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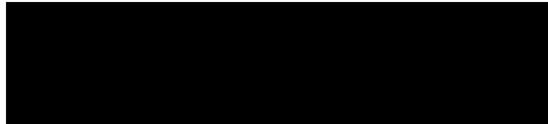

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

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INTRODUCTION

1. This is an appeal to the Tax Appeals Commission ("the Commission") of a decision of the Revenue Commissioners ("the Respondent") of 20 December 2019, whereby it refused to the repay and remit to [redacted] ("the Appellant") customs debts comprising anti-dumping duty ("ADD") and common customs tariffs ("CCT"), plus interest, previously assessed as due. At the time of the making of the request for repayment and remission, the Appellant had made part-payment of the ADD and CCT assessed.

2. The Appellant's CCT and ADD liability arose from its importation into the EU of iron and steel fastener products originating from China. The exact composition of the sums in respect of which the Appellant seeks repayment and remission are:-

    (i) ADD of €1,543,250.88;

    (ii) CCT of €31,557.14 of; and

    (iii) Interest of €135,292.00.

3. Where in this Determination the above sums are referred to collectively, they are called "the customs debt".

4. This appeal proceeded by way of oral hearing. No witness evidence was called by either party. In making this determination the Commissioner has had the benefit of written and oral submissions, based on agreed facts, made by counsel appearing for the Appellant and the Respondent.

BACKGROUND

The importation of the goods at issue

5. The Appellant is an importer and supplier of fixtures and fastener products and is based in [redacted] Ireland.

6. It was an agreed fact that over the period 29 May 2009 to 16 July 2012 ("the relevant period") the Appellant made 68 customs entry declarations relating to its importation into the EU of iron and steel fasteners ("the goods at issue"), ostensibly originating in Malaysia, Indonesia and Taiwan.

7. At the time of the importation of the goods at issue, each of these countries benefitted from preferential access to the EU market, granted by the EU under its Generalised Scheme of Preferences. The effect of this was that imports of goods from these countries into the EU benefitted from reduced or zero rates of customs duties.

8. On or about late 2009, the European Anti-Fraud Office ("OLAF") opened a case relating to suspected fraud concerning the importation into the EU of iron and steel fasteners, declared as being of Malaysian, Indonesian or Taiwanese origin, but suspected in fact of being of Chinese origin. One aspect of OLAF's inquiries concerned goods supposedly produced in Indonesia and then exported under certificates of preferential origin by a company named PT [redacted]. It was an agreed fact in this appeal that the Indonesian authorities had no record of this company being based in or carrying out any import or export activity in that country.

9. Over the period 2014 – 2016, the Respondent conducted an investigation into the importation by the Appellant of the goods at issue over the relevant period. By correspondence dated 4 August 2016, the Respondent held that the goods at issue in fact originated in China.

10. The significance of this finding of the Respondent in respect of the origin of the goods at issue lies in the fact that over the course of the relevant period, Council Regulation 91/2009 ("the Definitive Anti-Dumping Regulation 2009") imposed ADD iron and steel fasteners originating in China.[1] Moreover, CCT was applicable to goods originating from China in circumstances where that country did not benefit from preferential access to the EU market.

11. Accordingly, the correspondence of 4 August 2016 constituted a customs debt notification, which informed the Appellant that the customs debt referred to in paragraphs 1 and 2 of this Determination was due.

12. There was no dispute in this appeal that all of the goods at issue did in fact originate in China, rather than Malaysia, Indonesia and Taiwan.

13. There also was no dispute that 29 of the 68 aforementioned declarations made by the Appellant involved the importation of goods at issue, declared by the Appellant as originating in Indonesia. In respect of these, the Indonesian "competent authority" (i.e. its customs authority) had, based on false information provided to it, issued Certificates of Origin (GSP Form A) that erroneously specified their origin to be that country. These Certificates of Origin had been provided to the Appellant, which in turn provided them to the Irish customs authority at the place of importation as proof of the veracity of their declared Indonesian origin.

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[1] Article 1 of the Definitive Anti-Dumping Regulation 2009 specified particular rates of duty applicable to named manufacturers of iron or steel fasteners. The rate of duty applicable to "all other companies" was 85%.

14. It was agreed that these certificates had been issued despite the Indonesian competent authority having had no customs records of the seven relevant exporters to which they related carrying out any customs or export activities in Indonesia.

15. Of these 29 declarations made by the Appellant in respect of goods at issue, 22 related to one exporter, the aforementioned PT [redacted].

16. The Appellant did not appeal the customs debt notification of 4 August 2016, though it was entitled to do so under section 45 of the Customs Act 2015. Instead, on 15 August 2017, it entered into an agreement with the Respondent to pay the debt in instalments, as is provided for under Article 112 of Regulation (EU) 952/2013 of the European Parliament and Council laying down the Union Customs Code ("the UCC").

17. However, having entered into this agreement and made payments on foot of it, on 29 April 2019 the Appellant submitted a request ("the request") to the Respondent for the repayment and remission of the entire customs debt previously notified. This request was made pursuant to Articles 117(1) and 116(1)(a) of the UCC in respect of the ADD and pursuant to Articles 119 and 116(1)(c) in respect of the CCT.

The request for the repayment and remission of the customs debt

18. The Appellant gave three grounds in the request as to why it was entitled to the repayment and remission of some or all of the customs debt:-

    (i) The whole of the ADD was never legally owed in circumstances where the anti-dumping measures imposed under the Definitive Anti-Dumping Regulation 2009 infringed various Articles of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community ("the Basic Anti-Dumping Regulation") and the Charter of Fundamental Rights of the EU ("the CFEU") and, therefore, were invalid;

    (ii) Further or in the alternative, a number of the goods at issue in respect of which ADD had been notified and charged did not fall within the scope of the Definitive Anti-Dumping Regulation 2009. Article 1 therein specified the iron or steel fasteners subject to the ADD in question by reference to their Combined Nomenclature ("CN") and, in some cases, TARIC codes. A portion of those goods imported did not fall under any TARIC codes enumerated in Article 1; and

(iii) It was entitled to repayment and remission in respect of the CCT in circumstances where its liability in this regard arose from an error of the Indonesian competent authority in issuing GSP Form A Certificates of Origin.

The CN and TARIC systems

19. Regarding the Appellant's second ground, set out above, it is worth explaining in very brief terms that the CN is a tool for classifying goods and commodities, established under Council Regulation No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff. A CN code contains 8 digits, the first 6 of which reflect the classification given to goods under the World Trade Organisation's ("the WTO's") "Harmonised System". TARIC is an EU database that integrates all measures relating to EU customs tariff, commercial and agricultural legislation. The codes given to goods included in this database comprise ten digits, the first eight of which reflect a CN code, plus two additional digits. For example, as will be seen, this appeal relates, in part, to goods classified under the CN codes 7318 15 90, 7318 21 00 and 7318 22 00 and the TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98.

The history of the EU anti-dumping measures relating to Chinese iron and steel fasteners and the challenges to their validity

20. Regarding the first ground advanced by the Appellant, namely the asserted invalidity of the Definitive Anti-Dumping Regulation 2009 and its consequent entitlement to the repayment and remission of the entire ADD charged, the Commissioner considers it necessary at this point of the Determination to outline certain uncontentious background information.

21. In 2007, the European Commission received a complaint made on behalf of EU producers of iron and steel fasteners in relation to the "dumping" onto the EU market of certain such products manufactured in China.

22. By way of very brief explanation, dumping involves an exporter exporting a good to another market at a price lower than that which the good would fetch on its own domestic market when sold under normal conditions. This is considered to be an unfair trade practice under the law of the WTO as it has the effect of distorting trade and undercutting local industry. Consequently, pursuant to the WTO's Anti-Dumping Agreement ("the ADA"), a member of that organisation, such as the EU, adversely affected by the dumping of products may introduce measures imposing duties so as to offset the impact of that dumping.

23. However, the ADA sets out procedural and substantive conditions relating to the imposition of anti-dumping measures. As regards substance, there must, *inter alia*, exist: (a) proof of dumping; (b) the existence of injury to the industry of the importing country; and (c) proof the dumping has caused the injury. In respect of the first of these conditions, it is essential that "fair comparison" be made between the export price of the good suspected of being dumped on the market of the importer and the "normal price" of the "like product" on the market of the exporting country. This permits accurate calculation of the "dumping margin", if there is any, which in turn limits the rate of ADD that can be set under WTO rules. The Basic Anti-Dumping Regulation was adopted by the EU in light of its participation in the ADA.

24. The aforementioned complaint made by the EU producers resulted in the opening and notification of a "proceeding" by the European Commission; thereafter a determination by the European Commission of dumping by Chinese producers of iron or steel fasteners; and, finally, the imposition pursuant to the Definitive Anti-Dumping Regulation 2009 of ADD on iron or steel fasteners products originating from China, falling within the scope of the definition given in Article 1 therein. This ADD on iron or steel fasteners was later extended by the adoption of Council Implementing Regulation 723/2011 ("the extending Anti-Dumping Regulation 2011") to imports of the same type products consigned from Malaysia, whether declared as originating from there or not. As is clear from the Recitals to the extending Anti-Dumping Regulation 2011, this was done in circumstances where it had been found by OLAF that the measures imposed under the Definitive Anti-Dumping Regulation 2009 were being circumvented by certain importers by means of the transhipping of iron or steel fasteners originating in China through Malaysia.

25. China and Chinese producers of these products, believing the anti-dumping measures adopted pursuant to the Definitive Anti-Dumping Regulation 2009 to be contrary to the EU's obligations arising from its participation in the ADA, made a complaint to the WTO. On 28 July 2011, the Dispute Settlement Body ("the DSB") of the WTO adopted its Appellate Body Report and its Panel Report as modified by the Appellate Body Report in the dispute 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China'. In those reports, it was found that the EU, in its adoption of anti-dumping measures relating to iron or steel fasteners from China had acted inconsistently with, *inter alia*:-

    - Articles 6.4, 6.2 and 2.4 of the ADA with respect to certain aspects of the dumping determination in the fasteners investigation;

- Article 4.1 of the ADA with respect to the definition of the Union industry in the fasteners investigation;

- Articles 3.1 and 3.2 of the ADA with respect to the consideration of the volume of dumped imports in the fasteners investigation;

- Articles 3.1 and 3.5 of the ADA with respect to the causation analysis in the fasteners investigation, and

- Articles 6.5 and 6.5.1 of the ADA with respect to the treatment of confidential information in the fasteners investigation.

26. As a consequence of the findings by the DSB of EU infringements of the ADA, the European Commission initiated a review in accordance with Council Regulation (EC) No 1515/2001 on the measures that may be taken by the Community following a report adopted by the WTO DSB concerning anti-dumping and anti-subsidy matters. On 4 October 2012, the Council adopted Implementing Regulation (EU) No 924/2012 ("the amending Anti-Dumping Regulation 2012"), which amended the Definitive Anti-Dumping Regulation 2009 so as to seek to bring an end to inconsistencies between the ADA and the EU anti-dumping measures imposed in respect of the importation of certain iron or steel fasteners originating in China.

27. However, China considered the measures imposed pursuant to the amending Anti-Dumping Regulation 2012 also to be inconsistent with the terms of the ADA and they too became the subject of compliance review by the DSB. After the DSB adopted compliance reports on 12 February 2016 that found the EU's amended measures imposing ADD to be inconsistent with the ADA, the EU opted to repeal the ADD imposed under the Definitive Anti-Dumping Regulation 2009, as amended by the amending Anti-Dumping Regulation 2012. This was done by way of Commission Implementing Regulation 2016/278 ("the repealing Anti-Dumping Regulation 2016"). Article 2 therein provides:-

"*The repeal of the anti-dumping duties referred to in Article 1 shall take effect from the date of the entry into force of this Regulation as provided for in Article 3 and shall not serve as a basis for the reimbursement of the duties collected prior to that date*."

28. Prior to the repeal of the EU's anti-dumping measures regarding iron or steel fasteners originating in China, two producers of such products established in China brought proceedings before the CJEU challenging their validity under EU law. In these proceedings, Joined Cases C-376/15 P and C-377/15 P *Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd v Council of the European Union,* ECLI:EU:C:2017:269*,* the Chinese producers argued, *inter alia*, that the method by which

the Council had calculated the "dumping margin"[2] applicable to iron or steel fasteners giving rise to the duty rate arising under the Definitive Anti-Dumping Regulation 2009, as amended by the amending Anti-Dumping Regulation 2012, violated Article 2(11) of Council Regulation (EC) No 1225/2009 of 30 November 2009 ("the Basic Anti-Dumping Regulation 2009").[3]

29. In its judgment of 5 April 2017, the Court of Justice held that, in excluding from its analysis certain product types of iron or steel fasteners falling within the definition of the "product under investigation", the Council had failed to conduct a "fair comparison" between the "export price" of the product under investigation and its "normal value" on the Chinese domestic market. The effect of this failure was that the dumping margin established by the Council, which determined the applicable rate of duty, was arrived at in "manifest error". In making this finding, the CJEU rejected the Council's argument that it was sufficient for the purposes of Article 2(11) of the Basic Anti-Dumping Regulation 2009 that a "significant representation" of all the product types comprising the product under investigation were included in its comparison exercise.

30. The consequence of the amending Anti-Dumping Regulation 2012 infringing the Basic Anti-Dumping Regulation 2009 by virtue of the method chosen by the Council in the carrying out of its comparison of the export and domestic prices of the iron or steel fasteners in question, was the annulment by the Court of the former legislation "[…] *in so far as it* [related] *to Changshu City Standard Parts Factory and Ningbo Jinding Fastener Co. Ltd."*

The making of the request for repayment and remission and the refusal

31. The Commissioner now returns to the Appellant's request of 29 April 2019 for the repayment and remission of the duty charged in respect of the goods at issue. On 15 August 2019, the Respondent made a decision wherein it rejected each of the three grounds relied on by the Appellant and refused the claim in its entirety.

32. As regards the first ground relating to the invalidity of the Definitive Anti-Dumping Regulation 2009, the Respondent held that Article 2 of the repealing Anti-Dumping Regulation 2016 prohibited those who had paid anti-dumping duty on goods falling within the former's scope, in its original form or as amended by the amending Anti-Dumping Regulation 2012, from being reimbursed or having their debt remitted. This prohibition

[2] This is, the amount by which the export price from China of the iron or steel fasteners in question was less the fair market price of those goods in China.
[3] The Basic Anti-Dumping Regulation 2009 constituted a codification of the various amendments made to the Basic Anti-Dumping Regulation over the period 1996 – 2009.

applied to the Appellant's claim. At the end of this correspondence the Respondent did acknowledge that in Case C-351/04 *Ikea Wholesale Ltd v Commissioners of Customs & Excise*, ECLI:EU:C:2007:547, the Court of Justice "[…] *held that the invalidity of anti-dumping measures could be relied on by the importer in order to obtain repayment or remission of duties."* The Respondent, however, then expressed its view that:-

> "[…] *the facts of the present case are substantially different from the facts of the Ikea case and therefore are not comparable to the circumstances of* [the Appellant's] *case.*"

33. As regards the Appellant's second ground, which was to the effect that certain goods in respect of which ADD was charged fell under TARIC codes that did not come within the scope of the Definitive Anti-Dumping Regulation 2009, the Respondent held that it was satisfied that they were "[…] *in fact iron and steel fasteners which were subject to Anti-Dumping Duty* […] *in accordance with Regulation 91/2009."*

34. As regards the Appellant's third ground relating to the CCT assessed, the Respondent held, firstly, that in its view the issuing of the GSP Form A Certificates of Origin did not constitute an error on the part of the Indonesian competent authority in circumstances where it was deliberately misled by the exporter; secondly that, even if there had been such an error, the Appellant had not demonstrated that it was one that it could not have detected; and, thirdly, that the Appellant had not demonstrated that it had been acting in good faith in the importation from Indonesia of those goods at issue.

35. By way of correspondence of 18 November 2019, the Appellant made an appeal to the Respondent in respect of its refusal to allow the request for the repayment and remission of all or some of the customs debt. Therein it, in effect, repeated its arguments already made regarding the invalidity of the Definitive Anti-Dumping Regulation 2009 (the first ground) and its entitlement to the CCT (the third ground).

36. As regards the second ground, the Appellant elaborated on its reasons as to why, in its view, some of the goods held to attract ADD did not fall within the scope of this legislation. In short, it contended that where Article 1 of the Definitive Anti-Dumping Regulation 2009 stated that it applied to goods with eight-digit CN codes with the prefix "ex"[4], only those goods classified under the ten-digit TARIC codes appearing thereafter in the Article in brackets fell within its scope. As the Respondent had charged ADD on goods classified under three ten-digit TARIC codes not enumerated in Article 1, that portion of the ADD should not have been charged.

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[4] E.g. *"ex 7318 15 90".*

37. On 20 December 2019, a Designated Appeals Officer ("DAO") of the Respondent gave a Determination refusing the Appellant's appeal of the earlier refusal to repay and remit the customs debt. In relation to the Appellant's first ground, concerning the validity of the Anti-Dumping Regulation 2009, the DAO held:-

"*Article 2 of Commission Implementing Regulation EU 2016/278 of 26 February 2016 states that the regulation "…shall not serve as a basis for the reimbursement of the duties collected prior to that date." This imposes a legal obligation on Member States not to make any repayments or remissions of import duties paid during the period of validity of Regulation 91/2009. This requirement was reinforced by correspondence issued by OLAF to all Member States, which stated that Regulation 2009 was valid up until 28 February 2016. Member States, therefore, are obliged to implement the legislation in force and valid.*

I accept your position that you are not claiming Regulation 2016/278 has retroactive effect and this is not the basis for my position with regard to the validity of Regulation 91/2009. Instead, my interpretation of Regulation 2016/278 is that Regulation 91/2009 was valid up until 28 February 2016 by virtue of the above reference Article 2. Therefore, Member States are obliged to collect all customs duties payable during the validity period of that regulation and not to reimburse any such duties."

38. As regards the Appellant's second ground, concerning the question of the scope of the goods falling under the Definitive Anti-Dumping Regulation 2009, the DAO held:-

"*I have examined both the Regulation and TARIC to identify the specific codes to which the anti-dumping is applicable. You are correct in stating in your letter of appeal that not all products classified under the cited 8-digit codes fall within the scope of Regulation 91/2009. Where only an 8-digit code prefaced with 'ex' is cited in the legislation, there is a requirement to interrogate the electronic TARIC system to identify the full 10-digit codes under the cited 8-digit code to which the legislation applies.*

This task had been undertaken by the Revenue Commissioners when the work on the calculation of duties owed was being done. The codes relevant to your goods and declared for same all attracted anti-dumping applicable under Regulation 91/2009. Confirmation of the full 10-digit codes to which the anti-dumping is applicable can be found by interrogating the EU TARIC database."

39. It is curious that in the Determination of 20 December 2019, the DAO did not address the question of the claim for the repayment and remission of the CCT, at least in express terms. The Commissioner however considers the rejection of this ground to be implicit

from the Determination, which view appears to accord with the fact that the Appellant itself, in bringing the appeal before the Commission, sought to appeal its refusal and advanced arguments in the hearing on which it should succeed in this regard.

LEGISLATION

40. The legislative provisions relevant to this appeal are set out hereunder. In summary, this legislation includes: the UCC, the Basic Anti-Dumping Regulation, the Definitive Anti-Dumping Regulation 2009, the extending Anti-Dumping Regulation 2011, the amending Anti-Dumping Regulation 2012 and the repealing Anti-Dumping Regulation 2016.

Customs repayment and remission

41. Section 3 of the UCC is headed *"Repayment and remission".* Therein, Article 116(1) provides:-

    "*Subject to the conditions laid down in this Section, amounts of import or export duty shall be repaid or remitted on any of the following grounds:*

    (a) overcharged amounts of import or export duty;

    […]

    (c) error by the competent authorities;

    […]

    Where an amount of import or export duty has been paid and the corresponding customs declaration is invalidated in accordance with Article 174, that amount shall be repaid."

42. Article 117 of the UCC is entitled "*Overcharged amounts of import or export duty"* and point 1 therein provides:-

    "*An amount of import or export duty shall be repaid or remitted insofar as the amount corresponding to the customs debt initially notified exceeds the amount payable, or the customs debt was notified to the debtor contrary to point (c) or (d) of the second subparagraph of Article 102(1)."*

43. Article 119 of the UCC is entitled "*Error by competent authorities"* and provides:-

    "*(1) In cases other than those referred to in the second subparagraph of Article 116(1) and in Articles 117, 118 and 120, an amount of import or export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the*

amount corresponding to the customs debt initially notified was lower than the amount payable, provided the following conditions are met:

(a) the debtor could not reasonably have detected that error; and

(b) the debtor was acting in good faith."

(2) Where the conditions laid down in Article 117(2) are not fulfilled, repayment or remission shall be granted where failure to apply the reduced or zero rate of duty was as a result of an error on the part of the customs authorities and the customs declaration for release for free circulation contained all the particulars and was accompanied by all the documents necessary for application of the reduced or zero rate.

(3) Where the preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the customs territory of the Union, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of point (a) of paragraph 1.

The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment […]."

The validity of the Definitive Anti-Dumping Regulation 2009 and its scope

44. Article 2 of the Basic Anti-Dumping Regulation is entitled "*Determination of dumping".* Point 10 therein provides:-

"*A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at as nearly as possible the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:*

(a) Physical characteristics;

[…]

(b) Import charges and indirect taxes;

[…]

(c) Discounts, rebates and quantities;

[…]

(d) *Level of trade;*

[…]

(e) Transport, insurance, handling, loading and ancillary costs;

[…]

(f) Packing;

[…]

(g) Credit;

[…]

(h) After-sales costs;

[…]

(i) Commissions;

[…]

(j) Currency conversions."

45. Article 3 of the Basic Anti-Dumping Regulation is entitled *"Determination of injury"* and therein it is provided at points 1, 2 and 7 that:-

"1. Pursuant to this Regulation, the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of

the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

[…]

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6 . Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry."

46. Article 4 of the Basic Anti-Dumping Regulation is entitled "*Definition of Community industry"* and point 1 therein provides:-

"*For the purposes of this Regulation, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5 (4), of the total Community production of those products, except that:*

(a) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'Community industry' may be interpreted as referring to the rest of the producers;

(b) in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (i) the producers within such a market sell all or almost all of their production of the product in question in that market; and (ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market."

47. Recital 114 of the Definitive Anti-Dumping Regulation 2009 provides:-

"*The production of the Community producers that supported the complaint and fully cooperated in the investigation represents 27,0 % of the production of the product concerned in the Community. It is therefore considered that these companies constitute the Community industry within the meaning of Articles 4(1) and 5(4) of the basic Regulation.*"

48. Article 1 of the Definitive Anti-Dumping Regulation 2009 provides:-

    "A definitive anti-dumping duty is hereby imposed on certain iron or steel fasteners, other than of stainless steel, i.e. wood screws (excluding coach screws), self-tapping screws, other screws and bolts with heads (whether or not with their nuts or washers, but excluding screws turned from bars, rods, profiles or wire, of solid section, of a shank thickness not exceeding 6 mm and excluding screws and bolts for fixing railway track construction material), and washers, originating in the People's Republic of China, falling within CN codes 7318 12 90, 7318 14 91, 7318 14 99, 7318 15 59, 7318 15 69, 7318 15 81, 7318 15 89, ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00 (TARIC codes 7318 15 90 19, 7318 15 90 69, 7318 15 90 89, 7318 21 00 29, 7318 21 00 99, 7318 22 00 29 and 7318 22 00 99)."

49. Article 1 of the extending Anti-Dumping Regulation 2011 extended the ADD imposed under Article 1 of the Definitive Anti-Dumping Regulation 2009 to iron or steel fasteners consigned from Malaysia whether declared as originating in Malaysia or not. Enumerated therein after the CN codes "*ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00*" were, *inter alia,* the TARIC codes "*7318 15 90 91*", "*7318 21 00 95*" and "*7318 22 00 95*".

50. Commission Implementing Regulation 2015/519 renewed the ADD originally imposed under the Definitive Anti-Dumping Regulation 2009 following an expiry review by the European Commission. Enumerated therein after the CN codes "*ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00*" were, *inter alia,* the TARIC codes "*7318 15 90 91*", "*7318 15 90 98*", "*7318 21 00 95*", "*7318 21 00 98*", "*7318 22 00 95*" and "*7318 22 00 98*".

51. Article 1 of the repealing Anti-Dumping Regulation 2016 repealed the anti-dumping duty imposed on iron or steel fasteners under the Definitive Anti-Dumping Regulation 2009, as amended by the amending Anti-Dumping Regulation 2012. Enumerated therein after the CN codes "*ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00*" were, *inter alia,* the TARIC codes "*7318 15 90 91*", "*7318 15 90 98*", "*7318 21 00 95*", "*7318 21 00 98*", "*7318 22 00 95*" and "*7318 22 00 98*".

52. Article 2 of the repealing Anti-Dumping Regulation 2016 went on to provide:-

"*The repeal of the anti-dumping duties referred to in Article 1 shall take effect from the date of the entry into force of this Regulation as provided for in Article 3 and shall not serve as a basis for the reimbursement of the duties collected prior to that date.*"

53. Council Regulation 2658/87 established, under Articles 1 and 2 respectively, the CN and the integrated tariff know and the "TARIC". Article 6 of the same regulation provides that:-

"*The Commission shall be responsible for the management and publication of the TARIC. It shall, in particular, take the steps necessary to:*

(a) integrate the measures listed in Annex II into the TARIC;

(b) attribute TARIC code numbers;

(c) update the TARIC;

(d) inform Member States immediately of changes to TARIC subheading and numeric codes."

SUBMISSION

Appellant's submissions

Ground (i) – the purported invalidity of the Definitive Anti-Dumping Regulation 2009

54. The Appellant submitted that the heart of its case in relation to the repayment of the ADD was the invalidity of the Definitive Anti-Dumping Regulation 2009 on the grounds that it was incompatible with the Basic Anti-Dumping Regulation, which was in force at the time of the adoption of the former legislation.

55. The reasons why the Appellant contended that the Definitive Anti-Dumping Regulation 2009 violated the Basic Anti-Dumping Regulation was set out in succinct form at paragraph 2.1 of its written submissions provided in advance of the appeal. There it submitted:-

"*First, in the investigation pursuant to which the Regulation was adopted, the Commission failed to disclose to the Chinese producers the method of product grouping that was used to conduct the price comparison, and only did so very late in the proceedings. Consequently, Article 2(10) of the basic anti-dumping Regulation, read in conjunction with the general principles of EU law, was violated as this provision obliges the Commission to indicate to the parties what information is necessary to ensure a fair comparison.*

Second, for the purposes of its injury determination, the Commission limited the Union industry definition to only those producers that were willing to be part of the sample. In so doing, the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination, contrary to the requirements of Articles 4(1) and 3(2) of the basic anti-dumping Regulation.

Third, in its causation analysis, the Commission found that the export performance of the EU industry was not a source of material injury based on data relating to all EU fasteners producers. Consequently, the Commission acted inconsistently with Articles 3(2) and 3(7) of the basic Regulation by relying on information concerning producers not part of the domestic industry, as defined by the Commission for the purposes of the proceedings.

Fourth, the Commission failed to provide a timely opportunity for the Chinese producers to see the information regarding the product types on the basis of which the normal value (for the purposes of the price comparison) was established. This leads to a violation of Article 6(7) of the basic anti-dumping Regulation. In addition, in view of the Commission's failure to disclose this information on a timely basis, the Chinese exporting producers were denied a full opportunity to defend their interests. This amounts to a violation of the general principle of EU law of the respect for the rights of the defence, as well as the principle of good administration enshrined in Article 41(1) and (2) of the Charter of Fundamental Rights of the European Union."

56. The Appellant cited *Ikea Wholesale* as authority that the invalidity of an anti-dumping measure can be relied on by an importer to obtain the repayment and remission of ADD. In that case, Ikea paid ADD on imports into the United Kingdom of cotton-type bed linen originating in Pakistan and India, pursuant to Council Regulation (EC) No 2398/97. This legislation was the subject of a complaint to the WTO, which held that the EU's investigation giving rise to the anti-dumping measures violated the ADA. In light of the ruling of the WTO, the EU opted, pursuant to Regulation 1515/2001, to adopt Regulations that terminated the ADD on the cotton-type bed linen. These Regulations did not allow for the repayment of ADD previously paid in respect of the imports from these countries and, moreover, Regulation 1515/2001 provided that:-

"*Any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for*."

57. Ikea made a repayment and remission request to the customs authority of the United Kingdom, however this was refused on the grounds of the existence of the aforementioned prohibition on repayment. This refusal was upheld by the VAT and Duties Tribunal, which decision was in turn appealed to the High Court. One of the grounds of appeal concerned the validity of Regulation 2398/97 in light of the Basic Anti-Dumping Regulation and the Appellant's consequent right to repayment because, it was argued, under Article 236 of Council Regulation (EEC) No 2913/92[5] the ADD was "*not legally owed".*

58. The High Court decided to refer questions to the Court of Justice under the preliminary reference procedure, which concerned the validity of the Regulation imposing the ADD on cotton-type bed linen and the consequences regarding repayment and remission were it to be found invalid.

59. In answer to these questions, the Court of Justice found that the anti-dumping measures were invalid in circumstances where the methodology employed in calculating the dumping margin on the cotton-type bed linen did not comply with what was required by the Basic Anti-Dumping Regulation. The Court then found that, as a consequence of this:-

"*It is for the national authorities to draw the consequences, in their legal system, of a declaration of invalidity made in the context of an assessment of validity in a reference for a preliminary ruling (Case 23/75 Rey Soda [1975] ECR 1279, paragraph 51), which has the consequence that anti-dumping duties, paid under Regulation No 2398/97 are not legally owed within the meaning of Article 236(1) of Regulation No 2913/92 and should, in principle, be repaid by the customs authorities in accordance with that provision, provided that the conditions to which such repayment is subject, including that set out in Article 236(2), are satisfied, this being a matter for the national court to verify.*

Next, it must be observed that the national courts alone have jurisdiction to entertain actions for recovery of amounts unduly received by a national body on the basis of Community legislation declared subsequently to be invalid (see, to that effect, Case 20/88 Roquette v Commission [1989] ECR 1553, paragraph 14, and Case C-282/90 Vreugdenhil v Commission [1992] ECR I-1937, paragraph 12).

In those circumstances, the answer to the fifth question must be that an importer, such as that at issue in the main proceedings, which has brought an action before a national

[5] This being repayment and remission legislation preceding the adoption of the UCC and Articles 116(1) and 117 therein.

court against the decisions by which the collection of anti-dumping duties is claimed from it under Regulation No 2398/97, declared invalid by this judgment, is, in principle, entitled to rely on that invalidity in the dispute in the main proceedings in order to obtain repayment of those duties in accordance with Article 236(1) of Regulation No 2913/92."

60. Counsel for the Appellant argued that the Commissioner should find that the Definitive Anti-Dumping Regulation 2009 was incompatible with the Basic Anti-Dumping Regulation and disapply or treat it as invalid for the purpose of determining the within appeal. It was submitted that the ADD charged in respect of the goods at issue should thus be held never to have been owed and the Appellant found to be entitled to repayment and remission of the entirety of the same under Article 116(1)(a)/117(1) of the UCC.

61. Counsel for the Appellant stated that it was within the power of the Commissioner to treat the Definitive Anti-Dumping Regulation 2009 as invalid. He did accept that it did not follow inevitably from the finding of the DSB regarding the incompatibility of this legislation with the ADA that it was invalid as a matter of EU law. However, when one took into account that the purpose of the Basic Anti-Dumping Regulation was to give effect to the ADA; the judgment of the CJEU in *Changshu Standard Parts & Ningbo Jinding Fastener* in relation to the invalidity of the *amended* version of the Definitive Anti-Dumping Regulation 2009; and the substance of the judgment of the Court of Justice in *Ikea Wholesale,* there existed unique and exceptional circumstances warranting the making of a finding by the Commissioner that the legislation was invalid and, therefore, the ADD should be repaid and remitted.

Ground (ii) – the type of goods falling under the Definitive Anti-Dumping Regulation 2009

62. Further or in the alternative, counsel for the Appellant also submitted that the Respondent had charged ADD on goods falling outside the scope of the Definitive Anti-Dumping Regulation 2009. In this regard, he drew attention to the fact that in Article 1 therein, the CN codes *"7318 15 90", "7318 21 00" and "7318 22 00"* were each preceded by "*ex".* This was in contrast to the other CN codes mentioned, which contained no such prefix. These three CN codes were then followed in brackets by the TARIC codes "*7318 15 90 19, 7318 15 90 69, 7318 15 90 89, 7318 21 00 29, 7318 21 00 99, 7318 22 00 29 and 7318 22 00 99".* It was submitted that the import of this was that, in respect of CN codes referred to in Article 1 that were not preceded by "*ex",* all goods classifiable thereunder, whatever their TARIC code, fell within the scope of the Regulation. By contrast, only a subset of those goods classifiable under the CN codes with the prefix "*ex"* were subject to the ADD: namely those coming under the TARIC codes enumerated thereafter.

63. Counsel for the Appellant cited various sources in support of this submission. One of these was the following passage from guidance published by the European Commission regarding the interpretation of Council Regulation 833/2014[6]:-

> "*When a CN code is preceded by an "ex", it means that not all goods under the relevant CN code are covered by the prohibition but only a subset, which can be those corresponding to the description that appears in the table, in the title or sub-title of the relevant annex or in the relevant article in the Regulation. For example, in Annex X, for CN Code 8419 89 10 "Cooling towers and similar plant for direct cooling (without a separating wall) by means of recirculated water", only the goods falling under the description in the table as "Alkylation and isomerization units" are subject to the restrictions.*"

64. Another source upon which the Appellant relied in this respect was the statement of Advocate General Lenz at paragraph 34 in his Opinion in Case C-30/93 *AC-ATEL Electronic Vertiebs GmbH v Hauptzollamt Munchen Mitte,* ECLI:EU:C:1994:138 also concerning the scope of anti-dumping legislation, that:-

> "*It is significant that the original version of the disputed regulation always referred to code number 'ex 8542 11 71'. As is known, the prefix 'ex' which was also attached to all the other code numbers in the original version of the regulation, means that not all the goods corresponding to the code number in question were to be covered by the regulation, but only those corresponding to the definition given in the regulation.*"

65. Counsel for the Appellant then submitted that the Respondent had charged ADD on imported products classifiable under three TARIC codes not enumerated in the Definitive Anti-Dumping Regulation 2009: 7318 15 90 98, 7317 21 00 98 and 7318 22 00 98. The fact that the first eight digits of these TARIC codes – i.e. the CN codes - were included in Article 1 of this legislation with the "*ex*" prefix, and other ten-digit TARIC codes derived therefrom followed them in brackets, meant that the legislation had to be interpreted as not applying to those products falling under the aforementioned TARIC codes set out above. This was a further reason for the adjustment of the ADD charged.

Ground (iii) – error on the part of the Indonesian competent authority

66. Lastly, counsel submitted that the Appellant had been "*the victim of a wrong declaration of origin by the Indonesian exporter from which it bought these products".* It was agreed

[6] This Regulation concerned trade sanctions imposed on Russia as a consequence of its actions in 2014 in relation to Ukraine

that the false information furnished to the Indonesian competent authority had led it to issue inaccurate GSP Form A Certificates of Origin.

67. Counsel for the Appellant submitted that the issuing of the GSP Form A Certificates by the Indonesian competent authority indicating the goods at issue to originate in Indonesia amounted to "*an error on the part of* [that] *competent authority*" within the meaning of Article 116(1)(c) of the UCC.

68. In this context, counsel asserted in the course of legal argument that the Appellant had done its own "*due diligence"* on the provenance of the goods at issue and had relied upon the accuracy of these certificates. He submitted that the agreed facts of the case were such as to allow the Commissioner to infer that the error made by the Indonesian competent authority was one that could not reasonably have been detected by the Appellant and that it had in its reliance acted in good faith, as was required by Article 119 of the UCC for a claim for repayment and remission founded on competent authority error to succeed.

Respondent's submissions

Ground (i) – the purported invalidity of the Definitive Anti-Dumping Regulation 2009

69. Counsel for the Respondent began by highlighting that, in making its case for a determination requiring the repayment and remission of the full amount of the ADD charged, what the Appellant was asking for was that the Definitive Anti-Dumping Regulation 2009 be treated as invalid. This was something that the Commissioner did not have the jurisdiction to do, as was clear from the judgment of the Court of Appeal in *Lee v The Revenue Commissioners [2021] IECA 18,* where Murray J. held that in interpreting and applying legislation made at a national level an Appeal Commissioner was obligated to give effect to EU law. Counsel submitted that the Commissioner could not, as was suggested, dis-apply valid EU law on the grounds of the supposedly "*special circumstances"* of the Appellant's case.

70. Regarding the dispute between China and the EU before the WTO, it was stressed that the findings of the DSB that the Definitive Anti-Dumping Regulation 2009 was incompatible with provisions of the ADA had no impact on the validity of the former as a matter of EU law. That this was so was clear from the judgment of the Court of Justice in Case C-207/17 *Rotho Blaas Srl v Agenzia delle Dogane e dei Monopoli,* ECLI:EU:C:2018:840.

71. Counsel for the Respondent pointed to correspondence of OLAF of 18 March 2016, addressed to all Member States of the EU, regarding the presumption of the lawfulness of the Definitive Anti-Dumping Regulation 2009. This referenced the judgment in Case C-533/10 *Compagnie internationale pour la vente à distance (CIVAD) SA v Receveur des douanes de Roubaix,* ECLI:EU:C:2012:347, where the Court of Justice held that:-

> "*The acts of the European Union Institutions, bodies, offices and agencies are presumed to be lawful, which implies that they produce legal effects until such time as they are withdrawn, annulled in an action for annulment, or declared invalid following a reference for a preliminary ruling or a plea of illegality.*"

72. Applying the similar reasoning as that apparent in the later judgment in *Rotho Blaas,* the Court in *CIVAD* emphasised that the repeal of EU anti-dumping measures found to be incompatible with the ADA did not have any bearing on the validity of those measures prior to their repeal. Moreover, the repealing Anti-Dumping Regulation 2016 expressly stipulated at Article 2 that the repeal was not to serve as a basis for the repayment of ADD already collected pursuant to the Definitive Anti-Dumping Regulation 2009, as amended or otherwise.

Ground (ii) – the type of goods falling under the Definitive Anti-Dumping Regulation 2009

73. Counsel for the Respondent also addressed the Appellant's second ground of appeal, which related to the repayment and remission of that part of the ADD arising from the importation of goods falling under the TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98. It was submitted in this respect that, although these codes did not appear in the Definitive Anti-Dumping Regulation 2009, the products falling under them all came within the definition given in Article 1 regarding the type of iron or steel fasteners to which the anti-dumping measures in force over the relevant period applied.

74. It was submitted on behalf of the Respondent that the Appellant's argument regarding the meaning and significance of the enumeration of TARIC codes in EU anti-dumping legislation, and in particular in relation to the legislation at issue, was misconceived. It was not in dispute that the use of the prefix "*ex"* before 8-digit CN codes specified in anti-dumping legislation meant that only some of the products falling under such codes were intended to come within the relevant legislation's scope. However, what determined which products with the same 8-digit CN code fell within and without the scope of ADD measures was whether they conformed to the description of the products given in an anti-dumping measure. The TARIC codes specified in Article 1 of the Definitive Anti-Dumping Regulation 2009 were simply those that, at the time of the adoption of that legislation,

applied to products falling under the 8-digit CN code and the scope of the legislation. However the TARIC database, and the codes set out therein, must be updated regularly by the European Commission to record the creation of new duties and measures, in accordance with the obligation imposed by Article 6 of Council Regulation No 2658/87. The fulfilment of this obligation does not require the adoption of legislation, on the grounds that TARIC merely constitutes a database that specifies the duties and measures applicable to goods. The TARIC, the Respondent emphasised, is not a legal instrument.

75. The Respondent explained that in the case of the products falling under the TARIC codes in respect of which the Appellant took issue, each was a good constituting an iron or steel fastener within the definition given in Article 1 of the Definitive Anti-Dumping Regulation 2009, as originally drafted and later amended. TARIC code 7318 15 90 98, which fell within the CN code 7318 15 90 relating to "*screws or bolts, possibly with nuts or washers, and which are not coach screws or other wood screws, screw hooks and screw rings, or self-tapping screws",* had been introduced in October 2010 as a replacement for 7318 15 90 89, which had been enumerated in Article 1 of the Definitive Anti-Dumping Directive 2009. Its introduction, along with the separate TARIC code 7318 15 90 91, had occurred as a consequence of the commencement by way of Commission Regulation 966/2010 of the investigation into the circumvention of the original anti-dumping measures. The creation of these two codes was necessary so as to have a specific TARIC code relating to such products consigned from Malaysia (7318 15 90 91) and another for "other" (7318 15 90 98). In this regard, it was noted by the Respondent that Regulation 2015/519, which continued the imposition of anti-dumping measures on iron or steel fasteners originating in China/consigned from Malaysia following an "expiry review" in respect of those measures originally imposed under the Definitive Anti-Dumping Regulation 2009, made reference in its Article 1 to the products falling under TARIC code 7318 15 90 98. This, it was contended, illustrated that products falling under this TARIC code were those of a kind envisaged to be subject to ADD imposed in respect of iron or steel fasteners.

76. As regards the products in respect of which ADD had been charged coming under TARIC code 7318 21 00 98, the Respondent submitted that the same situation applied. TARIC code 7318 21 00 99, which was enumerated in Article 1 of the Definitive Anti-Dumping Directive 2009, covered products that were:-

> "*Screws, bolts, nuts, coach screws, rivets, cotters, cotter pins, washers (including spring washers) and similar articles, of iron and steel;*
>
> *Which were non-threaded;*
>
> *Constituting spring washers and other lock washers;*

Of stainless steel."

77. TARIC codes 7318 21 00 95 and 7318 21 00 98, which came into force in October 2010, replaced 7318 21 00 99 and were introduced in order to allow for a specific classification of such products consigned from Malaysia (7318 21 00 95) and "other" (7318 21 00 98"). Again, the Respondent submitted that:-

    "*As ADD is based solely on product description, the product description was the same; the only thing that changed is the TARIC code and country of consignment. The goods are still the same goods."*

78. The final products in respect of which ADD was charged with which the Appellant took issue on the grounds of the non-specification of their TARIC code in Article 1 of the Definitive Anti-Dumping Regulation 2009 was 7318 22 00 98. The Respondent submitted that 7318 22 00 99, which was specified in that Article covered products that were "*washers of stainless steel"* excluding the aforementioned spring washers and lock washers. 7318 22 00 98 had, along with 7318 22 00 95, replaced 7318 22 00 99 so that there existed a specific code that covered such products consigned from Malaysia and one that covered those that had not been so consigned. Again, the Respondent submitted that they clearly met the definition of the goods described in Article 1 as coming within the scope of the ADD imposed under the Definitive Anti-Dumping Regulation 2009.

79. The effect of the foregoing, submitted the Respondent, was that, when one had regard to the principle that it was the description of the goods in anti-dumping legislation that mattered when interpreting its scope, it was clear that goods falling under TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98 were correctly deemed to be subject to the ADD in question and the amounts charged thereon had not been in error.

Ground (iii) – error on the part of the Indonesian competent authority

80. Counsel for the Respondent agreed with the submissions of her counterpart in the appeal in relation to the test to be applied in a claim for the repayment of a customs duty on the grounds of an error on the part of a competent authority. What was not agreed was that there had been any such error, or, even if there had, that the remaining conditions necessary for repayment to be allowed were met by the Appellant.

81. Counsel submitted that what had happened in this instance was that the exporter of the goods, which she described in oral argument as the Appellant's "*servant or agent",* had deceived the Indonesian competent authority about the true provenance of the goods, so as to avoid the payment of ADD and CCT. She submitted that, on this basis, it could not even be said that a mistake had been made.

82. Secondly, counsel stressed that the Respondent had, from the outset, made clear that it did not accept that if there had been a mistake that it was one that could not have been detected by the Appellant and, moreover, that it had acted in good faith in the importation of the goods at issue. Counsel made the point that the Appellant had opted to run the appeal without calling any evidence from persons from the company who were involved in the importation of the goods at issue. There was therefore no evidence on which a finding could be made that any error on the part of the Indonesian competent authority could not reasonably have been detected by the Appellant or that, in importing the goods, it was doing so in good faith knowing that they did not in fact originate from China.

83. Accordingly, it was submitted that the claim for the repayment of the CCT in the amount of €31,557.14 should be refused.

MATERIAL FACTS

84. The facts material to this appeal were as follows:-

- The Appellant was at the times material to this appeal an importer and supplier of fixtures and fittings, based in the State;
- During the period 29 May 2009 – 16 July 2012, the Appellant made 68 customs entry declarations relating to the importation of iron or steel fasteners;
- The Appellant declared the origin of the iron or steel fasteners in question to be Malaysia, Indonesia and Taiwan;
- Of the 68 declarations, 29 related to iron or steel fasteners declared as originating from Indonesia, in respect of which the Indonesian competent authority had, based on false information provided to it, issued GSP Certificates of Origin (Form A) that erroneously stated their origin to be Indonesia;
- These 29 import declarations made by the Appellant related to iron or steel fasteners purportedly exported from Indonesia by seven different entities. 22 related to one entity, a company called PT [redacted];
- The relevant Indonesian authorities had no record of any of these entities, including PT [redacted], carrying out any import or export in that country;
- Contrary to the information contained in the Appellant's import declarations and the GSP Form A Certificates issued by the Indonesian competent authority, the origin of all of the goods at issue was China;

- Following an enquiry by the Respondent into the Appellant's importation of the goods at issue, conducted with the assistance of OLAF, the Appellant was assessed as owing €1,543,250.88 in ADD and €31,557.14 in CCT arising from their release for free circulation. The Respondent issued correspondence notifying the Appellant of these customs debts on 4 August 2016;
- On 29 April 2019 the Appellant submitted a request that the sums paid in respect of the customs debt be repaid to it;
- On 15 August 2019 the Respondent refused this request;
- A further appeal to the Respondent under section 45 of the 2015 Act/Article 44 of the UCC was rejected on 20 December 2019. This is the decision appealed to the Commission.

ANALYSIS

85. The Appellant in this appeal advanced three grounds as to why some or all of the customs debt should be repaid and remitted. As observed already, these were:-

    (i) That the Definitive Anti-Dumping Regulation 2009 was invalid as a matter of EU law and, as such, the ADD charged had never been legally due;

    (ii) Further or in the alternative, that certain of the goods at issue in respect of which ADD had been charged were not goods falling within the scope of the Definitive Anti-Dumping Regulation 2009, having regard to Article 1 therein; and

    (iii) That, in respect of the CCT charged, it met the conditions for repayment specified in Article 116(1)(c) and 119 of the UCC.

86. The Commissioner will now examine these grounds in turn.

Ground (i) - The purported invalidity of the Definitive Anti-Dumping Regulation 2009

87. The ground on which the Appellant bases its request for the repayment and remission of the entirety of the ADD charged on the goods at issue is the purported incompatibility of the Definitive Anti-Dumping Regulation 2009 with the terms of the Basic Anti-Dumping Regulation. What it asks that the Commissioner do is, on the basis of this incompatibility, to treat the former legislation as invalid for the purposes of this appeal. The consequence of so doing, it says, would be that it would become entitled to the repayment pursuant to Articles 116(1)(a) and 117(1) of the UCC of the full ADD charged in circumstances where it was never legally due. It should be emphasised that the Appellant did not ask that the

matter be the subject of a reference to the CJEU under Article 267 of the Treaty on the Functioning of the European Union ("the TFEU").

88. The Appellant submits that the Commissioner is empowered to treat the Definitive Anti-Dumping Regulation 2009 as invalid on the grounds of the special circumstances of the instant case. As the Commissioner understands it, these circumstances are that the inconsistency of the Definitive Anti-Dumping Regulation 2009 with the Basic Anti-Dumping Regulation is patent from the combination of:-

    (i) the WTO's DSB report that the anti-dumping duties imposed on imported iron or steel fasteners under the Definitive Anti-Dumping Regulation 2009 infringed terms of the ADA; and

    (ii) the judgment of the CJEU in *Changshu Standard Parts & Ningbo Jinding Fastener,* where it was held that the Definitive Anti-Dumping Regulation 2009, as amended by the amending Anti-Dumping Regulation 2012, was invalid in so far as it related to those particular named exporters.

89. In this regard it is found, firstly, that it is abundantly clear from the case law of the CJEU that the Commission, or indeed any national court, does not possess the power to treat as invalid law made by one of the institutions of the EU. The competence to carry out judicial review of the legality of the acts of such institutions resides solely with the CJEU, which competence is bestowed on those courts at the level of primary law by the EU's Treaties. As authority for this, the Commissioner cites the judgments of the EU Court of Justice in Case C-314/85 *Foto Frost, ECLI:EU:C:1987:452,* Case C-550/09 *E&F,* ECLI:EU:C:2010:382 at paragraph 44 and Case C-50/00 P *Unión de Pequeños Agricultores* v *Council* ECLI:EU:C:2002:462 at paragraphs 38 and 40. The Commissioner also draws attention to the Opinion of Advocate General Ćapeta of 17 November 2022 in Case C-123/21 P in *Changmao Biochemical Engineering Co Ltd,* ECLI:EU:C:2022:890.

90. On this basis, the Appellant's request for the repayment of the entirety of the ADD charged must fail, in circumstances where what has been sought at the appeal hearing is outside the scope of the Commissioner's powers. It is so found as a matter of law.

91. Notwithstanding the foregoing finding regarding the extent of the Commissioner's jurisdiction, it also is worth observing that, in so far as the Appellant founded, or perhaps sought to bolster, its invalidity argument on or by reference to the WTO's DSB report of 2011 and the judgment of the Court of Justice in the cases of *Changshu Standard Parts & Ningbo Jinding Fastener*, it appears that this argument was misconceived.

92. In respect of the findings made in the DSB report concerning the incompatibility of the measures imposed under the Definitive Anti-Dumping Regulation 2009 with the ADA, it has been held by the Court of Justice on several occasions that, given their nature and purpose, WTO agreements such as the ADA are not, in principle, among the rules in light of which the legality of measures adopted by the EU institutions may be reviewed (*Rotho Blaas,* paragraph 44). Thus, even were the Commissioner conferred with the power to assess the validity of legislation of the EU, which it is worth emphasising again is not the case, it would not follow that the answer to the question of whether the Definitive Anti-Dumping Regulation 2009 is compatible with the Basic Anti-Dumping Regulation would reflect that given by the WTO's Appellate Body in relation to the former's compatibility with its ADA.

93. That the validity of the Definitive Anti-Dumping Regulation 2009 cannot be assessed by reference to findings in WTO reports was in fact confirmed specifically in the judgment of the Court of Justice in Case C-104/19 *Donex Shipping and Forwarding BV,* ECLI:EU:C:2020:539, at paragraph 45. Furthermore, in that same case, a reference under Article 267 of the TFEU, the referring court asked whether the partial annulment in *Changshu Standard Parts & Ningbo Jinding Fastener* of the Definitive Anti-Dumping Regulation 2009, as amended by the amending Anti-Dumping Regulation 2012, on the grounds of its infringement of Articles 2(10) and 2(11) of the Basic Anti-Dumping Regulation, warranted the transposition "[…] *of the solution reached in that judgment* […] *to the present case."* In answer to this the Court of Justice held at paragraphs 43 and 44:-

> "*It must be borne in mind that the assessment of the validity of a measure which the Court is called upon to undertake on a reference for a preliminary ruling must normally be based on the situation which existed at the time that the measure was adopted (judgments of 17 July 1997, SAM Schiffahrt and Stapf, C-248/95 and C-249/95, EU:C:1997:377, paragraph 46, and of 1 October 2009, Gaz de France – Berliner Investissement, C-247/08, EU:C:2009:600, paragraph 49).*
>
> *It follows that both the adoption of Implementing Regulation No 924/12 and its partial annulment by the judgment of 5 April 2017, Changshu City Standard Parts Factory and Ningbo Jinding Fastener v Council (Case C-376/15 P and C-377/15 P, EU:C:2017:269), are incapable of having an impact on the validity of the regulation at issue, since both of those circumstances occurred after that regulation had been adopted."*

94. It is clear from this passage in *Donex Shipping and Forwarding BV* that the finding of the Court of Justice in *Changshu City Standard Parts Factory and Ningbo Jinding Fastener,*

that the annulment of the measures as amended by the Anti-Dumping Regulation 2012 in so far as it related to certain Chinese producers of iron or steel fasteners, cannot itself serve as a basis for treating the measures originally imposed under the Definitive Anti-Dumping Regulation 2009 as invalid in an entirely separate case.

95. The Commissioner considers the judgment of the Court of Justice in *Donex Shipping and Forwarding BV,* which was delivered on 9 July 2020, but was not referred to before or during the appeal hearing, to be relevant to this ground of appeal for another reason. Two of the four bases identified by counsel for the Appellant as to why the Definitive Anti-Dumping Regulation 2009 was invalid concerned the alleged failure of the European Commission to disclose information in a timely manner to the Chinese producers of the goods at issue. These disclosure failures, it was submitted, constituted breaches of Articles 2(10) and 6(7) of the Basic Anti-Dumping Regulation and violations of the right of the defence of those producers and the principle of good administration enshrined in Article 41(1) and (2) of the CFEU.

96. The background to *Donex Shipping and Forwarding BV* was not at all dissimilar to the instant case and was described by the Court at paragraphs 27-29 in the following terms:-

> *"In 2011, Donex filed declarations for the release into free circulation of iron or steel fasteners which it imported on behalf of a Netherlands company, which had bought them from two suppliers established in Thailand. In those declarations, Donex stated that Thailand was the country of origin of those fasteners.*
>
> *Following an investigation by the European Anti-Fraud Office (OLAF), however, it was revealed that those fasteners actually originated in China and that they were therefore subject to the anti-dumping duty imposed by the regulation at issue.*
>
> *Consequently, requests to pay anti-dumping duties, dated 4 June 2014, were sent to Donex. Those duties were fixed by application of the rate of 85% applicable to 'all other companies'.*"

97. Donex Shipping and Forwarding BV challenged the payment request unsuccessfully before the rechtbank Noord-Holland (the District Court, North Holland, Netherlands) and the Gerechtshof Amsterdam (the Court of Appeal, Amsterdam, Netherlands), where, *inter alia*, it called into question the validity of the Definitive Anti-Dumping Regulation 2009 on the grounds of its incompatibility with the Basic Anti-Dumping Regulation. The Hoge Raad der Nederlanden (the Supreme Court of the Netherlands) took a different view however and referred two questions under Article 267 of the TFEU to the CJEU. The second of

these concerned the compatibility of the Definitive Anti-Dumping Regulation 2009 with Article 2(10) of the Basic Anti-Dumping Regulation and asked, in essence:-

"[…] *whether the* [Definitive Anti-Dumping Regulation 2009] *is invalid on the ground that the Commission failed to provide, in a timely manner, during the investigation, the necessary information, in particular the figures of the Indian producer relating to the determination of the normal value, to the Chinese exporting producers, thus preventing them from substantiating their claims for adjustments*."[7]

98. The answer of the Court of Justice to this question, which the Commissioner considers in essence to address the same legal issue as that raised by the Appellant in its first ground suggesting the invalidity of the Definitive Anti-Dumping Regulation 2009, was set out at paragraphs 65 – 73 of its judgment. It is worth setting out in full:-

"*65.* […] *the referring court wonders whether the regulation at issue infringes Article 2(10) of the basic regulation on the ground that, in the investigation that led to its adoption, the EU institutions did not provide the cooperating Chinese exporting producers, or did not provide them in a timely manner, with all the figures of the Indian producer relating to the determination of the normal value.*

66. In that regard, it is apparent from the grounds of the request for a preliminary ruling that the referring count considers that, having failed to communicate, at least in a timely manner, those figures to the Chinese exporting producers, the EU institutions prevented them from substantiating their claims for adjustments. Similarly, Donex claims, in the written observations which it lodged at the Court, that the belated communication of those figures prevented those Chinese exporting producers from duly exercising their right to claim adjustments and to substantiate their claims.

67. Without prejudice to whether Article 2(10) of the basic regulation requires the EU institutions to provide the interested parties with information relating to the determination of the normal value on the basis of the prices of the producer in the analogous country, it appears, as the EU institutions correctly observe and as the Advocate General observed in point 64 of his Opinion, that the third ground of invalidity amounts, in essence, to taking issue with the EU institutions for having breached the rights of defence of the Chinese exporting producers that exercised their procedural rights during the investigation leading to the adoption of the regulation at issue.

[7] The precise question asked in this regard is set out at paragraph 39(2) of the judgment of the Court.

68. It follows from the Court's case-law that a company that did not participate in a dumping investigation and is not linked to any exporting producer in the country covered by the investigation cannot claim any rights of defence in a procedure in which it did not participate (see, to that effect, judgment of 10 September 2015, Fliesen-Zentrum Deutschland, C-687/13, EU:C:2015:573, paragraph 73).

69. As the Advocate General observed, in essence, in point 60 of his Opinion, the same must apply, a fortiori, when such a company seeks to rely on a breach of the rights of defence of the exporting producers of the country covered by the investigation with which it is not in any way connected.

70. As the Advocate General observed in point 57 of his Opinion, in the system governing anti-dumping proceedings, the basic regulation confers procedural rights and guarantees on certain interested parties, but the exercise of those rights and guarantees depends on the active participation by those parties in the proceedings in question, which must take the form, at the very least, of the submission of a written request within a stated deadline.

71. In this instance, it is apparent from the documents in the file before the Court, first, that neither Donex nor its suppliers participated in the investigation proceedings that led to the adoption of the regulation at issue and, second, that Donex does not appear to be linked to Chinese exporting producers that participated in that investigation. Therefore, as the Advocate General observed in point 65 of his Opinion, Donex cannot claim a potential breach of the rights of defence of those producers.

72. That conclusion cannot be called into question by the fact that the third ground of invalidity formally alleges infringement of Article 2(10) of the basic regulation owing to an error vitiating the fair comparison of the normal value and the export price. Any error vitiating that comparison would in fact be the potential consequence of the alleged omission to communicate, at least in a timely manner, certain information to the Chinese exporting producers. As already held in paragraph 67 of the present judgment, however, the latter omission would, if established, constitute a breach of those exporting producers' rights of defence.

73. Having regard to all of the foregoing considerations, the answer to the questions raised must be that consideration thereof has disclosed no factor of such a kind as to affect the validity of the regulation at issue."

99. The Commissioner considers this passage in *Donex Shipping and Forwarding BV* to indicate that neither the Appellant's first nor fourth grounds for contending that the

Definitive Anti-Dumping Regulation 2009 was invalid under EU law are well founded. In respect of the former, the Appellant argued that this invalidity flowed from the European Commission's failure in the process giving rise to the anti-dumping measures ultimately adopted to disclose information to exporting producers, or disclose it in a timely manner, in breach of Article 2(10) of the Basic Anti-Dumping Regulation. To the Commissioner's mind however this is, in all but name, an attempt to rely on the right of defence conferred on other persons, specifically the Chinese producers of iron or steel fasteners, which the Court of Justice held in clear terms could not occur. The fact that the Appellant's fourth ground concerning invalidity is formulated in a fashion that refers expressly to the "*Failure to provide timely information"* and a consequent breach of Article 41(1) and (2) of the CFEU and Article 6(7) of the Basic Anti-Dumping Regulation does not in the Commissioner's view alter the fact that the actual character of the first ground is the same. It is, in effect, an attempt to rely on the procedural rights of others. Thus, had the Appellant requested that a question or questions relating to its first and fourth grounds be referred to the CJEU under Article 267 of the TFEU, which in any event it did not do, the Commissioner would nonetheless have found this to be unnecessary and would have declined to do so.

100. With regard to the Appellant's second ground concerning invalidity, the Commissioner refers to the judgment of the Court of Justice of 28 September 2023 *Changmao Biochemical Engineering Co Ltd,* cited already at paragraph 89 of this Determination. This appears to be clear authority that the methodology employed by the European Commission in determining the scope of the "Union industry" for the purposes of the injury determination stage of its anti-dumping investigation was not contrary to Articles 4(1) and 3(2) of the Basic Anti-Dumping Regulation.[8] In that case, a Chinese producer of tartaric acid argued, in essentially the same fashion as did the Appellant in the instant case, that the limiting of the Union industry to just those Union-based producers of tartaric acid prepared to form part of its sample risked "distorting" the injury analysis and was thus in breach of EU law. The contrary finding of the Court, though lengthy, is worth setting out in full:-

"106. It should be noted at the outset that, in order for the EU institutions to be able to determine whether there is a threat of material injury to the Union industry in the economic sector concerned, it is necessary to know the current situation of that industry. It is only in the light of that situation that those institutions will be able to determine whether the imminent increase in future dumped imports will cause material

[8] The Court of Justice's judgment of 28 September 2023 upheld the earlier judgment of the General Court of 16 December 2020, ECLI:EU:T:2020:605, to the same effect.

injury to that industry in the event that no trade defence measures are taken. Thus, the assessment of the vulnerability of that industry constitutes the first stage of analysis in the context of the determination of whether there is a threat of injury (see, to that effect, judgment of 7 April 2016, Arcelor Mittal Tubular Products Ostrava and Others v Hubei Xinyegang Steel, C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 31).

107. Pursuant to Article 3(2) of the Basic Regulation, the determination of injury to an Union industry is based on positive evidence and involves an objective examination, on the one hand, of the volume of the dumped imports and the effect of those imports on prices in the Union market for like products and, on the other, of the consequent impact of those imports on the Union industry.

108. Article 4(1) of the Basic Regulation defines the concept of 'Union industry' in reference to 'the Union producers as a whole of the like products' or 'those of [those producers] whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Union production of those products'. The latter provision indicates, in particular, that an investigation will not be initiated where the Union producers expressly supporting the complaint account for less than 25% of the total production of the like product produced by the Union industry.

109. In that regard, the Court has already held that the 25% threshold refers to 'the total production of the like product produced by the Union industry' and relates to the percentage of that total production accounted for by the Union producers supporting the complaint. Only that 25% threshold is therefore relevant in determining whether those producers account for 'a major proportion' of the total production of the like product produced by the Union industry, within the meaning of Article 4(1) of the Basic Regulation (see, to that effect, judgment of 15 November 2018, Baby Dan, C-592/17, EU:C:2018:913, paragraph 79 and the case-law cited).

110. By referring to that threshold, Article 4(1) of the Basic Regulation thus merely specifies that a combined production of the Union producers supporting the complaint which does not reach 25% of the total EU production of the like product cannot, in any event, be considered sufficiently representative of the EU production. In the event that the combined output of those producers exceeds that threshold, anti-dumping duties may be imposed or maintained if the EU institutions concerned succeed in establishing, taking into account all the relevant factors of the case, that the injury resulting from the imports of the dumped product is injuring a major proportion of the total EU production of the like product (see, to that effect, judgment of 15 November 2018, Baby Dan, C-592/17, EU:C:2018:913, paragraph 80 and the case-law cited).

111. It follows that the definition of the Union industry, within the meaning of Article 4(1) of the Basic Regulation, may be limited solely to the Union producers which supported the complaint giving rise to the anti-dumping investigation (see, to that effect, judgment of 15 November 2018, Baby Dan, C-592/17, EU:C:2018:913, paragraph 81 and the case-law cited).

112. In the present case, it should be noted, first, that the production of the Union producers referred to in paragraph 13 of the judgment under appeal, which were at the origin of the complaint which led to the review investigation, represented 52% of the total production of the product concerned and therefore exceeded the threshold of 25% laid down in Article 4(1) of the Basic Regulation, read in the light of Article 5(4) of that regulation. It is also apparent from paragraph 30 of the judgment under appeal that the seven producers which cooperated in the investigation and which the Commission took into account in determining the vulnerability of the Union industry and the threat of injury represented 60% of total EU production.

113 Second, it is necessary to reject Changmao's arguments that, in essence, the General Court erred in law when it held, in paragraphs 103, 106 and 109 to 112 of the judgment under appeal, that it was sufficient for the Commission, in the context of determining the state of vulnerability of the Union industry, to take account solely of the information supplied by the seven Union producers which had decided to cooperate, without taking into consideration the data concerning Distillerie Mazzari, in its capacity as the largest producer of natural tartaric acid in the European Union. In so far as, in accordance with the case-law cited in paragraphs 109 to 111 of the present judgment, the definition of the Union industry may be limited to the Union producers which supported the complaint giving rise to the anti-dumping investigation, that circumstance alone is not such as to invalidate the methodology followed in adopting the contested regulation, within the meaning of Article 4(1) of the Basic Regulation. Furthermore, that circumstance also cannot allow a finding that the General Court erred in law because it did not find that the Commission had failed to examine all the relevant factors in order to establish the state of vulnerability of the Union industry and that, consequently, it had not acted with due diligence and in accordance with the principle of sound administration.

114 Third, the General Court cannot be criticised for failing to find that the Commission infringed Article 3(2) of the Basic Regulation. The fact that the definition of the Union industry is limited to the Union producers which supported the complaint giving rise to the anti-dumping investigation and which cooperated in the investigation does not, in

itself, and in the absence of any other factor of such a kind as to call into question the representativeness of those producers, allow it to be considered that the determination, in the contested regulation, of the state of vulnerability of the Union industry is not based on positive evidence and does not involve an objective examination within the meaning of Article 3(2) of the Basic Regulation.

115 It follows that, in holding, in paragraphs 103, 106 and 109 to 112 of the judgment under appeal, that it was sufficient for the Commission, in determining the state of vulnerability of the Union industry, to take account only of the information provided by the seven Union producers which decided to cooperate in the review investigation which gave rise to the contested regulation, without taking into consideration the data concerning Distillerie Mazzari, the General Court did not err in law.

116 In those circumstances, it is necessary to reject as inoperative Changmao's other arguments set out in paragraphs 95 to 97 of the present judgment, criticising the General Court, in essence, first, for failing to find that the Commission was able to obtain information concerning Distillerie Mazzari for the whole of the period of investigation leading up to the adoption of the contested regulation and, second, by holding that that institution was not supposed to include, in the selection of producers of tartaric acid deemed to constitute the Union industry in that sector, producers that had decided not to cooperate in the in the investigation, since those arguments cannot lead to the annulment of the judgment under appeal."

101. The Commissioner considers that this passage answers the second point made by the Appellant regarding the supposed invalidity of the Definitive Anti-Dumping Regulation 2009. It suggests that, in conducting its investigation into the dumping of Chinese origin iron or steel fasteners onto the EU market, in particular that part relating to the question of whether EU producers had suffered injury, the European Commission was entitled to define the "Union industry" by reference to those EU producers that had indicated their willingness to be part of its sample. Doing so did not, as the Appellant contended in written and oral argument, constitute an infringement of either Articles 4(1) or 3(2) of the Basic Anti-Dumping Regulation.

102. Thus, had the Appellant requested the making of a preliminary reference, which it did not do, the Commissioner would not have considered this point to be one requiring clarification by the CJEU under the Article 267 mechanism and would have declined to make any such reference.

Ground (ii) - The products falling within the scope of the Definitive Anti-Dumping Regulation 2009

103. With regard to the portion of the ADD attributable to goods at issue that fell to be classified under the TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98*,* the Commissioner finds, for the following reasons, that it was correctly charged.

104. Judging by the written submissions provided by the parties, there did not appear to be any dispute that the use in Article 1 of the Definitive Anti-Dumping Regulation 2009 of the prefix 'ex' before a CN code enumerated therein, signified that only some types of goods falling under that code were subject to ADD. However, as observed at paragraph 64 of this Determination, the Appellant relied on a passage in paragraph 34 of the Opinion of Advocate General Lenz in *AC-ATEL Electronic Vertiebs GmbH v Hauptzollamt Munchen Mitte,* as support for its proposition that the absence of the three aforementioned TARIC codes in Article 1 meant that goods classified thereunder that it had imported, were outside the scope of the anti-dumping measures. What was not quoted by the Appellant, however, were the two sentences preceding and following that passage, which the Commissioner considers to be essential to understanding the actual meaning of this part of the Advocate General's Opinion. As a whole, with additional parts underlined, the paragraph states:-

> "*In that respect, it must first be borne in mind that there is nothing in Regulation No 165/90 to suggest that the code numbers given in Article 1(1) were to take priority over other parts of the text in determining the scope of the regulation. It is significant that the original version of the disputed regulation always referred to code number ' ex 8542 11 71'. As is known, the prefix 'ex', which was also attached to all the other code numbers in the original version of the regulation, means that not all the goods corresponding to the code number in question were to be covered by the regulation, but only those corresponding to the definition given in the regulation. Thus, as regards the definition of its scope, this regulation attributes decisive significance to the definition rather than to the code numbers.*"

105. The Commissioner observes that under the heading "*Product concerned",* Recital 40 of the Definitive Anti-Dumping Regulation 2009 provides a comprehensive written description of the products falling within its scope, namely:-

> "[…] *iron or steel fasteners, other than of stainless steel, i.e. wood screws (excluding coach screws), self-tapping screws, other screws and bolts with heads (whether or not with their nuts or washers, but excluding screws turned from bars, rods, profiles or wire, of solid section, of a shank thickness not exceeding 6 mm and excluding screws*

and bolts for fixing railway track construction material), and washers, originating in the People's Republic of China (all together hereinafter referred to as fasteners or product concerned).”

106. Immediately thereafter, Recital 41 provides:-

> *“The product concerned is normally declared within CN codes 7318 12 90, 7318 14 91, 7318 14 99, 7318 15 59, 7318 15 69, 7318 15 81, 7318 15 89, ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00.”* [Emphasis added].

107. Article 1 of the Definitive Anti-Dumping Regulation 2009 provides:-

> “*A definitive anti-dumping duty is hereby imposed on certain iron or steel fasteners, other than of stainless steel, i.e. wood screws (excluding coach screws), self-tapping screws, other screws and bolts with heads (whether or not with their nuts or washers, but excluding screws turned from bars, rods, profiles or wire, of solid section, of a shank thickness not exceeding 6 mm and excluding screws and bolts for fixing railway track construction material), and washers, originating in the People's Republic of China, falling within CN codes 7318 12 90, 7318 14 91, 7318 14 99, 7318 15 59, 7318 15 69, 7318 15 81, 7318 15 89, ex 7318 15 90, ex 7318 21 00 and ex 7318 22 00 (TARIC codes 7318 15 90 19, 7318 15 90 69, 7318 15 90 89, 7318 21 00 29, 7318 21 00 99, 7318 22 00 29 and 7318 22 00 99).”*

108. What this leads the Commissioner to conclude is that, just as was observed by Advocate General Lenz in relation to the legislation at issue in *AC-ATEL Electronic Vertiebs GmbH v Hauptzollamt Munchen Mitte,* the Definitive Anti-Dumping Regulation 2009 does not suggest that the numbers, and in particular the TARIC codes, specified in Article 1 therein should take priority over the detailed written description preceding it.

109. It is clear that the actual type of goods at issue falling under 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98 differ in no way from, respectively, 7318 15 90 89, 7318 21 00 99 and 7318 22 00 99. All were iron or steel fasteners falling within the scope of the description given in Article 1. It also is clear that the changes in TARIC code occurred because, upon the adoption of the extending Anti-Dumping Regulation 2011, which applied the ADD imposed under the Definitive Anti-Dumping Regulation 2009 to iron or steel fasteners consigned from Malaysia, it became necessary to classify these goods so consigned under the TARIC system. The codes created were 7318 15 90 91, 7318 21 00 95 and 7318 22 00 95, each of which it should be noted were enumerated in Article 1 of the extending Anti-Dumping Regulation 2011.

110. Notwithstanding the principle, referred to already in a different context in this appeal, that the meaning of a Regulation cannot be interpreted in light of a subsequent Regulation, it is worthy of note that both Council Regulation 2015/519, which continued the anti-dumping measures on iron or steel fasteners originally imposed in 2009 upon an expiry review, and the repealing Anti-Dumping Regulation 2016, which brought an end to the measures, reference the TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98 in their respective Article 1. Why would they do so in circumstances where they were not previously enumerated in the Definitive Anti-Dumping Regulation 2009? The answer to this, it appears to the Commissioner, is that when it became necessary to renew and later repeal the measures, the TARIC codes of goods coming within the ambit of the description of the iron or steel fasteners set out in Article 1 of the Definitive Anti-Dumping Regulation 2009 had come to include 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98. This supports the position taken by the Respondent in submission that the TARIC codes in Article 1 do not determine the actual scope of this legislation. Rather it is the wording that precedes them, which the Commissioner finds as a matter of law is such as to encompass the goods falling under the TARIC codes 7318 15 90 98, 7318 21 00 98 and 7318 22 00 98, imported by the Appellant during the relevant period. As a consequence of this finding, the Appellant's appeal of the ADD charged in respect of this portion of the goods at issue, amounting to €193,683.34, must fail.

Ground (iii) - The Appellant's compliance with the conditions under Article 119 for the repayment of the ordinary customs debt.

111. The final issue to determine is the Appellant's request for the repayment of CCT in the amount of €31,557.14.

112. There was in fact no dispute between the parties in this appeal regarding the test that had to be met if the Appellant was to be entitled to the repayment and remission of the CCT charged on its importation of goods declared as originating in Indonesia, but in fact originating in China. First, it had to be shown that there was an error made by the Indonesian competent authority, secondly that the error in question could not reasonably have been detected by the Appellant and, thirdly, that the Appellant was acting in good faith in the importation of the goods at issue.

113. Counsel for the Respondent did not accept that the issuing of the GSP Form A Certificates constituted an error in circumstances where it was patent that the competent authority had been deliberately misled as regarding the true origin of the goods at issue in this context. The Commissioner has doubts about this aspect of the Respondent's submission

at the level of principle given the first two paragraphs of Article 119(3) of the UCC provide:-

> *"Where the preferential treatment of the goods is granted on the basis of a system of administrative cooperation involving the authorities of a country or territory outside the customs territory of the Union, the issue of a certificate by those authorities, should it prove to be incorrect, shall constitute an error which could not reasonably have been detected within the meaning of point (a) of paragraph 1.*
>
> *The issue of an incorrect certificate shall not, however, constitute an error where the certificate is based on an incorrect account of the facts provided by the exporter, except where it is evident that the issuing authorities were aware or should have been aware that the goods did not satisfy the conditions laid down for entitlement to the preferential treatment."* [Emphasis added].

114. At the hearing of the appeal, counsel for the Appellant submitted that it could be inferred by the Commissioner from the facts agreed, that the competent authority of Indonesia should have been capable of establishing for itself, that the information provided to it regarding the provenance of this portion of the goods at issue amounted to an "*incorrect account of the facts",* such that it should have been aware that those goods did not satisfy the conditions laid down for preferential treatment. The Commissioner is far from persuaded that such an inference could or should be drawn from the facts agreed. However, even if it were possible to so infer, there remain the questions of whether the Appellant could have detected the error and whether it acted in good faith. As regard the latter requirement, this means that it must "demonstrate" that:-

> "[…] *during the period of the trading operations concerned,* [the Appellant] *has taken due care to ensure that all the conditions for the preferential treatment have been fulfilled."*

115. It is necessary to recall that from the outset of this appeal, the Appellant put in issue the question of the Appellant's inability to detect any error made by the Indonesian authorities and, in particular, its good faith in the importation of the goods at issue. Presumably because of this, it was initially indicated that in presenting its case, evidence would be given by persons involved in the Appellant. At a later point, however, the Appellant indicated that in fact it would not be calling anybody to give evidence.

116. As is apparent from the presence of the word "*demonstrate"* in Article 119(3) of the UCC and from Ireland's own domestic case law (see *Menolly Homes v Revenue Commissioners [2010] IEHC 49* at paragraph 22), it is the Appellant that bears the onus

of proving that it acted in good faith in the importation of the goods ostensibly originating in Indonesia, but in fact originating in China. The Commissioner does not at all agree with the submission made by counsel for the Appellant that one could and should infer simply from the agreed matrix of fact that there was good faith on the part of the Appellant in the importation of the goods at issue, which it wrongly declared as being of Chinese origin. Indeed, it was notable that at hearing counsel for the Appellant did not specify what particular agreed facts the Commissioner should take into account that would lead to this conclusion, save that no criminal prosecutions of persons involved in the Appellant had accompanied or followed the appealed assessments to ADD and CCT. It need hardly be stated that the answer to the question of whether a company acted in good faith in importing goods the origin of which were wrongly declared, with the result that the company avoided very large customs duties, does not follow from the decision of the Director of Public Prosecutions whether to bring criminal proceedings as a consequence of those declarations.

117. In short, the Commissioner finds that there is a want of evidence on which to base a finding that the Appellant acted in good faith in its importation of the goods that it was agreed originated from China and were not declared as such. Exactly the same analysis applies in respect of the possibility of making a finding regarding its inability to detect any error that may have been made by the Indonesian competent authority leading to its issuing of a GSP Form A Certificate of origin. No evidence was proffered in the course of the appeal hearing by the Appellant regarding the nature of the "due diligence" that it had performed in importing that part of the goods at issue giving rise to the CCT.

118. Accordingly, this aspect of the Appellant's appeal, whereby it seeks the repayment and remission of CCT found to be due must also fail.

DETERMINATION

119. For the reasons set out in the preceding part of this Determination, the Commissioner determines the Appellant's appeals of the decisions of the Respondent refusing to remit and repay ADD and CCT, in the following manner:-

(a) The Respondent's refusal to repay and remit to it ADD in the amount of €1,543,250.88 was correct and stands affirmed;

(b) The Respondent's refusal to repay and remit CCT in the amount of €31,557.14 was correct and stands affirmed;

120. It follows from the foregoing that the Appellant's appeal against the refusal to repay interest accrued in respect of the above sums must also fail.

121. This Appeal is determined in accordance with Part 40A of the TCA 1997, in particular 949AL thereof. This determination contains full findings of fact and reasons for the determination, as required under section 949AJ(6) of the TCA 1997.

NOTIFICATION

122. This determination complies with the notification requirements set out in section 949AJ of the TCA 1997, in particular section 949AJ(5) and section 949AJ(6) of the TCA 1997. For the avoidance of doubt, the parties are hereby notified of the determination under section 949AJ of the TCA 1997 and in particular the matters as required in section 949AJ(6) of the TCA 1997. This notification under section 949AJ of the TCA 1997 is being sent via digital email communication **only** (unless the Appellant opted for postal communication and communicated that option to the Commission). The parties will not receive any other notification of this determination by any other methods of communication.

APPEAL

123. Any party dissatisfied with the determination has a right of appeal on a point or points of law only within 42 days after the date of the notification of this determination in accordance with the provisions set out in section 949AP of the TCA 1997. The Commission has no discretion to accept any request to appeal the determination outside the statutory time limit.

Conor O'Higgins
Appeal Commissioner
17 May 2024