originating in China. However, a group of affected exporting producers (including the Appellant's supplier) gave a mandate to the CCCME to submit the Undertaking to the Commission on their behalf. Pursuant to Decision 2013/423/EU the Commission accepted the Undertaking and Regulation (EU) No. 748/2013 was adopted amending Regulation 513 to effectively introduce an exemption from ADD for goods manufactured and exported by the specific producers where it meets specified requirements ("**the Exemption**").

4. The amended provisions of Regulation 513 provide that the Exemption will apply where a) the producer is one of those providing the Undertaking; b) the importer is a company related to the producer or the first independent customer acting as importer and clearing the goods for free circulation into the EU; c) the imports to be accompanies by a commercial invoice and declaration meeting the requirements specified in Annex II to Regulation 513; d) the import to be accompanied by an Export Undertaking Certificate meeting the requirements of Annex III of Regulation 513 ("**the Certificate**"); and e) that the goods must correspond precisely to the description in the invoice.

5. For the purposes of this appeal and this application Annex III requires that the Export of Undertaking Certificate must have an expiry date which is three months after issuance.

6. Pursuant to Implementing Regulations (EU) No. 1238/2013 ("**the ADD Regulation**") the Council imposed definitive ADD on imports of crystalline silicon photovoltaic modules and key components originating in China subject to the Exemption (Decision 2013/707/EU confirming acceptance of the Undertaking).

7. CVD was definitively imposed on the same products, under the same conditions and subject to the same Exemption by Regulation (EU) No. 1239/2013 ("**the CVD Regulation**").

8. The photovoltaic modules which are the subject of the Appellant's appeal were of the type which are subject to ADD and CVD. However, the supplier to the Appellant was a signatory to the Undertaking. The supplier completed the Certificate regarding the shipment on 16 October 2014. The goods were exported from China on 26 October 2014 and they arrived in the UK (the point of entry into the EU) on 5 December 2014. However, they were immediately bonded into long-term storage and finally presented for customs clearance and entered free circulation on 29 January 2015. The Certificate ceased to be valid on 16 January 2015.

9. On 10 October 2017, following a customs audit HMRC concluded that the goods could not benefit from the Exemption solely on the basis of the expired Certificate. HMRC issued duty assessments totalling £1,115,540.04 and a civil penalty of £1,250.

10. The Appellant requested a review and following the review appealed to the Tribunal on the following grounds:

(1) The Appellant complied with the requirements of Regulation 1238/2013 and 1239/2013 in consequence of which no ADD or CVD is due;

(2) Without prejudice to the generality of the foregoing the impugned import of goods was, at the point of entry into free circulation, accompanied by an appropriate Export Undertaking Certificate;

(3) Further and without prejudice to the generality of the foregoing, the Export Undertaking Certificate is not rendered invalid as a consequence of more than three months having passed since the date of issuance of the certificate or its 'expiry date' having passed;

(4) Further and without prejudice to the generality of the foregoing the relevant date for assessing the validity of the certificate is not the date on which the goods were released for free circulation but the date on which the goods arrived in the customs territory of the European Union;

(5) Further and without prejudice to the foregoing, the imposition of duty and penalty in the circumstances of this case would breach the principle of proportionality in circumstances where the Undertaking price was paid (ensuring that there was no damage to the Union interests), ADD and CVD was applied as if the Undertaking price had not been paid, and the Appellant has borne the entirety of the cost of the ADD and CVD.

THE APPELLANT'S ATTEMPTS TO OBTAIN THE UNDERTAKING

11. The Appellant considers that the Undertaking is relevant to the interpretation of the ADD and CVD Regulations in determining the role of the Certificate in connection with the application of the Exemption.

12. On 11 February 2019 the Appellant wrote to the Commission requesting that certain information be provided. That information was particularised as:

(1) The applicable minimum price level under the Undertaking as at 30 October 20014 (so the Appellant could assess whether the price paid for the goods was in accordance with the Undertaking as at 30 October 2014) or, alternatively, confirmation that the applicable minimum price level under the Undertaking as at 30 October 2014 was the same as the level as at 16 October 2014; and

(2) Confirmation that the permissible volumes under the Undertaking had not been exceeded on 30 October 2014.

13. The Commission refused to provide the requested information by email response on 21 February 2019 simply stating that the information requested was confidential.

14. On 13 March 2019 the Appellant applied to the Commission for access to a document pursuant to Article 2 of Regulation (EC) No. 1049/2010 ("**the Public Access Regulation**") regarding public access to, inter alia, Commission documents. The Appellant contended that the information that had been requested should not be confidential as they were not seeking either the exact level of the minimum import price or the permissible volume but only information which would show that as at 30 October 2014 the importation was in accordance

with the terms of the Undertaking (at least the price and volume requirements). The Appellant also contended that the information was required in order for it to exercise its defence in connection with the present appeal with the consequence that the overriding public interest of a right of defence would require the communication of even confidential information. The same information request as at 11 February 2019 was repeated.

15. By letter dated 16 April 2019 the Commission responded again refusing to provide the information requested. The Commission relied on Articles 19 and 20 of Regulations (EU) 2016/1036 and 2016/1037 (the codified regulations concerning the initiation and investigation of unfair dumping/subsidy practices) ("**the Investigation Regulations**") as providing a complete set of rules guaranteeing the confidential treatment of information collected during an investigation conducted by them. In accordance with those provisions, investigation documents are categorised as confidential (in nature or at the request of parties to the investigation) or non-confidential. In essence, and by reference to those provisions disclosure of confidential information is prohibited of all confidential documents. Further, the Commission note that the recitals to Decision 2013/707/EU set out the involvement of interested parties and identifies that: 1) non-confidential versions of the Undertaking had been provided to interested parties 2) minimum import price and annual levels are subject to professional secrecy and thereby confidential; and 3) having considered request relating to different terms of the Undertaking but had concluded that revealing the information would increase the risk of price manipulation and gaming on the market as so as not to unduly distort the functioning of the market such information should not be available to buyers or competitors.

16. The Commission further considered and articulated its assessment of balancing the right of access provided for under the Public Access Regulation and the Investigation Regulations the Commission considered that the minimum import price and annual level information was confidential by nature and could only be disclosed for the purposes of enforcement of duties by national customs authorities.

17. In addition, the Commission relied on Article 4(2) of the Public Access Regulation which exempts disclosure of documents "where disclosure would undermine the protection of … the purpose of inspections, investigations and audits." They contend that disclosure even after an anti-dumping or anti-subsidy procedure has closed ran the risk of adversely affecting the willingness of entities to cooperate in the future.

18. The Commission saw no overriding public interest.

19. However, the Commission noted that following the judgment in *Zwartveld e.a.,* C-2/88 a national judge could make a request for the information requested by the Appellant to ensure the application and enforcement of Union Law in the national legal order.

20. As was their right the Appellant then submitted a confirmatory application to access a document to the Commission for access to documents including the following information:

> (1) Confirmation that the applicable minimum import price level under the Undertaking as at 30 October 2014 was the same as the level as at 16 October 2014 and
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> (2) Confirmation that the permissible volumes under the Undertaking had not been exceeded on 30 October 2014.

21. The Appellant reiterated that it was not seeking confidential information as they were not seeking the exact minimum import price or annual level and only that confirmation of information which would enable them to establish, in essence, whether a Certificate in the same terms as the Certificate received could/would have been issued on 30 October 2014. They also note that as the ADD and CVD restrictions are no longer in force and the

information pertains to a period more than 5 years previously, they cannot see how its disclosure could distort the market even if, as set out in the Commission letter, there were ongoing legal cases.

22. The Appellant challenged the conclusion that disclosure could prejudice the Commission's authority to purse trade defence investigations again by reference to the time elapsed since the investigation concluded and by reference to the limited information request.

23. On the question of overriding public interest the Appellant responded that the information requested was "paramount to allow [it] to demonstrate that the thirteen-day delay between the Certificate's expiry and the import declaration did not cause harm to the EU's interests" such that it justified disclosure even of confidential information.

24. In the alternative, reliant on the nature of disclosure articulated in the recitals to Decision 2013/707 EU, the Appellant sought partial access but essentially in the same terms.

25. On 27 May 2019 the Commission sought confirmation as to whether the Appellant was seeking information or access to documents pointing out that the Public Access Regulation related only to existing documents and could not require the production of new documents. The Commission noted that the information requested was not contained in the Undertaking.

26. The Appellant confirmed that they were not making an information request and that they considered that the information requested could be ascertained from the Undertaking alone on the basis that they were looking to determine if 16 October 2014 and 30 October 2014 fell within the same period of application and the generic information on how the annual level is set which would allow the Appellant to determine whether the permissible volume had been exceeded by 30 October 2014. They clarified that they sought access to the relevant passages of the non-confidential version of the Undertaking as communicated to interested parties in the trade defence proceedings referenced in Decision 2013/707 EU.

27. The Commission responded on 9 October 2019 with an 11 page letter. That letter addressed the arguments raised by the Appellant in their confirmatory application:

> (1) They reiterated that the Investigation Regulations provides a complete set of rules to guarantee the confidential treatment of information collected in an anti-dumping/subsidy manipulation investigation. In that context they contended that disclosure of non-confidential information had already been granted to interested parties but that the Appellant had not applied at the relevant time. They contend that disclosure of such material at that time does not have the consequence that the information becomes public and that the Public Access Regulation does not override the terms of the Investigation Regulation
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> (2) The confirmatory application under the Public Access Regulation is refused on the basis of Article 4(2) of that Regulation on the grounds that to permit disclosure would undermine the purpose of investigations as the certain confidentiality of submissions made in an investigation facilitates the disclosure of relevant and sensitive information and full participation and co-operation in an investigation which cannot, otherwise, be compelled. Preserving the confidentiality of the sensitive information (including minimum import price and annual levels) is considered by the Commission is an inherent requirement for effective investigation of anti-dumping/subsidy investigations as state aid or competition investigations. The Commission also notes that despite the Undertaking no longer having force continuing named litigation could be prejudiced by disclosure of the Undertaking.
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> (3) The Commission also introduces reliance on Article 4(1) Public Access Regulation which precludes disclosure of personal data which they assert forms part of

the Undertaking by way of names, email addresses and other information enabling the non-Commission contributors to be identified. The Commission contend that the Appellant provides not basis on which it should be permitted access to such personal data and the access request should also be rejected on this basis.

(4) On the question of partial access the Commission consider that as the exceptions in Article 4(1) and (2) apply to a partial access as to a full one such partial access too is denied.

(5) The Commission indicate that there can be no overriding public interest as the purpose for which the disclosure is requested is limited to defending the Appellant in the present proceedings.

28. Again however, the Commission reference a national judge's ability to access the information.

ZWARTVELD

29. As indicated in paragraph 19 above the Commission had repeatedly referenced the ability for a national judge to have access to the Undertaking. In this regard they have said:

> By way of concluding note, my services would nonetheless like to recall that access to the information you request may be requested by a national judge under the Zwartveld case- law to ensure the application and enforcement of Union law in the national legal order.8 It arises from that line of case-law that, if a national court needs information that only the EU institutions can provide, the principle of loyal cooperation, contained in Article 4(3) TEU, in principle, requires the EU institution concerned to communicate the information when it is available to the court concerned. Naturally, when an EU institution produces, in response to such a request, documents in national proceedings, the national court is supposed to guarantee the protection of confidential information, including business secrets.

30. *Zwartveld* concerned an application to the Court of Justice of the European Union ("**CJEU**") by a Dutch investigating magistrate for information relating to certain inspections undertaken by the Commission as part of an investigation. The Commission refused the application on the grounds of confidentiality and the magistrate made a request for mutual assistance to the CJEU.

31. The CJEU determined that the Commission owed a duty of sincere co-operation to member states which was "particularly important vis a vis the judicial authorities of the Member States" The CJEU went on:

> [22] In this case, the request has been made by a national court which is hearing proceedings on the infringement of Community rules, and it seeks the production of information concerning the existence of the facts constituting those infringements. It is incumbent on every Community institution to give its active assistance to such national legal proceedings, by producing documents to the national court and authorizing its officials to give evidence in the national proceedings; that applies particularly to the Commission, to which Article 155 of the EEC Treaty entrusts the task of ensuring that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. …
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> [25] Under those circumstances, the Commission must produce to the Rechter-commissaris the documents which it has requested, unless it presents to the Court imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities justifying its refusal to do so.

32. The First Zwartveld order led to further proceedings as the Commission considered that the facts were confidential and could not be communicated. The CJEU recognised that the Commission may justify refusal to produce documents to a national judicial authority on legitimate grounds connected with the protection of rights of third parties of where the disclosure of the information would be capable of interfering with the functioning and independence of the Community by jeopardizing the accomplishment of the tasks entrusted to it but that it is the obligation of the Commission to establish the basis for non-disclosure. The clear inference is that non-disclosure is the exception.

33. In *First et Franex* C-275/00 the CJEU further explained:

> H6 … if a national court needs information that only the Commission can provide, the principle of loyal cooperation laid down in Article 10 EC will, in principle, require the Commission when requested to do so by the national court to provide that information as soon as possible, unless refusal to provide such information is justified by overriding reasons relating to the need to avoid any interference with the functioning and independence of the Community or to safeguard its interests.

34. And in *Eurobolt* C-644/17 added:

> [27] … the referring court asks, in essence, whether article 267FEU, read in conjunction with article 4(3)EU, is to be interpreted as meaning that a national court or tribunal is entitled to approach the EU institutions that have taken part in drawing up a piece of secondary EU legislation, the validity of which is being contested before that court or tribunal, in order to obtain information from those institutions regarding the factors which they took or should have taken into consideration when adopting that piece of legislation.
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> [28] It should be borne in mind that national courts may examine the validity of an act of the Union and, if they consider that the grounds which they have raised of their own motion or which have been raised by the parties in support of invalidity are unfounded, they may reject those grounds, concluding that the act is completely valid ..
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> [29] Accordingly, if the grounds put forward by the parties are sufficient to convince the national court that an act of the Union is invalid, that court should, solely on that basis, question the Court of Justice as to the validity of that act, without investigating further. As can be seen from *Foto-Frost*, para 18 the Court of Justice is in the best position to decide on the validity of pieces of secondary EU legislation, in so far as the EU institutions whose acts are challenged are entitled, under the second paragraph of article 23 of the Statute of the Court of Justice of the European Union, to submit written observations to the court in order to defend the validity of the acts in question. In addition, under the second paragraph of article 24 of that statute, the court may require the institutions, bodies, offices and agencies of the Union not being parties to the case to supply all information which it considers necessary for the purposes of the case before it.
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> [30] That being said, a national court or tribunal is entitled to approach an EU institution, prior to the bringing of proceedings before the Court of Justice, in order to obtain specific information and evidence from that institution which that court or tribunal considers essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned and, thus, avoid making a reference to the Court of Justice for a preliminary ruling for the purpose of assessing validity.
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> [31] In that regard, it is apparent from the case-law of the Court of Justice that the EU institutions are under a duty of sincere cooperation with the

> judicial authorities of the Member States, which are responsible for ensuring that EU law is applied and respected in the national legal system. On that basis, those institutions must, pursuant to Article 4(3) TEU, provide those authorities with the evidence and documents which have been asked of them in the exercise of their powers, unless the refusal to provide these is justified by legitimate reasons based, inter alia, on protecting the rights of third parties or the risk of an impediment to the functioning or the independence of the Union.

35. There is a single domestic case in which it appears that the Commission has been required to produce documents to the tax Tribunal: *S&S Services Ltd* [2003] VATD 4571. That case considered an application for a witness summons to be issued to the Commission to produce documents. As here the Appellant had made an application for the documents pursuant to the Public Access Regulation. The judgment does not state the grounds on which disclosure was refused by the Commission, but it is to be assumed that the documents were not disclosed and hence the application for a witness summons. The Commission treated the witness summons as an application made by the Tribunal of the *Zwartveld* principle. Applying that principle, the Commission sent a copy of two bundles to the Tribunal: the first contained non-confidential documents permitting the Tribunal to disclose that bundle to the parties and; the second was a bundle of all confidential material "For The Tribunal's Eye's Only" and requiring that the second bundle remain confidential.

36. At paragraph 23 the Tribunal set out the principles it considered were established by *Zwartveld*

> (1) that where a national court is hearing proceedings on the infringement of Community rules and seeks the production of information concerning the existence of the facts constituting those infringements. it is incumbent on every Community institution to give its active assistance to such national legal proceedings by producing documents to the national court;
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> (2) that if the Commission has "imperative reasons relating to the need to avoid any interference with the functioning and independence of the Communities justifying its refusal" to supply the documents then the documents should be forwarded to the court with a statement of the reasons justifying the refusal;
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> (3) that the only documents which have to be disclosed by the Commission are those concerning the actual facts at issue before the national court; and
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> (4) that although the Commission may justify a refusal to produce documents to a national judicial authority on legitimate grounds connected with the protection of the rights of third parties, or where the disclosure of the information would be capable of interfering with the functioning and independence of the Community, the Commission has to adduce evidence to show that the production of the documents would be likely adversely to affect those matters.

37. The Tribunal then proceeded to approach the confidential bundle in the manner required to be adopted when reviewing documents on which legal professional privilege or public interest immunity is claimed. The Tribunal considered that the principles restricting disclosure would be narrowly construed and that the Tribunal would seek to establish with the Commission the basis for non-disclosure if there were any doubt as to the application of the *Zwartveld* principles. Following a review of the documents the Tribunal was satisfied that the majority of the redactions in the non-confidential bundle as compared to the confidential bundle either concerned irrelevant facts or were to protect the rights of third parties and so were upheld.

THE APPLICATION

38. The Appellant makes its application under rule 5(3) FTT Rules which provides that the Tribunal may require a non-party to provide documents or information to the Tribunal or to a party.

39. By reference to the Upper Tribunal judgment in *Ingenious Games LLP* [2014] UKUT 0062 the Appellant contends that the approach to be adopted is: 1) for the Tribunal to exercise its powers in order to meet the overriding objective; 2) in so doing it will generally be fair and reasonable to order disclosure against a party of all relevant documents and information with relevance being determined broadly; 3) any document referred to in a party's pleaded case generally being considered to be relevant and disclosable; 4) but that confidentiality (usually in a public immunity sense) could be a basis for non-disclosure.

40. The Appellant also referred to the FTT and Upper Tribunal judgments in *McCabe* [2019] UKFTT 317 and [2020] UKUT 266. In that case the Upper Tribunal reiterated the position adopted by the Court of Appeal in *Smart Price Midlands* [2019] EWCA Civ 841 that disclosure is not an end in itself but a means of ensuring that the Tribunal has before it all the information reasonably required to determine the appeal.

41. The Appellant contends that the Undertaking is relevant to the appeal. In this regard it is contended that as the central issue in the case is the relevance of the three month expiry for the Certificate and what events must have occurred prior to the expiry date it is important to establish what events need to occur prior to expiry which should be determined by reference to the language of the ADD/CVD Regulations but also by reference to its purpose which, the Appellant contends, may be determined in part from the terms of the Undertaking which would shed light on the "mischief" which the Certificate addresses. The Appellant contends that the Undertaking followed the anti-dumping/subsidy investigation and will therefore be expected to set out the rationale for the safeguards within the Undertaking as to ensure that the Exemption was correctly applied.

42. In addition, the Appellant contends that the Undertaking is relevant to its contentions on proportionality – i.e. that the charge to ADD/CVD is excessive given that the Certificate had expired only 13 days before the goods were cleared into free circulation and valid at the point of arrival. In this regard the Appellant notes that they the validity of the ADD/CVD Regulations may themselves be vulnerable on the grounds of proportionality if the validity of the Certificate is a cliff edge issue.

43. By reference to the three Commission responses the Appellant contends that the Tribunal has the power to request the documents from the Commission under the *Zwartveld* principle. They contend that even a redacted version of the Undertaking would provide background and context. The Appellant acknowledges that the Commission may refuse to disclose on the grounds of confidentiality but that does not provide the Tribunal with a basis for refusing to request the Undertaking.

HMRC'S RESPONSE

44. HMRC initially opposed the Appellant's application on the grounds of relevance. However, when invited to make written submissions for the purposes of the hearing of this matter on the papers, by letter dated 11 January 2021 they stated:

> "1. As this is, in substance, an application for third party disclosure, we consider in the circumstances that we should no longer object. However, we adopt a neutral position; and
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> 2. The Tribunal will be aware that the third party (the European Commissions) has repeatedly objected to the provision of the material and

will undoubtedly take those objections into consideration when determining the application.

3. It is a matter for the Tribunal whether the Appellant has satisfied it that the direction should be made"

DISCUSSION

45. Having carefully considered the Appellants submissions and all the case law referenced it is apparent to the Tribunal that this is not strictly an application for disclosure under rule 5(3)(d); rather, it is an invitation by the Appellant for the Tribunal to invoke the *Zwartveld* principle and make a formal application for disclosure by way of for mutual co-operation. That application may be for disclosure of documentation/information to the Tribunal for its own use and/or as a conduit for disclosure to the parties noting that the disclosure achieved under each of these alternatives may be different by reference to the application of the limitation on what needs to be provided under mutual co-operation as set out in the second *Zwartveld* order and articulated in *S&S Services Ltd*.

46. The different nature of the basis of the application influences the approach required to be taken by the Tribunal in determining whether to approach the Commission.

47. Analysis of the various communications between the Appellant and the Commission reveal some anomalies. The Appellant's position has changed somewhat through the course of the correspondence in subtle ways which may not have been fully appreciated by the Commission. The first request was, on its face, a request for information. The initial request under the Public Access Regulation was a request for information but by reference to the document in which the Appellant considered that information was likely to be contained, namely, the Undertaking. By the confirmation application the Appellant had reframed the information request and requested only the disclosure of the non-confidential version of the Undertaking which had previously been provided to interested parties in the trade dispute. Nevertheless the Commission has systematically and with more vehemence resisted disclosure even, it would seem, of the non-confidential copy of the Undertaking.

48. In connection with this application the Appellant invites the Tribunal to seek disclosure of the full confidential Undertaking.

49. By its application the Appellant has made some very bold assertions that the Undertaking will shed light on the mischief addressed by the Certificate and the safeguard it thereby provides. The Tribunal is unclear on what basis that Appellant can be so certain that the Undertaking will address these issues. The Tribunal accepts that the Undertaking may do either of these things but equally it may not with the position being less clear again by reference to the non-confidential version previously shared with interested parties.

50. The line of cases starting with *Zwartveld* establishes that the Tribunal is entitled to request documents and information where those documents are "essential in order to dispel all doubts which it may have as regards the validity of the EU act concerned". Thus, if the Tribunal can reach a conclusion on the issue before it without the document or information it will never be "essential".

51. By reference to the grounds of appeal the principal focus of the appeal is simply and interpretation of the ADD/CVD Regulations and, in particular, the circumstances of the application of the Exemption. Critical to that process is the public articulation of the acceptance of the undertaking and the crafting of the Exemption as set out in the Council Decisions 2013/453 and 2013/707. It is not clear what the Undertaking itself will add and whether the Tribunal hearing this matter would consider it "essential". However, it is clear that it would be inappropriate to try the case for the purposes of determining this application.

52. Further the scope of a valid request would appear to be limited to documentation/information regarding the validity of an EU act. In this regard the Appellant has not fully pleaded its position as to the relevance of the information/documentation in the context of an EU act. Implicitly, but without particularising the relevant EU act, the Appellant appears to want the information to contend that had they had a certificate with validity on 29 January 2014 that certificate would have been in the same terms as the certificate actually issued and that they therefore should fall within the Exemption despite not having a valid certificate. If that is the Appellant's position it may be feasible to proceed on an assumption that that may have been the case in order to test the legal argument and if relevant to then seek to establish the factual position. Again however, this should be a matter for the Tribunal actually hearing the case.

53. The final ground of appeal raises the question of proportionality but, as drafted, appears more of an attack on HMRC's interpretation than as an attack on the terms of the Regulations themselves, though the point is more expansively drafted in connection with the present application. It is therefore not clear what the Appellant's case is in this regard. In this context the EU act would however seem to be the requirement for there to be a certificate at all or one with a time bound validity. As above the Tribunal hearing the case will be in a better position to assess the relationship between the information/documentation and the legal issues to be resolved in the appeal.

54. The Appellant indicates that the anticipated refusal to disclose by the Commission is not reason to refuse making the request of them. The Tribunal agrees however, in this case, the Commission has been expansive as to the basis on which it considers that the Undertaking should not be disclosed, it has provided the level of particularisation which seems to have been missing in other cases. The clearly stated position of the Commission cannot therefore be ignored completely particularly in the context that enforcing a request, if refused by the Commission, is via the CJEU, an action which, post Brexit, likely to be fraught with difficulty if permitted at all.

55. As indicated at paragraph 46 above the Appellant considers that the approach to be adopted in determining this application is not exactly as for a conventional disclosure application. It will certainly be the case that the Tribunal should act in accordance with the overriding objective and that whether a document is relevant will lie at the heart of the application. However, relevant or potential relevance is not, in the Tribunal's view, enough. The document must be relevant and essential to the Tribunal's determination of the issues before it.

56. On balance the Tribunal is not satisfied that the Appellant has established a case for the Tribunal making a *Zwartveld* application now. It may be that the Tribunal hearing the case, having heard legal argument on the text of the Regulation, by reference to the relevant Council Decisions and any other publicly available traveaux preparatoir feels able to reach a conclusion on the case without the Undertaking or the minimum import price/annual level information. In which case the evidence will not be essential and there will be no need for the application to be made. If however, the Tribunal reaches a view on the legal argument before it that further documents/information is required it will be appropriate for the Tribunal to make its application then at which point it will then be in a position to more completely assess the Commission's response. It appears that the Commission are responsive on these applications and that an application by the hearing judge would not substantially delay the final outcome of the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

57. 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.

AMANDA BROWN QC
TRIBUNAL JUDGE

RELEASE DATE: 09 APRIL 2021