Neutral Citation: [2024] UKFTT 00085 (TC)

Case Number: TC09050

FIRST-TIER TRIBUNAL
TAX CHAMBER

Hearing Venue: Taylor House, London

Appeal reference: TC/2021/02200
TC/2021/02122
TC/2021/13167

Anti-dumping, countervailing duty – solar cells – whether consigned from Taiwan or Vietnam – whether issue determined by CJEU in Megasol Energie AG v European Commission – whether Appellant notified of the debt – whether 2016 Implementing Regulations apply to the entries – whether HMRC should have accepted Appellant's amended invoice – whether remission of duty should be allowed

Heard on: 23, 24 and 27 November 2023
Judgment date: 22 January 2024

Before

TRIBUNAL JUDGE GUY BRANNAN
TRIBUNAL MEMBER JO NEILL

Between

CANADIAN SOLAR EMEA GmbH

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Timothy Lyons KC instructed by Reed Smith LLP

For the Respondents: Joanna Vicary, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. One of the main issues in this appeal, beguiling in its simplicity, is whether solar cells used by the Appellant in the construction solar panels, were "consigned from" Taiwan or whether they were consigned from Vietnam. Upon this issue (and other related issues) turns a liability to anti-dumping duty ("ADD") of £3,210,145, countervailing duty ("CVD") of £691,323.36 and import VAT of £780,293.67, totalling £4,681,762.03, the decisions in respect of which the Appellant now appeals. In addition, the Appellant also appeals against HMRC's refusal to remit the total sum of £4,681,762.03. Originally, HMRC also imposed a penalty under the Finance Act 2003, but the penalty decision was subsequently withdrawn by HMRC and therefore does not form part of the appeal before us.

THE EVIDENCE

2. We were provided with a hearing bundle of over 2000 pages.

3. On behalf of the Appellant, the produced witness statements:

   (1) Susanne Pflug, the General Manager of the Modules and Systems Solutions segment of the Canadian Solar group in Europe, the Middle East and Africa ("EMEA") and the Managing Director of the Appellant provided a witness statement; and

   (2) Jesse De Bruyn, an advocaat, of Reed Smith LLP.

4. On behalf of HMRC the following produced witness statements:

   (1) Philip Parker, a Senior Customs Technical Lead within HMRC;

   (2) Carol Hobbs, a customs officer of HMRC.

5. Of the witnesses, only Mr Parker was cross-examined.

THE FACTS

6. We were informed that the facts in this appeal were not in dispute. Nonetheless, for reasons which were never explained, the parties lamentably failed to produce an agreed statement of facts. The parties are reminded that part of the duty to cooperate with the Tribunal, contained in Rule 2 The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, is that they should produce an agreed statement of facts in those cases where, or to the extent that, the facts are not in dispute. Failure to do so results in the commitment of unnecessary judicial time.

7. The Appellant is a company based in Germany. It imports solar energy equipment.

8. The appeals relate to the same 13 importations of solar panels and their parts. The entry dates of the 13 importations were between 9 November 2017 and 19 December 2017 inclusive.

9. The solar panels contained solar cells. From 2015, the Appellant sourced its solar cells from manufacturers in Taiwan, for commercial reasons. The solar cells were shipped from Taiwan, where they were manufactured, to Vietnam. In Vietnam the solar cells were incorporated into solar panels (modules) i.e. they were connected to form a frame with a glass protective covering (solar panels). The solar panels, containing the solar cells, were then shipped to the UK.

10. All 13 importations (each an "Entry" and together, the "Entries") were declared under the following commodity codes:

• 8541 40 90 49 – covering solar modules imported from anywhere other than China, Malaysia and Taiwan; and

• 8541 50 00 00 – covering semi-conductor devices

11. The Appellant's use of the commodity codes 8541 40 90 49 and 8541 50 00 00 resulted in no charge to ADD or CVD being raised since the Customs Handling of Import and Export Freight system (known as CHIEF) does not take account of the Country of Origin declared, because ADD and CVD is not due on goods properly declared to those codes.

12. HMRC contends (and the Appellant disputes) that the correct commodity code for the solar cells imported was: 8541 40 90 53 (the relevant entries having been consigned from Taiwan).

13. Use of this commodity code would have given the Appellant the option to select either:

(1) The generic 'all other companies' rates for ADD/CVD by inputting additional code B999, which would have attracted both ADD at 53.4% and CVD at 11.5%; or

(2) To enter the specific code for one of the relevant (potentially exempt) producers, e.g. C081 for Gintech Energy Corporation (one of the approved Taiwanese manufacturers of solar cells – see below)

14. We were shown the UK Integrated Online Tariff. This provided the user with the ability to scroll down to the appropriate manufacturer within the applicable country and, against its name, will be listed in the relevant Additional Code together with the applicable conditions set out within a further link – this sets out the requirements (e.g. the need for an invoice with a signed declaration – resulting in duty of 0%; failure to provide a document resulting in 53.40% ADD, 11.50% CVD)

15. It was common ground that the solar cells had their origin, for customs purposes, in Taiwan by virtue of Commission Delegated Regulation 2015/2446, Annex 22-01, HS 2012 Code ex 8541 (a). This was confirmed by the Cell Certificates of Origin contained within the import paperwork with which we were provided in the hearing bundle. The solar cells were manufactured in Taiwan and there was insufficiently substantial processing carried out on the solar cells to change their origin for customs purposes from Taiwan to Vietnam.

16. The manufacturers of the solar cells were potentially exempt companies, viz manufacturers listed as exempt Taiwanese producers for the purposes of Article 1 of both the Commission Implementing Regulation (EU) 2016/185 (ADD) and the Commission Implementing Regulation (EU) 2016/184 (CVD) ("the 2016 Implementing Regulations").

17. On 5 March 2020 the Respondents opened a post-clearance audit on the Appellant's imports.

18. When the Respondents further considered a number of import entries declared by the Appellant during the relevant period it considered that, in fact, and contrary to the commodity codes declared, the countries of origin were variously stated to be China, Israel, Vietnam and Taiwan. The use of the incorrect commodity codes 8541 40 90 49 and 8541 50 00 00 resulted in no charge to ADD or CVD having being raised because ADD and CVD was not due on goods properly declared to those codes.

19. By a letter dated 29 September 2020 HMRC wrote to the Appellant notifying them of the errors which they said had been had discovered, setting out the import duties they believed to be due, and inviting the Appellant to comment or provide any further information within 30 days.

20. The Appellant wrote to HMRC in a letter dated 28 October 2020:

(1) stating that the Appellant accepted that their customs agent wrongly declared imports to CN 8541 50 00 00 when, in fact, the correct tariff classification for these entries was 8541 40 90 49;

(2) asserting that their customs agent had wrongly declared the country of origin and/or consignment for certain imports;

(3) providing further information to the Respondents, in particular setting out the process by which the solar panels were acquired; and

(4) maintaining that no duties or additional import VAT was due.

21. By a letter from HMRC dated 5 November 2020 ("the 5 November 2020 letter"), HMRC contend that they notified the Appellant that it had incurred a customs debt amounting to £4,681,762.03. The letter from HMRC read as follows:

> "In my letter dated 29 September 2020 I told you about the post clearance demand for £5,380,685.13 that I intended to send to you. In that letter I gave you the chance to:
>
> • question my decision
>
> • give me any extra information that could change any amounts I'd charge you
>
> Thank you for the extra information that you've given me. I've considered this and have decided to reduce the amount I'll charge you. The updated calculations are shown on the enclosed schedule.
>
> This decision will not affect any further action that we may take in the future about this matter.
>
> If there's anything about your health or personal circumstances that may make it difficult for you to deal with this, please tell me so that I can help you in the most appropriate way.
>
> What happens next
>
> You do not need to pay anything now. This letter is for your records. I'll shortly send you a post-clearance demand. The total amount due is £4,681,762.03. This is shown in the summary below.

Type of duty	**Amount due**
Anti-dumping duty	£3,210,145.00
Countervailing duty	£691,323.36
Import VAT	£780,293.67
Total	**£4,681,762.03**

> Please pay the amount due as soon as you receive the demand. I'll send you details of how to pay with the demand."

22. The letter then set out what the Appellant had to do if it disagreed with HMRC, including the right to request a review and the right to appeal.

23. A C18 Post Clearance Demand Note ('the C18') was issued to the Appellant on 12 November 2020. The decision was upheld on review, with the conclusions of the reviewing officer being notified to the Appellant in letter dated 5 May 2021.

24. On 1 February 2021, Reed Smith LLP, on behalf of the Appellant, sent amended intercompany invoices to HMRC. These invoices contained the prescribed wording set out in Article 1(2) of the 2016 Implementing Regulations.

25. HMRC wrote to the Appellant in a letter dated 1 July 2022 refusing the Appellant's claim for remission.

THE EVIDENCE OF MS PFLUG

26. Ms Pflug, the General Manager of the Modules and Systems Solutions segment of the Canadian Solar group in Europe, the Middle East and Africa ("EMEA") and the Managing Director of the Appellant, produced a witness statement on which she was not cross-examined.

27. Ms Pflug explained that the Appellant had used the law firm, Sidley Austin, as its primary adviser on topics including anti-dumping regulations, anti-subsidy regulations and anti-circumnavigation investigations. Sidley Austin advised Canadian Solar on these topics on a regular basis. Accordingly, Sidley Austin had kept the Appellant informed about the introduction of the 2016 Implementing Regulations.

28. In an email from Sven De Knop (Partner of Sidley Austin) to Ms Pflug on 12 February 2016, Sidley Austin confirmed to Canadian Solar that the 2016 implementing Regulations had been published by the European Commission earlier that day and imposed "an anti-circumvention duty of 64.9% on imports of CSPV[1] modules and cells consigned from Taiwan or Malaysia (i.e., the extended anti-dumping duty of 53.4% and countervailing duty of 11.5%)." The email also set out a list of "cell/module manufacturers that are exempted from the anti-circumvention duties ...." This list included the four Taiwanese cell manufacturers that produced the cells within the solar modules that made up the consignments subject to these appeals, namely: Gintech Energy Corporation, Inventec Solar Energy Corporation, Motech Industries, Inc. and TSEC Corporation.

29. While Ms Pflug understood that the 2016 Regulations only imposed ADD and CVD on the consignment of solar modules from Taiwan or Malaysia, and not on consignments of solar modules containing solar cells originating in Taiwan (if the solar module was in fact consigned from another country), due to the seriousness of these regulations, she ensured that the Appellant obtained confirmation from, Sidley Austin, as to their application.

30. In emails 15 February 2016, Ms Pflug asked a colleague, Ms Kirschengofer, to ask Mr De Knop for confirmation that the 2016 Regulations "do not apply to modules incorporating Taiwanese cells." Mr De Knop confirmed that interpretation and said:

> "[Y]ou are correct, CSPV modules consigned from Vietnam and manufactured from cells originating in Taiwan should not be subject to the anti-circumvention measures."

31. Accordingly, with that confirmation, Ms Pflug was comforted that the 2016 Regulations did not apply to the Appellant's consignment of solar modules from Vietnam, which contained solar cells purchased from and originating in Taiwan. Therefore, the Appellant did not believe it to be necessary to make further enquiries with HMRC as to the applicability of the 2016 Regulations to the Appellant's imports of solar modules into the United Kingdom in 2017.

32. We accept Ms Pflug's evidence in relation to the advice received from Sidley Austin – her evidence was not challenged and, as we have said, she was not cross-examined.

33. In relation to HMRC's assertion that its letter to Canadian Solar dated 5 November 2020 was sufficient notice to Canadian Solar that the disputed ADD, CVD and import VAT was

[1] crystalline silicon photovoltaic

owed and payable by Canadian Solar to HMRC, Ms Pflug said that she could not remember receiving the letter. She was only aware of the demand notice issued by HMRC to Canadian Solar dated 12 November 2020, which confirmed that HMRC had determined that Canadian Solar owed ADD, CVD and Import VAT on the consignments totalling £4,681,762.03. Ms Pflug did not recall receiving the demand on 12 November 2020 directly from HMRC, but through the Appellant's tax advisers, Sayers Butterworth LLP, a few days later. She did not recall noticing immediately that, as the Demand was not issued until 12 November 2020, some of the consignments fell outside the three-year limitation period imposed by the Union Customs Code.

34. In the event, it was not contended before us that the Appellant had not received the letter of 5 November 2020.

35. Ms Pflug also annexed to her witness statement a memorandum issued on 17 February 2017 by the Netherlands customs authority, Douane Belastingdienst, which was produced in response to general market questions regarding the effect of the transhipment of solar modules through Malaysia and the requisite application of the 2016 Regulations. Although the Appellant did not tranship its solar modules through Malaysia, the memo, in Ms Pflug's view, confirmed that it was the country from which the solar modules were consigned that constituted the integral characteristic that determined whether or not the ADD and CVD is payable under the 2016 Regulations. We attach a translation of the memorandum as Appendix 3.

EMAIL CORRESPONDENCE WITH THE COMMISSION IN DECEMBER 2020

36. The following exchange of emails took place between Mr Yves Melin of Reed Smith LLP, acting for the Appellant, and the European Commission.

37. In an email from Reed Smith LLP to the Commission dated 8 December 2020, Mr Melin posed the following question:

> "I am contacted by a company that is an odd situation. In a post release investigation, customs authorities are asking them to pay anti-dumping and countervailing duties on solar modules made in South East Asia (not Malaysia), from exempted cells made in Taiwan.
>
> Under the specific rule of origin, the modules have the origin of their Taiwanese cells. Since they are made from exempted cells, in the absence of circumvention our understanding is that the modules should not be covered by the duties.
>
> There is a practical difficulty though: how to benefit from the exemption, without the possibility to issue invoice certifications complying with the requirements of Regulation 2016/185 (there is no additional code for the manufacturer of the modules, as it is not in Taiwan nor Malaysia)?
>
> Have you come across this type of issue before? Would you have any guidance I could use to convince the customs authorities to not collect the duties here.
>
> I tried to reach you by phone this afternoon. Would it be possible to speak with you or a member of your team this week?"

38. On 22 December 2020, Mr Elsen of the Commission replied as follows:

> "I understood that you already had a phone call with Per. I can confirm that your understanding is correct and that the modules made outside Taiwan from cells of a Taiwanese company which benefits from an exemption should not be subject to duties.

> As regards the practical issue, in particular the declaration which should accompany the commercial invoice: You can fill in the declaration/certification but you can only provide one additional TARIC code, i.e. the one of the Taiwanese producer of cells which benefits from an exemption. It is important to provide at least this code to customs, as this will allow national customs authorities to determine that the imports should not be made subject to duties. As you rightly point out, the module manufacturer (outside Taiwan) does not have its individual additional TARIC and one cannot be requested to provide something which does not exist. So giving the name of the module manufacturer outside Taiwan + the explanation that it does not have its individual TARIC code is all you can do and should normally be sufficient.
>
> Hope this helps, let me know if you have further questions…"

THE RELEVANT LEGISLATIVE PROVISIONS – IN OUTLINE

39. We set out below, in outline, the relevant legislative provisions. All references to the "UCC" are to the Union Customs Code contained in Regulation (EU) No. 952/2013 of the European Parliament and of the Council.

(i) Relevant provisions of the UCC on Customs Declarations

40. By Article 15 UCC the trader is made responsible for ensuring that its declarations are accurate, complete, authentic and valid. Article 162 UCC sets out the content required for a standard customs declaration.

41. Article 162 UCC sets out the content required for a standard customs declaration.

42. Article 163 UCC sets out the supporting documents required for a standard customs declaration.

43. Article 173 sets out the requirements for the amendment of a customs declaration are set out.

(ii) Relevant provisions of the UCC on Customs Debts

44. By Article 77 the circumstances in which a customs debt on import is incurred are set out.

45. Articles 101-114 place obligations on the Customs Authorities (HMRC in the present case) to recover any amounts of Customs Duty and VAT found to be legally due but not collected by them at the time the declaration was accepted and passed; and, importantly in the present appeals, Article 103(1) imposes a three-year time limit for the notification of a customs debt.

(iii) Domestic legislation on untrue customs declarations

46. Section 167 of the Customs and Excise Management Act 1979 sets out the consequences of making an untrue customs declaration.

(iv) Rules of Origin

47. Articles 59 to 63 UCC inclusive, set out the rules for non-preferential origin. In particular, Article 60 UCC provides that where the production of goods involves more than one country, the goods shall be deemed to originate in the country where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.

48. The non-preferential rules of origin contained within Articles 59 to 63 of the UCC are supplemented by Commission Delegated Regulation (EU) 2015/2446 ('UCCDA'). In particular, Articles 31-36 together with Annex 22-01 sets outs rules on what processing or working operations are necessary to confer non-preferential origin for various products; this covers Solar Panels within Chapter 85 of the Customs Tariff. In particular, Article 32 of the UCCDA sets out the non-preferential rules of origin for goods, the production of which involves more than one country or territory.

(v) Anti-dumping duty ('ADD')

49. Council Regulation (EU) No 1238/2013 imposed ADD on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China. The rate of ADD imposed was 53.4% for all other companies save for those set out within Article 1(2) and Annex 1 to whom an alternative rate was attributed.

50. On 11 February 2016, by Commission Implementing Regulation (EU) 2016/185, ADD was extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not.

(vi) Countervailing duty ('CVD')

51. Council Implementing Regulation (EU) No 1239/2013 ("the 2013 Implementing Regulations") imposed CVD on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China. The rate of CVD imposed was 11.5% for all other companies save for those set out within Article 1(2) and Appendix 1 to whom an alternative rate was attributed.

52. On 11 February 2016, by Commission Implementing Regulation (EU) 2016/184, CVD was extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and in Taiwan or not.

(vii) Exemptions from ADD and CVD

53. Article 1 of Regulation 2016/185 and Regulation 2016/184 respectively (collectively 'the 2016 Implementing Regulations') there are permitted exemptions from ADD and CVD for certain companies (including Gintech Energy Corporation; Motech Industries, Inc.; Inventec Solar Energy Corporation; TSEC Corporation) on the condition that the invoice for the goods contained a declaration in a specified format that the goods were sold for export to the EU and were manufactured by the company making the declaration. In the absence of such a declaration the goods, HMRC contend, attract the 'all other companies' rate of ADD or CVD.

54. Article 1(2) of the 2016 Regulations respectively, further set out the application of exemptions that are 'conditional' upon presentation of a valid commercial invoice issued by the producer or consignor and drafted in the wording provided.

55. Article 1(3) of the 2016 Regulations respectively, provides that the relevant duties extended shall be collected on imports consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and Taiwan or not.

56. On 5 May 2016, HMRC published guidance (Anti-Dumping Duty measure AD2099) advising that ADD and CVD had been extended. Further, on 13 October 2017, the Respondents published guidance (Anti-Dumping Duty measure 2233) setting out the basis upon which an exemption could be claimed.

(viii) Import VAT

57. At all material times, section 1 of the Value Added Tax Act 1994 ("VATA") provided that VAT is due on imports into the UK from outside of the EU. Section 2(1) VATA provides that that the rate of VAT is charged at a rate of 20% on the value of the imported goods.

58. Section 21(1) and (2) VATA confirm that the value of imported goods for import VAT purposes shall include "all taxes, duties and other charges levied either outside or, by reason of importation, within the United Kingdom (except VAT)".

(ix) Remission under the UCC

59. Where a customs debt has arisen, if the requirements of Article 116(1) of the UCC are satisfied, repayment or remission can be granted.

60. Article 117 UCC provides for repayment or remission in circumstances when import or export duty has been overcharged.

61. Article 119 UCC provides for repayment or remission 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 that: (a) the debtor could not reasonably have detected that error; and (b) the debtor was acting in good faith.

62. Article 120 UCC provides a general equity clause for repayment or remission in the interests of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

(x) Jurisdiction and Burden of Proof

(a) Appellate jurisdiction

63. Article 44 UCC gives a person a right of appeal against the decision of a customs authority relating to the application of customs legislation which affects that person. This is given effect in domestic law by section 13A of the Finance Act 1994 of which sets out the meaning of a relevant decision.

64. The decisions involved in these appeals are "relevant decisions" and the right of appeal to the Tribunal is conferred by Finance Act 1994, section 16. Section 16(5) sets out the Tribunal's powers on an appeal against a relevant decision include those to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

65. This Tribunal therefore has a full appellate jurisdiction in these appeals.

(b) Burden of Proof

66. These appeals are made under section 16 of the Finance Act 1994, subsection (6) of which provides that in relation to relevant decisions the burden is on the Appellant: "to show that the grounds on which any such appeal is brought have been established."

67. Therefore, in these appeals, the burden on all matters lies with the Appellant.

THE 2016 IMPLEMENTING REGULATIONS

68. Commission Implementing Regulation 2016/185 in relation to ADD (the operative provisions of Commission Implementing Regulation 2016/184 in respect of CVD are in materially very similar terms) contains detailed recitals recording how Regulation (EU) No 1238/2013 was being circumvented by Chinese cells and modules being trans-shipped through Malaysia and Taiwan, the investigation carried out by the Commission and its conclusions.

69. Recital 117 provided:

"It is considered that special measures are needed in this case in order to ensure the proper application of such exemptions. These special measures are the requirement of the presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Article 1(2). Imports not accompanied by such an invoice shall be made subject to the extended anti-dumping duty.

70. The Regulation provides as follows:

"Article 1

1. The definitive anti-dumping duty applicable to 'all other companies' imposed by Article 1(2) of Regulation (EU) No 1238/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT, is hereby extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan whether declared as originating in Malaysia and in Taiwan or not, currently falling within CN codes

ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90 (TARIC codes 8501 31 00 82, 8501 31 00 83, 8501 32 00 42, 8501 32 00 43, 8501 33 00 62, 8501 33 00 63, 8501 34 00 42, 8501 34 00 43, 8501 61 20 42, 8501 61 20 43, 8501 61 80 42, 8501 61 80 43, 8501 62 00 62, 8501 62 00 63, 8501 63 00 42, 8501 63 00 43, 8501 64 00 42, 8501 64 00 43, 8541 40 90 22, 8541 40 90 23, 8541 40 90 32, 8541 40 90 33) with the exception of those produced by the companies listed below:

Country	Company	TARIC additional code
Malaysia	AUO — SunPower Sdn. Bhd.	C073
	Flextronics Shah Alam Sdn. Bhd.	C074
	Hanwha Q CELLS Malaysia Sdn. Bhd.	C075
	Panasonic Energy Malaysia Sdn. Bhd.	C076
	TS Solartech Sdn. Bhd.	C077
Taiwan	ANJI Technology Co., Ltd	C058
	AU Optronics Corporation	C059
	Big Sun Energy Technology Inc.	C078
	EEPV Corp.	C079
	E-TON Solar Tech. Co., Ltd	C080
	Gintech Energy Corporation	C081
	Gintung Energy Corporation Inventec Energy Corporation	C082

	Inventec Solar Energy Corporation	C083
	LOF Solar Corp.	C084
	Ming Hwei Energy Co., Ltd	C085
	Motech Industries, Inc.	C086
	Neo Solar Power Corporation	C087
	Perfect Source Technology Corp.	C088
	Ritek Corporation	C089
	Sino-American Silicon Products Inc.	C090
	Solartech Energy Corp.	C091
	Sunengine Corporation Ltd	C092
	Topcell Solar International Co., Ltd	C093
	TSEC Corporation	C094
	Win Win Precision Technology Co., Ltd	C095
		C096

2. The application of exemptions granted to the companies specifically mentioned in paragraph 1 of this Article or authorised by the Commission in accordance with Article 2(2) shall be conditional upon presentation to the customs authorities of the Member States of a valid commercial invoice issued by the producer or consignor, on which shall appear a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function. In case of crystalline silicon photovoltaic cells this declaration shall be drafted as follows:

'*I, the undersigned, certify that the (volume) of crystalline silicon photovoltaic cells sold for export to the European Union covered by this invoice was manufactured by (company name and address) (TARIC additional code) in (country concerned). I declare that the information provided in this invoice is complete and correct.*'

…

If no such invoice is presented and/or one or both of the TARIC additional codes are not provided in the abovementioned declaration, the duty rate applicable to 'all other companies' shall apply and shall require the declaration of TARIC additional code B999 in the customs declaration.

3. The duty extended by paragraph 1 of this Article shall be collected on imports consigned from Malaysia and Taiwan, whether declared as originating in Malaysia and Taiwan or not, registered in accordance with Article 2 of Commission Implementing Regulation (EU) 2015/833 and

> Articles 13(3) and 14(5) of Regulation (EC) No 1225/2009, with the exception of those produced by the companies listed in paragraph 1.
>
> 4. Unless otherwise specified, the provisions in force concerning customs duties shall apply."

SUMMARY OF MAIN ISSUES

71. The main issues raised by these appeals are, in outline, as follows:

(1) whether the issues in this appeal are effectively settled by the decision of the CJEU Case T-152/16 *Megasol Energie AG v European Commission* ("*Megasol*");

(2) whether the Appellant had been notified by HMRC of a debt;

(3) whether, in short, the phrase "consigned from" Taiwan in the 2016 Implementing Regulations meant directly shipped from or indirectly shipped from Taiwan;

(4) whether there was a three-year limitation period for the Appellant to claim exemption from ADD and CVD so that HMRC should have allowed an amendment to the entries submitted by Reed Smith LLP on 1 February 2021; and

(5) whether the Appellant should be allowed remission of ADD and CVD.

72. We shall address these issues in turn.

THE DECISION OF THE CJEU IN MEGASOL ENERGIE

73. Mr Timothy Lyons KC, appearing for the Appellant, submitted that the CJEU had already decided that the 2016 Implementing Regulations were inapplicable to facts comparable to those in the present appeals in its Order in *Megasol*. The decision in *Megasol* is available only in German and French. We were provided with a translation which we set out in Appendix 1 to this Decision. The Court's decision appears only in the German and French languages. We have some doubts as to the fluency and accuracy of this translation and, therefore, we also set out in Appendix 2 the Court's decision in French as it appears on the Court's website.

74. Mr Lyons' argument was that the 2016 Implementing Regulations only applied to consignments of solar cells directly from Taiwan and not where they had been shipped from Taiwan to Vietnam, where they were incorporated into modules, and then imported into the EU from Vietnam. In his submission, *Megasol* determined this issue in favour of the Appellant.

75. In *Megasol*, the company applied to the CJEU to annul the 2016 Implementing Regulations. Megasol was a Swiss company which bought Taiwanese solar cells from exempt Taiwanese manufacturers and, in Switzerland, incorporated them into modules for sale in the EU. Thus, the cells were shipped from Taiwan to Switzerland where they were incorporated into modules and then exported to the EU.

76. Mr Lyons noted that the facts in *Megasol* were essentially the same as in the present appeals. He further drew to our attention the fact that the Commission at [14] argued that Megasol's imports did not fall within the scope of the contested regulations and that the Court considered that Megasol had not shown that the 2016 Implementing Regulations applied to it. In Mr Lyons' submission the Court held, in effect, that Megasol was not within the scope of the regulations it was trying to annul. Mr Lyons submitted that, contrary to HMRC's argument, there was no indication that Megasol had completed the necessary paperwork to show that the manufacturers in Taiwan were exempt as required by the 2016 Implementing Regulations. Effectively, as Mr Lyons characterised it, by putting its case forward (i.e. by showing that it was outside the scope of the 2016 Implementing Regulations) Megasol had destroyed it.

77. Ms Joanna Vicary, appearing for HMRC, noted that *Megasol* was not a fully reasoned, substantive decision of the Court on the application of the 2016 Implementing Regulations. All that the Court held was that the regulations did not cover persons in Megasol's position. Megasol was arguing that the 2016 Implementing Regulations did not apply to it. One of Megasol's arguments was that it had bought solar cells from exempt manufacturers. Effectively, in Ms Vicary's submission, the Court was simply refusing to annul the 2016 Implementing Regulations on the basis that they were not causing Megasol a problem. There was no analysis of the scope of the regulations. It was, Ms Vicary argued, impossible to regard *Megasol* as authority the proposition that the 2016 Implementing Regulations did not apply in the circumstances of the present appeals – there was simply no substantive decision taken in that case. Ms Vicary also noted that Mr Lyons' argument based on *Megasol* did not appear in the Appellant's grounds of appeal.

78. Dealing first with the Appellant's grounds of appeal, it seemed to us that the application of the *Megasol* decision raised a pure point of law. We also note that, as Mr Lyons pointed out, *Megasol* had previously been raised in correspondence with Mr Parker. Ms Vicary did not strenuously object to it being raised for the first time in Mr Lyons' skeleton argument. In any event, Ms Vicary was fully able to deal with the point. We therefore, to the extent that it is needed, give permission for this point to be raised by the Appellant.

79. It seems to us that it is impossible for us to conclude that *Megasol* should determine the outcome of these appeals. There is no detailed reasoning in the CJEU's Order, the point was not substantively addressed and the facts were not fully laid out (e.g. whether Megasol had complied or had failed to comply with necessary exemption formalities required by the 2016 Implementing Regulations). Moreover, the Court dismissed the application on the basis that Megasol had not shown that the regulations were, as Ms Vicary put it, causing it a problem. On that basis, the Court considered that the point being raised a hypothetical situation in respect of which Megasol was seeking a declaratory decision and therefore had not established that it had a sufficient interest in bringing the proceedings. We consider that it is unsafe to treat *Megasol* as authority for any proposition other than that Megasol had simply failed to demonstrate how the 2016 Implementing Regulations were or might be applicable to it and, therefore, the application was inadmissible.

80. Accordingly, we do not consider that that *Megasol* determines the position in these appeals.

WHETHER THE APPELLANT HAD BEEN NOTIFIED BY HMRC OF A DEBT

The applicable legislation

81. The decision to notify a customs debt to a trader is dealt with by Article 29 UCC. This provides:

> "Article 29
>
> **Decisions taken without prior application**
>
> Except when a customs authority acts as a judicial authority, Article 22(4), (5), (6), Article 23 (3) and Articles 26, 27 and 28 shall also apply to decisions taken by the customs authorities without prior application by the person concerned."

82. Article 22 (4), (5), (6) and (7) UCC provide:

> "Article 22
>
> **Decisions taken upon application**
>
> 1-3 […]

> 4. Except where otherwise specified in the decision or in the customs legislation, the decision shall take effect from the date on which the applicant receives it, or is deemed to have received it. Except in the cases provided for in Article 45(2), decisions adopted shall be enforceable by the customs authorities from that date.
>
> 5. Except where otherwise provided in the customs legislation, the decision shall be valid without limitation of time.
>
> 6. Before taking a decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it. Following the expiry of that period, the applicant shall be notified, in the appropriate form, of the decision.
>
> …
>
> 7. A decision which adversely affects the applicant shall set out the grounds on which it is based and shall refer to the right of appeal provided for in Article 44."

83. Article 102 UCC relevantly provides:

> "The customs debt shall be notified to the debtor in the form prescribed at the place where the customs debt is incurred …
>
> (2) …
>
> (3) … the customs debt shall be notified to the debtor by the customs authorities when they are in a position to determine the amount of import or export duty payable and take a decision thereon."

84. Next, Article 87 of the Commission Delegated Regulation (EU) 2015/2446 provides:

> "The notification of the customs debt in accordance with Article 102 of the Code may be made by means other than by electronic data-processing techniques."

85. Article 103(1) UCC provides:

> "(1) No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred."

86. Finally, we should note that section 1 (4) Value Added Tax Act 1994 provides that import VAT is to be "charged and payable as if it were a duty on Customs."

87. The first two Entries covered by the assessment were accepted on 9 November 2017, with all other Entries being accepted on or after 20 November 2017.

The relevant correspondence and dates of Entries

88. We have set out above (paragraph 21) the text of the 5 November 2020 letter. HMRC submit that this letter contained the notification required by Article 102 (3) because it notified the Appellant that it had incurred a customs debt amounting to £4,681,762.03. In the alternative, HMRC submit that the C18 dated 12 November 2020 (referred to in paragraph 23 above) constituted the requisite notification.

Discussion

89. First, We accept Ms Vicary's submission that no particular form of notification is prescribed by the legislation – a point that was noted by the Upper Tribunal in *HMRC v Sharya UK Ltd* [2019] UKUT 0143 (TCC):

> "[58] A striking feature of the UCC and CCC[2] is that neither sets out expressly how the debt must be notified, or where HMRC must send documents relating to customs duty."

90. Mr Lyons, however, contends that neither the 5 November 2020 letter nor the C18 demand constituted a valid notification for the purposes of the UCC. He argued that the 5 November 2020 letter was not a notification of a debt but, rather, merely contained the provision of updated calculations. The provision of updated calculations could not constitute a notification that.

91. We have no hesitation in rejecting this argument. In our view, the 5 November 2020 letter clearly notified the Appellant of an "Amount due" in the sum of £4,681,762.03. The fact that the letter stated that the amount was not payable until the demand was sent does not alter the fact that the Appellant was notified that it had a liability in the stated amount. The debt had accrued and would be due once the C18 was received. The purpose of the notification obligation in Article 102 UCC is to make the Appellant aware of the liability. In our view, the 5 November 2020 letter fulfilled this requirement.

92. We note, as HMRC submitted, that in *Belgische Staat v Molenbergnatie NV* (Case C-2014/04), the CJEU said, in the context of the CCC, that laying down the "appropriate procedures" was a matter for member states saying, at [53] and [54]:

> [53] Given the absence in the Community customs legislation of provisions on the meaning of 'appropriate procedures' or of any provision conferring power on entities other than the Member States and their authorities to determine those procedures, *it must be held that the procedures are within the scope of the national legal systems of the Member States*. Should the latter not have enacted specific procedural rules, it is the responsibility of the competent State authorities to guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights.
>
> [54] *In the light of the foregoing, the answer to the fourth question is that Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights*." (Emphasis added)

93. In our view, the Appellant received "adequate information and which enable [it], with full knowledge of the facts, to defend [its] rights". As already indicated, the 5 November 2020 letter contained information about the Appellant's right to request a review and to appeal.

94. In the light of our conclusion that the 5 November 2020 letter constituted an adequate notification of the alleged customs debt, it is not necessary for us to express a view as to whether the C18 also constituted a notification of a debt. In our view, however, it was also a valid notification and we see no merit in Mr Lyons' submission that a demand for payment cannot be a notification of the debt.

[2] The Community Customs Code

95. Bearing in mind the dates of the Entries described in paragraph 87 above, the 5 November 2020 letter was within the three-year period specified by Article 103 UCC.

96. Accordingly, we reject the Appellant's contention that, as required by Article 102(3) UCC, HMRC had failed to notify the Appellant.

WHETHER THE SOLAR CELLS WERE CONSIGNED FROM TAIWAN

97. In essence, Mr Lyons submitted that the solar cells were not consigned from Taiwan but were, instead, consigned from Vietnam. It followed, so the argument ran, that the importation of the solar cells into the UK fell outside the scope of the 2016 Implementing Regulations.

98. In support of this submission, Mr Lyons took us through the recitals to the 2016 Implementing Regulations. These recorded the investigation by the EU Commission leading to the enactment of the 2016 Implementing Regulations. The mischief which the 2016 Implementing Regulations was addressed was the exportation of solar cells from the People's Republic of China ("PRC") which were then routed via Malaysia and Taiwan before being exported to the EU, thereby circumventing the 2013 Implementing Regulations. In the present case, the solar cells were manufactured in Taiwan. There was no circumvention of the 2013 Implementing Regulations. It followed, therefore, in Mr Lyons's submission, that the 2016 Implementing Regulations were simply inapplicable to the Appellant's circumstances.

99. In addition, Mr Lyons argued that the construction of the 2016 Implementing Regulations put forward by HMRC contravened the General Agreement on Tarriffs and Trade 1994 ("GATT"), which permitted the imposition of ADD and CVD i.e. where an appropriate determination have been made following an investigation.

100. Ms Vicary argued that, as was common ground, the country of origin of the solar cells was Taiwan under Articles 59(b) and 60[3] UCC. As regards whether there could be a distinction between the exporting country and the country of origin, Article 1(3) of the Basic Regulation (EU) 1225/2009 (replaced with identical wording in Regulation (EU) 2016/1036) provides:

> "3. The exporting country shall normally be the country of origin. However, it may be an intermediate country, except where, for example, the products are merely transhipped through that country, or the products concerned are not produced in that country, or there is no comparable price for them in that country."

101. There was, Ms Vicary contended, no distinction in this case between the exporting country and the country of origin. The distinction between the country of origin (Taiwan) and the exporting country could not arise where the products were merely trans-shipped through the second country (Vietnam) in circumstances where products were not produced in Vietnam under the principles relating to substantial processing.

102. Ms Vicary argued that the purpose of the 2016 Implementing Regulations was to catch all exports of solar cells from Taiwan with the only exceptions being those exported by genuine manufacturers in Taiwan (where there was an appropriate invoice and certification for the purposes of Article 1(2)). Ms Vicary drew attention to Recitals 116 and 117 of the 2016 Implementing Regulations relating to ADD ((EU) 2016/185) which provided:

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[3] Article 60(2) provides: "2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture."

> "(116) Where an exemption is warranted, the extended measures in force shall be amended accordingly. Subsequently, any exemption granted will be monitored to ensure compliance with the conditions set therein.
>
> (117) It is considered that special measures are needed in this case in order to ensure the proper application of such exemptions. These special measures are the requirement of the presentation to the customs authorities of the Member States of a valid commercial invoice, which shall conform to the requirements set out in the Article 1(2). Imports not accompanied by such an invoice shall be made subject to the extended anti-dumping duty."

103. The scheme of the legislation, in Ms Vicary's submission, was that if the goods were not accompanied by the appropriate invoice and declaration, it was necessary to pay the duty and then reclaim it by subsequently producing the appropriate invoice and declaration – the invoice declaration was part of the customs declaration. The Appellant, when the goods entered the UK, should have entered the code B999 because it did not have the appropriate invoice containing the necessary certification. It should then subsequently have claimed the duty back by producing the appropriate paperwork.

104. As regards the distinction drawn by Mr Lyons between the invoice declaration and the customs declaration, Ms Vicary submitted that this was a false distinction. For example, the Code C081 for Gintech Energy Corporation was the code that should have been put on the customs declaration and that code should only have been used when the Appellant had the necessary invoice from Gintech Energy Corporation containing the appropriate certification. The position was made clear by the concluding paragraph of Article 1(2) which states:

> "If no such invoice is presented and/or one or both of the TARIC additional codes are not provided in the abovementioned declaration, the duty rate applicable to 'all other companies' shall apply and shall require the declaration of TARIC additional code B999 in the customs declaration."

105. Notwithstanding Mr Lyons' skilful arguments, we cannot accept the meaning of the 2016 Implementing Regulations which he urged upon us.

106. The clear purpose of the 2016 Implementing Regulations was to prevent the circumvention of the 2013 Implementing Regulations. It is plain to us that the Council addressed the issue of the circumvention of the 2013 Implementing Regulations by introducing a blanket imposition of ADD and CVD in respect of all solar cells produced in Taiwan, save in respect of those produced by a specified list of Taiwanese manufacturers *and* where, in addition, there was compliance with the formalities specified in Article 1(2) of the 2016 Implementing Regulations, viz the production of a valid commercial invoice issued by the producer or consignor, on which appeared a declaration dated and signed by an official of the entity issuing such invoice, identified by his/her name and function.

107. The investigation which preceded the enactment of the 2016 implementing Regulations, as the recitals to the Regulations indicate, revealed that many Taiwanese companies claimed to manufacture cells in Taiwan but did not in fact do so or could not prove they did so. Therefore, it was necessary to impose a comprehensive coverage of ADD and CVD in respect of solar cells consigned from Taiwan, subject to certain identified genuine producers being specified and compliance with the documentation requirements set out in Article 1(2). Those recitals also indicated the evidence upon which the 2016 Implementing Regulations were based – this is the answer to Mr Lyons's submission relation to GATT.

108. This is confirmed by Article 1(1) of the 2016 Implementing Regulations which provides:

> "The definitive anti-dumping duty applicable to 'all other companies' imposed by Article 1(2) of Regulation (EU) No 1238/2013 on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT, *is hereby extended to imports of crystalline silicon photovoltaic modules and key components (i.e. cells) consigned from Malaysia and Taiwan whether declared as originating in Malaysia and in Taiwan or not, currently falling within CN codes […codes listed…] with the exception of those companies listed below…*" (Emphasis added)

109. HMRC argued that the interpretation of the 2016 Implementing Regulations put forward by the Appellant would open the door to wide-scale avoidance. It would only be necessary to trans-ship goods via a second country in order to circumvent the 2016 Implementing Regulations. Mr Lyons countered by arguing that such trans-shipment would constitute an abuse which could be counteracted by the "abuse of law" doctrine in Case C-255/02 *Halifax and ors v Customs & Excise Commissioners* ("*Halifax*").

110. However, we accept Ms Vicary's argument that this would effectively be using the anti-abuse doctrine to disapply the words of the charging provision. Moreover, in construing the words "consigned from Malaysia and Taiwan" in Article 1(1) regard must be had to the purpose of the 2016 Implementing Regulations which was, as we have noted, to prevent the circumvention of the 2013 Implementing Regulations. To interpret the words "consigned from Malaysia and Taiwan" as meaning, effectively, "directly consigned" from those countries would throw the doors wide open to abuse. Mr Lyons' argument that such abuse could be countered by the *Halifax* doctrine left unanswered the practical question how it would be possible for HMRC to enforce the 2016 Implementing Regulations if, on his interpretation, they could be so easily side-stepped.

111. Mr Lyons also argued that the 2016 Implementing Regulations had to be interpreted conform with the EU Charter of Fundamental Rights. The 2016 Implementing Regulations permitted an interference with the right to property and any such interference must be under conditions provided for by law. It was, Mr Lyons submitted, impermissible to construe the 2016 Implementing Regulations by reference to requirements (e.g. in relation to the completion invoice declarations) that were not publicly accessible and were communicated individually and privately. The Charter, therefore, required the interpretation of the 2016 Implementing Regulations in accordance with *Megasol*.

112. We reject the submission. The documentation requirements of the 2016 Implementing Regulations were published and accessible to all to whom those regulations were relevant. There was nothing private about them.

113. We were referred to a judgment of the Amsterdam Court of Appeal in case number 20.00408 dated 29th March 2022 relating to the Dutch-language version of the 2016 Implementing Regulations, alongside an English translation. The case involved modules produced by a non-exempt company. The cells were produced by an approved producer in Taiwan. The taxpayer argued that it could escape the Dutch version of the 2016 Implementing Regulations by showing that the cells did not originate in China. The Amsterdam Court of Appeal rejected this argument.

114. Paragraph 6.4 of the judgment that states:

> "Both extending regulations refer to the country of consignment (provenance) and not to the country of origin for the purposes of liability Contrary to what the interested party argues, it is not possible for it, as an importer, to prove in

> proceedings before the national court that the imported solar panels are not of Chinese origin, in order to avoid the imposition of anti-dumping and countervailing duties on solar panels consigned from Taiwan.".

115. We have derived limited assistance from this judgment, which in any event is not binding upon us. The decision appears only to establish that the taxpayer could not escape the application of the 2016 Implementing Regulations by showing that the cells did not originate in China (see paragraph 14 of the judgment).

116. Accordingly, we have come to the view that the words "consigned from Malaysia and Taiwan" in the 2016 Implementing Regulations, in circumstances in which the goods were originally consigned from Malaysia and Taiwan and where what occurs in the intermediate jurisdiction (Vietnam in the present case) is not sufficiently substantial to change the origin of the goods and thereby change the TARIC code, means originally or indirectly consigned from Malaysia and Taiwan. Accordingly, we reject the Appellant's argument on this ground.

WHETHER AMENDED DECLARATIONS IN FEBRUARY 2021 SATISFIED THE 2016 IMPLEMENTING REGULATIONS

117. Mr Lyons argued that the amended declarations submitted by Reed Smith LLP on 1 February 2021 satisfied the requirements of the 2016 Implementing Regulations. HMRC were wrong to reject those declarations on the basis that they were submitted more than three years from the importations in 2017. Mr Lyons submitted that there was no time limit at all in which to provide the invoice declarations. The 2016 Regulations provided no time limit as to when the invoice declarations should be presented. Mr Lyons cited the decision of the CJEU in Case C-156/16 *Tigers GmbH v Hauptzollant Landshut* ("*Tigers*") at [24] in support of his argument. Mr Lyons submitted that the CJEU would not have said that an invoice declaration presented after a customs declaration was part of the customs declaration. Therefore, HMRC's reliance upon Articles 173 and 163 UCC was misconceived. In addition, Article 173(3) did not impose a time limit on amendments of the kind made by the Appellant.

118. Ms Vicary submitted that Article 173 UCC did not permit the Appellant to amend the customs declaration and therefore to obtain the desired exemption. First, Article 173(2)(b) UCC forbids any amendments to declarations where the customs authorities have established that the particulars of the Customs declarations were incorrect. In the present case, the errors were brought to the attention of the Appellant by HMRC in their decision letter dated 5 November 2020. Therefore, after that date, Ms Vicary submitted, no amendment to the customs declaration could be accepted – the amendments purported to be made by the Appellant were made some three months later on 1 February 2021.

119. Secondly, and in any event, Ms Vicary maintained that the information required for the grant of the exemption specified in the 2016 Implementing Regulations (i.e. the invoices containing the required declarations) was supplied by the Appellant after the expiry of the three-year period specified in Article 173(3).

120. There was, therefore, no legal basis on which HMRC could allow the Appellant to amend its customs declaration.

The law

121. Article 173 of the UCC provides:

> Amendment of a customs declaration
>
> 1. The declarant shall, upon application, be permitted to amend one or more of the particulars of the customs declaration after that declaration has been accepted by customs. The amendment shall not render the customs declaration applicable to goods other than those which it originally covered.

> 2. No such amendment shall be permitted where it is applied for after any of the following events:
>
> (a) the customs authorities have informed the declarant that they intend to examine the goods;
>
> (b) the customs authorities have established that the particulars of the customs declaration are incorrect;
>
> (c) the customs authorities have released the goods.
>
> 3. Upon application by the declarant, within three years of the date of acceptance of the customs declaration, the amendment of the customs declaration may be permitted after release of the goods in order for the declarant to comply with his or her obligations relating to the placing of the goods under the customs procedure concerned.

122. In *Tigers* a German importer (Tigers) in 2012 imported ceramics from China. The importer was required by the German customs authorities to provide cash security in the highest amount for provisional anti-dumping duties applicable, even though the goods had been purchased from a manufacturer who was entitled to a lower individual duty rate. The invoice, when it was submitted with the customs declaration, did not contain the special declaration required by the regulation imposing the provisional anti-dumping duties. When the definitive duties were adopted in 2013, the German customs authorities required Tigers to pay the duty for "all other companies". A week later, Tigers produced the required invoice and asked for a refund of the anti-dumping duties paid in excess of the individual company rate. The German customs authorities refused that request on the grounds that they could not accept an invoice drawn up or presented retroactively – the authorities argued that the invoice ought to have been presented at the time when the customs declaration was accepted.

123. The CJEU held that while it was clear under the regulation imposing the ADD that presentation of a valid commercial invoice with the manufacturer's declaration was required to benefit from the individual company rate, the regulation did not specify when such invoice must be presented. It, therefore, held that an invoice could still be presented *after* the customs declaration had been accepted.

124. The Court said:

> "20 By its first question, the referring court asks, in essence, whether Article 1(3) of Implementing Regulation No 412/2013 must be interpreted as meaning that it allows the presentation, after the customs declaration has been made, of a valid commercial invoice, for the purposes of fixing a definitive anti-dumping duty, in the case where all the other preconditions necessary for obtaining a company-specific anti-dumping duty rate are satisfied.
>
> 21 According to settled case-law, for the purpose of interpreting a provision of EU law, it is necessary to consider not only its wording but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 16 November 2016, *Hemming and Others*, C-316/15, EU:C:2016:879, paragraph 27 and the case-law cited).
>
> 22 As regards the wording of Article 1(3) of Implementing Regulation No 412/2013, that wording provides for the application of an individual anti-dumping duty rate to be conditional on the presentation, to the customs authorities of the Member States, of a valid commercial invoice conforming to the requirements set out in Annex II to that regulation. If no such invoice is presented, the rate of duty applicable to all other companies, not listed in that regulation, is to apply.

> 23 It follows clearly from that wording, in particular from the word 'conditional', that the presentation, to the customs authorities, of a valid commercial invoice conforming to the requirements set out in Annex II to that regulation is an indispensable condition for the application of an individual anti-dumping duty rate.
>
> 24 By contrast, that wording provides no information whatsoever as to when that invoice must be presented. Therefore, that wording does not preclude an invoice, which meets all the requirements set out in Article 1(3) of Implementing Regulation No 412/2013, from being presented to the customs authorities after the customs declaration has been made.
>
> 25 As regards the context of which that Article 1(3) forms part, it must be stated at the outset that, as the Advocate General has noted in point 60 of his Opinion, no other provision of Implementing Regulation No 412/2013, unlike other anti-dumping regulations, specifies the point in time at which a valid commercial invoice must be presented to the customs authorities.
>
> 26 In those circumstances, Article 1(3) of Implementing Regulation No 412/2013 must be interpreted as not precluding the importers concerned from presenting such an invoice after the customs declaration has been made.
>
> 27 However, since that regulation does not include any provision which, pursuant to Article 1(4) thereof, would render the provisions in force in the field of customs duties inapplicable, the derailed rules on lodging and checking the customs declaration of goods subject to anti-dumping duties are governed by the Customs Code.
>
> 28 In that respect, it must be held that that code does not expressly state when a commercial invoice must be presented. Moreover, while Article 62(2) of the Customs Code indicates that the declaration must be accompanied by all the documents required for implementation of the provisions governing the customs procedure for which the goods are declared, including, evidently, a commercial invoice, that provision does not specify the consequences linked to a lack of conformity of the documents accompanying that declaration, such as the commercial invoice at issue in the main proceedings."

Discussion

125. We accept HMRC's argument that the position is governed by Article 173 UCC. Article 1(4) of the 2016 Implementing Regulations provides that:

> "Unless otherwise specified, the provisions in force concerning customs duties shall apply."

126. In the present case, and it was not disputed, the Appellant's errors were brought to the attention of the Appellant by HMRC in their decision dated 5 November 2020. Therefore, after 5 November, in accordance with Article 173(2)(b), no amendment to the customs declaration could be made. The Appellant made its amendments on 1 February 2021.

127. Accordingly, we reject the Appellant's argument that it made valid amendments 1 February 2021.

REMISSION OF DUTY

The provisions dealing with remission of duty

128. The relevant provisions are Articles 116, 117, 119 and 120 UCC. It is fair to say that most of the argument before us focused on Article 120 UCC.

129. Article 116 (1) summarises the circumstances in which duty may be repaid or remitted:

"**General provisions**

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;

(b) defective goods or goods not complying with the terms of the contract;

(c) error by the competent authorities;

(d) equity.

…"

130. Article 117 UCC relevantly provides:

"**Overcharged amounts of import or export duty**

1. 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 points (c) or (d) of Article 102(1).

…"

131. Article 119 UCC relevantly provides:

"**Error by the competent authorities**

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.

…"

132. Article 120 UCC is known as the "general equity" clause and provides:

"**Equity**

1. In cases other than those referred to in the second subparagraph of Article116(1) and in Articles 117, 118 and 119 an amount of import or export duty shall be repaid or remitted in the interest of equity where a customs debt is incurred under special circumstances in which no deception or obvious negligence may be attributed to the debtor.

2. The special circumstances referred to in paragraph 1 shall be deemed to exist where it is clear from the circumstances of the case that the debtor is in an exceptional situation as compared with other operators engaged in the same business, and that, in the absence of such circumstances, he or she would not have suffered disadvantage by the collection of the amount of import or export duty."

Submissions

133. Mr Lyons submitted that the Appellant was entitled to remission of duty under Articles 117 and 119 UCC, broadly, for the reasons already discussed. Once the 2016 Implementing Regulations were properly construed, and/or the provisions governing the notification of

customs liabilities were applied, it was clear that the Appellant had been overcharged and that HMRC had committed errors.

134. Ms Vicary, again for the reasons summarised above, submitted that the Appellant had not been overcharged ADD or CVD and that there had been no error by HMRC. Therefore, Articles 117 and 119 UCC were inapplicable.

135. For the reasons given above, we agree with HMRC that Articles 117 and 119 UCC are inapplicable.

136. As we have mentioned, most of the argument before us concerned Article 120 UCC – the general equity clause. The operation of (a previous version of) the general equity clause was considered by CJEU in *Eyckeler & Malt AG v The Commission* [1998] EUECJ T-42/96 ("*Eyckeler & Malt*") where the Court said:

> "131. Article 13(1), as amended by Regulation No 3069/86, provides that `import duties may be repaid or remitted in special situations other than those referred to in Sections A to D, which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned'.
>
> 132. According to settled case-law, Article 13 constitutes a general equitable provision designed to cover situations other than those which arose most often in practice and for which special provision could be made when Regulation No 1430/79 was adopted (*Cerealmangini and Italgrani v Commission*, cited above, paragraph 10, and SEIM, cited above, paragraph 41). It is intended to apply, inter alia, where the circumstances characterising the relationship between a trader and the administration are such that it would be inequitable to require the trader to bear a loss which it normally would not have incurred (Case 58/86 *Coopérative Agricole d'Approvisionnement des Avirons* [1987] ECR 1525, paragraph 22).
>
> 133. The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision (see, to that effect, Case 160/84 *Oryzomyli Kavallas and Others v Commission* [1986] ECR 1633, paragraph 16). Although it enjoys a margin of assessment in that respect (*France-Aviation v Commission*, cited above, paragraph 34), it is required to exercise that power by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk. Consequently, when examining whether an application for remission is justified, it cannot simply take account of the conduct of importers. It must also assess the impact of its own conduct on the resulting situation even if it is at fault.
>
> 134. Provided that the two conditions laid down in Article 13 of Regulation No 1430/79 are satisfied, namely the existence of a special situation and the absence of any deception or obvious negligence by the person concerned, the person liable is entitled to reimbursement or remission of the import duties, since to hold otherwise would deprive that provision of its effectiveness (see, as regards the application of Article 5(2) of Regulation No 1697/79, *Mecanarte*, cited above, paragraph 12, Case C-292/91 *Weis* [1993] ECR I-2219, paragraph 15, and *Faroe Seafood and Others*, cited above, paragraph 84)."

137. It was common ground that there was no "deception" on the part of the Appellant in the present appeals.

138. In relation to Article 120, Mr Lyons submitted that the provision was a general fairness clause, requiring consideration of all relevant facts and matters on a case-by-case basis. As regards "special circumstances" (i.e. where it was clear that the debtor was in an exceptional situation compared with other operators engaged in the same business and in the absence of such the debtor would not have suffered disadvantage by the collection duty), such circumstances existed in the present case.

139. First, Mr Lyons submitted that HMRC had required the Appellant to complete invoice declarations notwithstanding that there were no TARIC codes as envisaged by the 2016 Implementing Regulations. Secondly, HMRC also required the Appellant to complete invoice declarations completed in accordance not with publicly available rules but private and individual advice given to the Appellant by an official of the European Commission.

140. Secondly, Mr Lyons referred to the absence of any reference in public advice on the 2016 Implementing Regulations that "consigned from Malaysia and Taiwan" meant also "consigned from Vietnam." A careful reader of the HMRC's public guidance could not understand that HMRC meant "consigned from Vietnam" when referring to consignments from Malaysia and Taiwan.

141. Thirdly, Mr Lyons contended that the Appellant not been guilty "obvious negligence". The Appellant had acted consistently with the published views of the European Commission and HMRC. HMRC had withdrawn the decision to impose penalty decision, mitigated by 50%. In HMRC's Statement of Case, Mr Lyons noted that HMRC had not suggested that either "deception" or "obvious negligence" be attributed to the Appellant. Even if negligence could be shown, that was not enough – simple negligence was not "obvious negligence".

142. "Obvious negligence" was, according to Mr Lyons, a concept of EU and not UK law. Mr Parker, one of the HMRC officers who gave evidence, accepted in cross-examination that he had incorrectly applied concepts of UK law on negligence rather than EU law. Mr Lyons referred to the decision of the CJEU in T-26/03 *Geologistics BV v Commission* ("*Geologistics*"), which required all the relevant facts to be considered, including the complexity of the provisions in question, the trader's relevant experience and the care taken by the trader (see: *Geologistics* [40], [75] and [77]). As regards the complexity of provisions, Mr Lyons submitted that no trader would expect to interpret "consigned from Malaysia and Taiwan" as including "consigned from Vietnam".

143. Fourthly, Mr Lyons drew our attention to the fact that the Appellant had three sources of advice confirming that consignments from Vietnam will not subject to ADD or CVD – two of these were before the importations incurred:

(1) the advice from Sidley Austin on 15 February 2016 referred to in Ms Pflug's evidence;

(2) the views expressed by the Netherlands customs authorities dated 17 February 2017 (see Appendix 3); and

(3) the views expressed by Mr Elsen, Deputy Head of Unit, European Commission on 22 December 2020 (see paragraphs 36-38 above).

144. Fifthly, Mr Lyons submitted that the special situation and a trader's negligence had been linked and in this case they were not – HMRC was responsible for the special situation (*Geologistics* at [84]).

145. Ms Vicary contended that there were no special circumstances because the Appellant had not been placed in an exceptional situation compared with other operators within the same industry.

146. Ms Vicary drew attention to HMRC's published guidance (anti-Dumping Duty measure ADD 2099) which drew attention to the fact that the exemptions from ADD and CVD had been extended and that the exemptions from duty were conditional on the presentation of an invoice, including a declaration, complying with the requirements of Article 1(2) of the 2016 Implementing Regulations. The guidance also noted that if no such invoice was presented and/or one or both of the additional TARIC codes are not provided in the declaration the duty rate applicable to "all other companies" shall apply.

147. Ms Vicary contended that the Appellant's competitors were subject to the same regulations and were expected to comply. The Appellant was, she said, an experienced trader. Ms Vicary also drew attention the email exchange with Mr Elsen of the Commission (see paragraphs 36-38 above) which emphasised the need for procedural compliance with the 2016 Implementing Regulations (e.g. the declaration on the commercial invoice of the provision of a TARIC code). In the light of the publicly available information and the clear wording contained in the 2016 Implementing Regulations, the failure to supply documentation to obtain the exception constituted a basic and obvious error by the Appellant. This was, Ms Vicary submitted, obvious negligence. In case of doubt, it was incumbent on the Appellant to seek clarification from HMRC (C-48/98 *Sohl & Söhlke v Hauptzollamt Bremen*) ("*Sohl & Söhlke*"). The relevant comparator was other traders importing solar cells and modules into the EU. It would be inequitable for the Appellant to obtain remission because it would place the Appellant at an advantage over compliant traders.

148. Ms Vicary noted that the correspondence with Mr Elsen of the Commission was out of time and occurred after the Appellant had already been assessed duty. In fact, Mr Elsen stated that the Appellant had to claim the exemption in accordance with the 2016 Implementing Regulations.

149. DiscussionRemission of import duties is an exception to the normal import duty regime and should therefore be interpreted strictly. The point was made clearly by the CJEU in *Heuschen Schrouff Oriental Foods Trading BV v Commission* C-38/07, at [60] where the court said:

> "It must be borne in mind at the outset that repayment or remission of import and export duties, which may be made only under certain conditions and in cases specifically provided for, constitutes an exception to the normal import and export procedure and, consequently, the provisions which provide for such repayment or remission must be interpreted strictly. Since a lack of 'obvious negligence' is an essential condition of being able to claim repayment or remission of import or export duties, it follows that that term must be interpreted in such a way that the number of cases of repayment or remission remains limited (*Söhl & Söhlke*, paragraph 52)."

150. In *Sohl & Söhlke* the Court considered the care that had to be exercised by a trader:

> "56. By analogy with those criteria, in order to determine whether or not there is 'obvious negligence' within the meaning of the second indent of Article 239(1) of the Customs Code, account must be taken in particular of the complexity of the provisions non-compliance with which has resulted in the customs debt being incurred, and the professional experience of, and care taken by, the trader.
>
> …
>
> 58. As regards the care taken by the trader, it must be noted that, where doubts exist as to the exact application of the provisions non-compliance with which may result in a customs debt being incurred, the onus is on the trader to make

> inquiries and seek all possible clarification to ensure that he does not infringe those provisions."

151. We must consider all the relevant facts when considering the application of the general equity clause – Article 120 UCC – balancing, on the one hand, the interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk

152. There is no doubt that the Appellant is an experienced trader – there was no attempt by Mr Lyons to argue otherwise.

153. It is also important to consider the complexity of the provisions in question. We accept that the phrase "consigned from Malaysia or Taiwan" used in the 2016 Implementing Regulations is less than wholly clear in circumstances where the cells are manufactured and originate in Taiwan but are then shipped to Vietnam where they are incorporated into modules before being imported into the EU. A detailed study of the legislative provisions, including the recitals and the legislative background, has led us to the conclusion that the phrase "consigned from Malaysia or Taiwan" includes cases, such as the present, where the cells are shipped to another jurisdiction before being imported into the EU. We have to acknowledge, however, that we reached that conclusion after we had the benefit of more than two days of skilled legal argument. The inherent ambiguity as to whether "consigned" means directly or indirectly "consigned", as far as was drawn to our attention, was not specifically or clearly addressed in HMRC's public guidance. We note also, that the Netherlands tax authorities and Mr Elsen of the Commission (and possibly the Amsterdam Court of Appeal) appear to have come to a different conclusion from that which we have reached. That, of itself, suggests that the conclusion reached by the Appellant was not obviously negligent.

154. In the present case, the Appellant would have been entitled to exemption if it had complied with the formalities in Article 1(2) of the Implementing Regulations – this is not a case where a trader is seeking to avail itself of a relief which it would not otherwise be entitled. This is a relevant, but not a major consideration, although it is one which is to be weighed in the overall evaluative exercise.

155. It is important, in our view, that the Appellant sought the advice of counsel (Sidley Austin), experienced in import duty matters, when the 2016 Implementing Regulations were announced. The Appellant was advised that the 2016 Implementing Regulations did not apply to it. That advice, as it turns out, was incorrect. However, the effect of that advice was that the Appellant believed that it did not have to to comply with the formalities set out in Article 1(2) of the Implementing Regulations 2016, setting in train the events which eventually led to the decisions and assessments in this case.

156. We have come to the conclusion, considering all the relevant facts and circumstances, that the effect of the incorrect advice, together with the other factors we have mentioned, is to put the Appellant in a special situation, viz in an exceptional situation as compared with other operators engaged in the same business and that the Appellant was not obviously negligent. The Appellant had sought to understand its legal obligations, seeking advice from an appropriate quarter. In this connection, to be clear, we do not consider that it was necessary for the Appellant also to approach HMRC for clarification. If the law cannot be understood without recourse to governmental authorities then it cannot be said to be clear and comprehensible to the ordinary citizen. In this case, the Appellant had taken appropriate and sufficient steps to understand its legal obligations and had acted in accordance with its understanding. In our view, this acquits the Appellant of any obvious negligence and the other factors which we have mentioned reinforce this conclusion. As we have said, there is no suggestion of deception in the present case.

157. Ms Vicary criticised the Appellant for the apparent informality of an email exchange with its legal advisers. We do not agree that such an exchange was inappropriate – indeed, it is a commonplace occurrence of commercial legal practice, of which this Tribunal has considerable experience, that tax advice is frequently given by email.

158. Furthermore, we did not understand the final condition of Article 120 to be in dispute, viz that in the absence of such special circumstances, the Appellant would not have suffered disadvantage by the collection of the amount of import or export duty. Clearly, the Appellant would have been disadvantaged.

159. We have therefore reached the conclusion, in relation to remission of duty, that the duty should be remitted and that, therefore, the appeal against HMRC's decision of 1 July 2022, refusing to remit the total sum of duty (including import VAT) of £4,681,762.03, should be allowed.

CONCLUSION

160. For the reasons given above, we allow the appeal (TC/2021/02122) against HMRC's refusal to remit duty. The other appeal (TC/2021/02200) against a decision on review to uphold a demand for ADD and CVD and import VAT is dismissed.

161. Finally, we wish to express our gratitude to Mr Lyons and Ms Vicary for their thorough, informative and skilful submissions, which we found of great assistance.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

162. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JUDGE GUY BRANNAN
TRIBUNAL JUDGE

Release date: 22nd JANAURY 2024

APPENDIX 1 – MEGASOL (TRANSLATION)

ORDER OF THE GENERAL COURT (Fourth Chamber) 26. June 2017 (1)

"Action for annulment - Dumping - Subsidies - Imports of crystalline silicon photovoltaic modules and key components thereof (cells) shipped from Malaysia and Taiwan - Extension of the definitive anti-dumping" and countervailing duty on imports of crystalline silicon photovoltaic modules and key components thereof (cells) originating in or dispatched from China on these imports - Lack of legal protection interest - Inadmissibility "

In Case T-152/16

Megasol Energie AG based in Wangen an der Aare (Switzerland), represented by: Attorney T. Wegner,

Plaintiff,

against

European Commission, represented by T. Maxian Rusche, A. Demeneix and K. Blanck-Putz as authorized representatives,

Defendant,

because of one based on Art. 263 TFEU based application for the annulment of the Commission Implementing Regulation (EU) 2016/184 of 11 February 2016 to extend the definitive countervailing duty introduced by the Council Implementing Regulation (EU) No. 1239/2013 on imports of photovoltaic modules made of crystalline silicon and key components thereof (Cells) originating in or dispatched from the People's Republic of China on imports dispatched from Malaysia and Taiwan of crystalline silicon photovoltaic modules and key components thereof (cells), whether or not declared as originating in Malaysia or Taiwan (ABI. 2016, L 37, p. 56), and the Commission Implementing Regulation (EU) 2016/185 of 11 February 2016 to extend the definitive anti-dumping duty introduced by Council Regulation (EU) No. 1238/2013 on imports of photovoltaic modules crystalline silicon and key components thereof (cells) originating in or dispatched from the People's Republic of China on imports of crystalline silicon photovoltaic modules and key components thereof (cells) dispatched from Malaysia and Taiwan, whether or not declared as originating in Malaysia or Taiwan (ABI. 2016, L 37, p. 76), insofar as they are applicable to the plaintiff

THE COURT (Fourth Chamber)

With the participation of President H. Kanninen and Judges J. Schwarcz (Rapporteur) and C. Iliopoulos,

Registrar: E. Coulon, following

DECISION

Litigation history

1. The plaintiff, Megasol Energie AG, is a company under Swiss law which, according to its own statements, manufactures photovoltaic panels or modules from crystalline silicon (hereinafter: modules) in Switzerland and exports them to the European Union.

2. With its Implementing Regulation (EU) No. 1238/2013 of December 2, 2013 for the introduction of a definitive anti-dumping duty and for the definitive collection of the provisional duty on imports of modules and key components thereof (cells) originating in or dispatched from the People's Republic of China (ABI[4]. 2013, L 325, p. 1), the Council imposed a definitive anti-dumping duty of 53.4% on imports of modules and cells of the type used in the named modules from China for all but the ones listed in Art. 1 para. 2 and companies listed in Annex I of this Ordinance

3. On December 2, 2013, the Council of the European Union also issued Implementing Regulation (EU) No. 1239/2013 introducing a definitive countervailing duty on imports of modules and key components thereof (cells) originating in or dispatched from the People's Republic of China (ABI. 2013,

[4] Presumably a reference to the Official Journal

L 325, p. 66). A countervailing duty of 11.5% was imposed on the imports of modules and cells from China for all except those listed in Art. 1 para. 2 and listed in Annex 1 of this Ordinance.

4. On February 11, 2016, the Commission issued Implementing Regulation (EU) 2016/184 to extend the definitive countervailing duty introduced by Implementing Regulation No. 1239/2013 to imports of modules and key components thereof (cells), whether originating in Malaysia, from Malaysia and Taiwan or Taiwan registered or not (ABI. 2016, L 37, p. 56). On the same day, the Commission also adopted Implementing Regulation (EU) 2016/185 to extend the definitive anti-dumping duty imposed by Regulation No 1238/2013 to imports of modules and key components thereof (cells) sent from Malaysia and Taiwan, whether originating in Malaysia or Taiwan's registered or not (ABI. 2016, L 37, p. 76).

5. With these Implementing Regulations 2016/184 and 2016/185 (hereinafter together: the contested regulations) the definitive countervailing and anti-dumping duties applicable to "all other companies", which were implemented by Implementing Regulation No. 1239/2013 and Implementing Regulation No. 1238 / Imported in 2013, on imports of modules and cells from Malaysia and Taiwan, whether or not declared as products originating in Malaysia or Taiwan, which at the time of the adoption of these contested regulations were subject to CN codes ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90 (TARIC codes 8501310082, 8501310083, 8501320042, 8501320043, pii[sic]725875736, p[sic]82330755002, pii[sic]925873628, 8501320043, 8501330062 8501612042, 8501612043, 8501618042, 8501618043, 8501620062, 8501620063, 8501630042, 8501630043, 8501640042, 8501640043, 8541409022, 8541409023, 8541409032 and 8541409033) have been included, with the exception of those named by the Taiwanese companies EEPV Corp., Gintech Energy Corp., LOF Solar Corp. and Solartech Energy Corp. manufactured goods, expanded [sic].

6. According to the information provided by the applicant, it purchases cells covered by the contested regulations exclusively in Taiwan from the above-mentioned marg.[sic] 5, transfers these cells into free circulation in Switzerland and then uses them to manufacture the modules in Switzerland. The value added share in Switzerland is between at least 50, depending on the type of module % and 80 %[sic]. You [sic] then sell the modules under the tariff position 8541 40 90 29 would be classified under their own brand, Megasol, to customers in the Union. The plaintiff emphasizes that it does not export any cells sent from Taiwan to the Union, carry them through Switzerland or store them for transport. Rather, they process them into modules in Switzerland.

Procedures and motions by the parties

7. The plaintiff brought the present action by an application received by the court registry on April 11, 2016.

8. In a letter dated the same day, she requested that, in accordance with Art. 66 of the Rules of Procedure of the Court of First Instance, anonymity is granted and certain data are treated confidentially. In response to a question from the court, the plaintiff stated by letter of 2 June 2016 that it would withdraw these applications.

9. The applicant requests

– Annul the contested regulations;

– In the alternative, annul the contested regulations insofar as they are used to impose anti-dumping and countervailing duties on the modules it exports to the Union, insofar as these modules contain cells originally shipped from Taiwan by companies exempted from these measures;

– In the alternative, annul the contested regulations insofar as they are used to impose an anti-dumping and countervailing duty on the modules it exports to the Union, insofar as these modules originally shipped from Taiwan by the companies Gintech Energy, EEPV, LOF Solar or Solartech Energy included;

– In the alternative, annul the contested regulations in so far as they concern them;

– Order the defendant to pay the costs.

10. In a separate pleading received by the court registry on July 22, 2016, the European Commission raised an objection of inadmissibility under Art. 130 para. 1 of the Rules of Procedure.

11. In its objection of inadmissibility, the Commission claims that [the Court should]

– Dismiss the action as inadmissible;

– Order the applicant to pay the costs.

12. On September 2, 2016, the plaintiff commented on the objection of inadmissibility raised by the Commission and held the action to be admissible.

Legal appreciation

13. In style of. 130 para. 1 of the Rules of Procedure, the court can decide in advance on the inadmissibility or lack of jurisdiction if the defendant so requests. In the present case, the court considers itself sufficiently informed on the basis of the files and decides to decide without continuing the proceedings.

14. In support of its objection of inadmissibility, the Commission submits that, first, the applicant's imports do not fall within the scope of the contested regulations; second, those regulations are not addressed to the applicant; third, they are not directly or individually concerned by them; Ordinances implementing measures within the meaning of Art. 263 para. 4 TFEU and fifthly the plaintiff has no interest in legal protection.

15. The objections of inadmissibility that the applicant's imports did not fall within the scope of the contested regulations and that the applicant had no interest in legal protection must be examined together.

16. The Commission contends that, if the facts described by the applicant are correct, the modules which it exports from Switzerland to the Union do not fall within the scope of the contested regulations.

17. The applicant also takes the view that the modules it exports to the Union are not subject to the contested regulations. They are not sent from Taiwan but from Switzerland and are made from cells which are subject to the contested regulations and are made by companies exempt from the duties imposed by those regulations. Only if it is assumed that these are applicable to them does it apply for their annulment.

18. The applicant takes the view, however, that it has an interest in legal protection because it is not clearly evident that the contested regulations are applicable to its exports.

19. According to settled case law, an action for annulment by a natural or legal person is only admissible if the latter has an interest in the annulment of the contested act. Such an interest presupposes that the annulment of this act as such can have legal effects and that the legal remedy of the party who lodged it can thus result in an advantage (cf. Judgment of 17 September 2015, Mory et al. V Commission, C-33/14 P, EU: C: 2015:609, para. 55 and the case law cited there).

20. A plaintiff's legal protection interests must exist and be present. It must not refer to a future and hypothetical situation (cf. Judgment of 17 September 2015, Mory et al. V Commission, C-33/14 P, EU: C: 2015:609, para. 56 and the case law cited there).

21. This interest must exist with regard to the subject of the action when the action is brought - otherwise the action is inadmissible - and continue to exist until the court decision is issued, otherwise the legal

dispute is essentially settled (cf. Judgment of 17 September 2015, Mory et al. V Commission, C-33/14 P, EU: C: 2015:609, para. 57 and the case law cited there).

22. The plaintiff must provide evidence of his interest in legal protection, which is the essential prerequisite for any lawsuit. In particular, for an action for annulment by a natural or legal person against an act to be admissible, the plaintiff must conclusively demonstrate his interest in the annulment of this act (cf. in this sense judgments of June 4, 2015, Andechser Molkerei Scheitz / Commission, C. -682/13 P, not published, EU: C: 2015:356, Rn. 27 and 28 and the case law cited there, and of September 17, 2015, Mory et al / Commission, C-33/14 P, EU: C: 2015:609, Rn. 58 and the case law cited there).

23. Although it has that obligation, the applicant has not attempted to show that its exports are covered by the contested regulations. It even argued the opposite, on the one hand by emphasizing that the modules are manufactured in Switzerland and exported from there to the Union and, on the other hand, by stating that the cells used for the modules are bought from companies that are operated by the contested regulations are exempt. In its observations on the objection of inadmissibility, it stated that it brought the present action in order to put an end to the uncertainty surrounding the application of the contested regulations, but in no way demonstrated to what extent these could be applicable to them. In reality, she [sic] is seeking a declaratory judgment from the court for a hypothetical situation and does not in any way show that her legal protection interests exist and are present.

24. It follows that the action must be dismissed as inadmissible without it being necessary to examine the Commission's other objections of inadmissibility.

costs

25. In style of. 134 para. 1 of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs upon application.

26. Since the applicant has been unsuccessful, it must be ordered to pay the Commission's costs in addition to its own costs, as it has applied for.

For these reasons

THE COURT (Fourth Chamber)

decided:

1. The action is dismissed as inadmissible.

2. Megasol Energie AG bears the costs.

Luxembourg, June 26th 2017

The

Chancellor [sic]

The president

APPENDIX 2 (MEGASOL – ORDER OF THE COURT IN THE FRENCH LANGUAGE FROM THE COURT'S WEBSITE) eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=CELEX:62016TO0152

DOCUMENT DE TRAVAIL

ORDONNANCE DU TRIBUNAL (quatrième chambre)

26 juin 2017 (1)

« Recours en annulation – Dumping – Subventions – Importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) expédiés de Malaisie et de Taïwan – Extension à ces importations du droit antidumping et du droit compensateur définitifs institués sur les importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) originaires ou en provenance de Chine – Absence d'intérêt à agir – Irrecevabilité »

Dans l'affaire T-152/16,

Megasol Energie AG, établie à Wangen an der Aare (Suisse), représentée par M^{e} T. Wegner, avocat,

partie requérante,

contre

Commission européenne, représentée par M. T. Maxian Rusche, M[mes] A. Demeneix et K. Blanck-Putz, en qualité d'agents,

partie défenderesse,

ayant pour objet une demande fondée sur l'article 263 TFUE et tendant à l'annulation du règlement d'exécution (UE) 2016/184 de la Commission, du 11 février 2016, portant extension du droit compensateur définitif institué par le règlement d'exécution (UE) n° 1239/2013 du Conseil sur les importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) originaires ou en provenance de la République populaire de Chine aux importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) expédiés de Malaisie et de Taïwan, qu'ils aient ou non été déclarés originaires de ces pays (JO 2016, L 37, p. 56), et du règlement d'exécution (UE) 2016/185 de la Commission, du 11 février 2016, portant extension du droit antidumping définitif institué par le règlement (UE) n° 1238/2013 du Conseil sur les importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) originaires ou en provenance de la République populaire de Chine aux importations de modules photovoltaïques en silicium cristallin et leurs composants essentiels (cellules) expédiés de Malaisie et de Taïwan, qu'ils aient ou non été déclarés originaires de ces pays (JO 2016, L 37, p. 76), pour autant qu'ils s'appliquent à la requérante,

LE TRIBUNAL (quatrième chambre),

composé de MM. H. Kanninen, président, J. Schwarcz (rapporteur) et C. Iliopoulos, juges,

greffier : M. E. Coulon,

rend la présente

Ordonnance

Antécédents du litige

1 La requérante, Megasol Energie AG, est une société de droit suisse, qui indique être active dans la production, en Suisse, de panneaux ou de modules photovoltaïques en silicium cristallin (ci-après les « modules ») et dans l'exportation de ceux-ci vers l'Union européenne.

2 Par son règlement d'exécution (UE) n° 1238/2013, du 2 décembre 2013, instituant un droit antidumping définitif et collectant définitivement le droit antidumping provisoire institué sur les importations de modules et leurs composants essentiels (cellules) originaires ou en provenance de la République populaire de Chine (JO 2013, L 325, p. 1), le Conseil a institué un droit antidumping définitif de 53,4 % sur les importations de modules et de cellules du type utilisé dans lesdits modules originaires ou en provenance de Chine pour toutes les sociétés autres que celles expressément mentionnées à l'article 1[er], paragraphe 2, et à l'annexe I dudit règlement.

3 Le 2 décembre 2013, le Conseil de l'Union européenne a également adopté le règlement d'exécution (UE) n° 1239/2013, instituant un droit compensateur définitif sur les importations de modules et leurs composants essentiels (cellules) originaires ou en provenance de la République populaire de Chine (JO 2013, L 325, p. 66). Un droit compensateur de 11,5 % a été institué sur les importations de modules et cellules originaires ou en provenance de Chine pour toutes les sociétés autres que celles expressément mentionnées à l'article 1[er], paragraphe 2, et à l'annexe I dudit règlement.

4 Le 11 février 2016, la Commission a adopté le règlement d'exécution (UE) 2016/184 portant extension du droit compensateur définitif institué par le règlement d'exécution 1239/2013 aux importations de modules et leurs composants essentiels (cellules) expédiés de Malaisie et de Taïwan, qu'ils aient ou non été déclarés originaires de ces pays (JO 2016, L 37, p. 56). Ce même jour, la Commission a également adopté le règlement d'exécution (UE) 2016/185 portant extension du droit antidumping définitif institué par le règlement 1238/2013 aux importations de modules et leurs composants essentiels (cellules) expédiés de Malaisie et de Taïwan, qu'ils aient ou non été déclarés originaires de ces pays (JO 2016, L 37, p. 76).

5 Par ces règlements d'exécution 2016/184 et 2016/185 (ci-après, pris ensemble, les « règlements attaqués »), les droits compensateur et antidumping définitifs, applicables à « toutes les autres sociétés » institués respectivement par le règlement d'exécution n° 1239/2013 et par le règlement d'exécution n° 1238/2013 ont été étendus aux importations de modules et de cellules expédiés de Malaisie et de Taïwan, qu'ils aient ou non été déclarés originaires de ces pays, relevant au moment de l'adoption des règlements attaqués des codes NC ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 et ex 8541 40 90 (codes TARIC 8501310082, 8501310083, 8501320042, 8501320043, 8501330062, 8501330063, 8501340042, 8501340043, 8501612042, 8501612043, 8501618042, 8501618043, 8501620062, 8501620063, 8501630042, 8501630043, 8501640042, 8501640043, 8541409022, 8541409023, 8541409032 et 8541409033), à l'exception des produits fabriqués notamment par les sociétés taïwanaises EEPV Corp., Gintech Energy Corp., LOF Solar Corp. et Solartech Energy Corp.

6 Selon les déclarations de la requérante, elle achète des cellules, visées par les règlements attaqués, exclusivement à Taïwan auprès des quatre sociétés mentionnées au point 5 ci-dessus, met ces cellules en libre pratique douanière en Suisse, puis les utilise pour produire, en Suisse, les modules. La part de la valeur ajoutée en Suisse s'établirait, selon le type de module, entre au moins 50 et 80 %. La requérante vendrait ensuite les modules, qui relèveraient de la position tarifaire 8541 40 90 29, sous sa propre marque, Megasol, à des clients dans l'Union. La requérante souligne qu'elle n'exporte pas vers l'Union des cellules expédiées de Taïwan ni ne procède au simple transit par la Suisse ou au stockage de celles-ci en cours de transport. Bien au contraire, elle procèderait, en Suisse, à leur transformation en modules.

Procédure et conclusions des parties

7 Par requête déposée au greffe du Tribunal le 11 avril 2016, la requérante a introduit le présent recours.

8 Par lettre du même jour, la requérante a demandé à bénéficier de l'anonymat, conformément à l'article 66 du règlement de procédure du Tribunal, et du traitement confidentiel de certaines données. En réponse à une question posée par le Tribunal, la requérante a, par lettre du 2 juin 2016, indiqué retirer ces demandes.

9 La requérante conclut à ce qu'il plaise au Tribunal :

– annuler les règlements attaqués ;

– à titre subsidiaire, annuler les règlements attaqués en ce que, en vertu de ceux-ci, un droit antidumping et compensateur est perçu sur les modules exportés par elle vers l'Union lorsque ces modules contiennent des cellules initialement expédiées de Taïwan et provenant d'entreprises exemptées de ces mesures ;

– à titre subsidiaire, annuler les règlements attaqués en ce que, en vertu de ceux-ci, un droit antidumping et compensateur est perçu sur les modules exportés par elle vers l'Union lorsque ces modules contiennent des cellules initialement expédiées de Taïwan et provenant de Gintech Energy, EEPV, LOF Solar ou Solartech Energy ;

– à titre encore plus subsidiaire, annuler les règlements attaqués, en ce qu'ils la concernent ;

– condamner la défenderesse aux dépens.

10 Par acte séparé déposé au greffe du Tribunal le 22 juillet 2016, la Commission européenne a soulevé une exception d'irrecevabilité au titre de l'article 130, paragraphe 1, du règlement de procédure.

11 Dans son exception d'irrecevabilité, la Commission conclut à ce qu'il plaise au Tribunal :

– rejeter le recours comme irrecevable ;

– condamner la requérante aux dépens.

12 Le 2 septembre 2016, la requérante a présenté ses observations sur l'exception d'irrecevabilité soulevée par la Commission et conclut à la recevabilité de son recours.

En droit

13 Aux termes de l'article 130, paragraphe 1, du règlement de procédure, si la partie défenderesse le demande, le Tribunal peut statuer sur l'irrecevabilité ou l'incompétence sans engager le débat au fond. En l'espèce, le Tribunal s'estime suffisamment éclairé par les pièces du dossier et décide de statuer sans poursuivre la procédure.

14 À l'appui de son exception d'irrecevabilité, la Commission soutient, premièrement, que les importations de la requérante n'entrent pas dans le champ d'application des règlements attaqués, deuxièmement, que la requérante n'est pas le destinataire de ces règlements, troisièmement, qu'elle n'est concernée par ces derniers ni directement ni individuellement, quatrièmement, que les règlements attaqués comportent des mesures d'exécution au titre de l'article 263, quatrième alinéa, TFUE et, cinquièmement, que la requérante n'a pas d'intérêt à agir.

15 Il convient d'examiner, ensemble, les fins de non-recevoir tirées de ce que les importations de la requérante n'entreraient pas dans le champ d'application des règlements attaqués et que la requérante n'aurait pas d'intérêt à agir.

16 La Commission fait valoir que, pour autant que la description des faits présentée par la requérante est exacte, les modules que celle-ci exporte de Suisse vers l'Union n'entrent pas dans le champ d'application des règlements litigieux.

17 La requérante estime également que les modules qu'elle exporte vers l'Union ne sont pas soumis aux règlements attaqués. Ils ne seraient pas expédiés de Taïwan, mais de Suisse, et ils seraient fabriqués à partir des cellules visées par les règlements attaqués, qui seraient produites par des sociétés exemptées des droits institués par ces mêmes règlements. Ce n'est que s'il était considéré que ces derniers lui étaient applicables que la requérante demanderait leur annulation.

18 Toutefois, la requérante considère qu'elle a un intérêt à agir, au motif qu'il n'apparaîtrait pas clairement que les règlements attaqués s'appliquent à ses exportations.

19 À cet égard, selon une jurisprudence constante, un recours en annulation intenté par une personne physique ou morale n'est recevable que dans la mesure où cette dernière a un intérêt à voir annuler l'acte attaqué. Un tel intérêt suppose que l'annulation de cet acte soit susceptible, par elle-même, d'avoir des conséquences juridiques et que le recours puisse ainsi, par son résultat, procurer un bénéfice à la partie qui l'a intenté (voir arrêt du 17 septembre 2015, Mory e.a./Commission, C-33/14 P, EU:C:2015:609, point 55 et jurisprudence citée).

20 L'intérêt à agir d'une partie requérante doit être né et actuel. Il ne peut concerner une situation future et hypothétique (voir arrêt du 17 septembre 2015, Mory e.a./Commission, C-33/14 P, EU:C:2015:609, point 56 et jurisprudence citée).

21 Cet intérêt doit, au vu de l'objet du recours, exister au stade de l'introduction de celui-ci, sous peine d'irrecevabilité, et perdurer jusqu'au prononcé de la décision juridictionnelle, sous peine de non-lieu à statuer (voir arrêt du 17 septembre 2015, Mory e.a./Commission, C-33/14 P, EU:C:2015:609, point 57 et jurisprudence citée).

22 Il appartient à la partie requérante d'apporter la preuve de son intérêt à agir, qui constitue la condition essentielle et première de tout recours en justice. En particulier, pour que le recours en annulation d'un acte, présenté par une personne physique ou morale, soit recevable, il faut que la partie requérante justifie de façon pertinente l'intérêt que présente pour elle l'annulation de cet acte (voir, en ce sens, arrêts du 4 juin 2015, Andechser Molkerei Scheitz/Commission, C-682/13 P, non publié, EU:C:2015:356, points 27 et 28 et jurisprudence citée, et du 17 septembre 2015, Mory e.a./Commission, C-33/14 P, EU:C:2015:609, point 58 et jurisprudence citée).

23 Bien que cette obligation lui incombe, la requérante n'a pas cherché à démontrer que ses exportations seraient visées par les règlements attaqués. Elle a même soutenu le contraire, en soulignant, d'une part, que les modules étaient produits en Suisse et expédiés de ce pays vers l'Union et, d'autre part, que les cellules utilisées pour les modules étaient achetées auprès de sociétés exemptées par les règlements attaquées. Dans ses observations sur l'exception d'irrecevabilité, elle a expliqué avoir introduit le présent recours pour mettre un terme à l'incertitude qu'il y aurait quant à l'application des règlements attaqués, mais n'a aucunement démontré dans quelle mesure ceux-ci pourraient lui être applicables. Partant, elle sollicite en réalité une décision déclaratoire du Tribunal, pour une situation hypothétique, et n'établit aucunement que son intérêt à agir est né et actuel.

24 Il s'ensuit que le recours doit être rejeté comme irrecevable, sans qu'il soit nécessaire d'examiner les autres fins de non-recevoir soulevées par la Commission.

Sur les dépens

25 Aux termes de l'article 134, paragraphe 1, du règlement de procédure, toute partie qui succombe est condamnée aux dépens, s'il est conclu en ce sens.

26 La requérante ayant succombé, elle doit être condamnée à supporter, outre ses propres dépens, les dépens de la Commission, conformément aux conclusions de cette dernière.

Par ces motifs,

LE TRIBUNAL (quatrième chambre)

ordonne :

1) **Le recours est rejeté comme irrecevable.**

2) **Megasol Energie AG est condamnée aux dépens.**

Fait à Luxembourg, le 26 juin 2017.

Le greffier Le president

APPENDIX 3

Netherlands National Customs Office 17 February 2017
MEMO Solar panels consigned from Malaysia Vietnam

Introduction
The memo contains a question and answer about the condition of" ... solar panel consigned from ...".
The way in which the companies cooperate in the Customs investigation is also explained.
Question
Solar cells from Malaysia are processed in Vietnam in solar panels. The party concerned declares, on importation, the origin of Malaysia and the consignment from Vietnam. Are the goods to be considered as being consigned from Malaysia and are the anti-dumping and countervailing duties payable?
Answer
It is about the concept of consignment. The measures in respect of Malaysia shall apply to consignments from Malaysia, whether or not declared to be of (non-preferential) origin from Malaysia.
The " ... consigned from ... " is neither defined in the Implementing Regulation (EU) 2016/184 and Implementing Regulation (EU) 2016/185 establishing anti-dumping and anti-subsidy

measures, nor is it defined in the UCC, the UCC Delegated Act and the UCC Implementing Act. In the explanatory note to the Single Administrative Document, Annex 18 to Delegated Regulation (EU) 2016/341 an indication was given about the "country of dispatch". The two concepts are not the same. The note in the explanatory memorandum of the Single Administrative Document also states as follows:
"*Box 15: Country of dispatch/export*
Where neither a commercial transaction (e.g. sale or processing) nor a delay not related to the carriage of goods has taken place in an intermediate country, Enter in box 15a the relevant Union code of Appendix 01 for the country from which the goods were initially dispatched to the Member State in which the goods are located at the time of their release for the customs procedure. If such a delay or trade transaction has occurred, state the last intermediate country."

Only two constructed cases with conclusions are included below. In the case of other facts and circumstances, commercial documents and public documents, physical characteristics and identifications, other conclusions must be drawn.
Case 1
In a case, a sale took place between a company in Hong Kong and a company in Germany. The goods are manufactured in Vietnam and shipped to Malaysia. In Malaysia, the goods were stored for a few days. The goods were released for free circulation there and were not unpacked, repacked, etc. The goods were then shipped to Belgium. In these movements, only one transport document (bill of cargo) has been drawn up from Vietnam to Belgium with a delay in the context of deep sea transport in Malaysia. The same destination has been given for both sales and transport movements. In this case, there is a consignment from Vietnam and no anti-dumping and countervailing duties are due.
Case 2
In another case, a sale took place between a Hong Kong company and a Malaysia company. The goods are manufactured in Vietnam and shipped to Malaysia. In Malaysia, the goods are stored, packed and then repacked . The goods were released for free circulation there. A sale of the repackaged goods took place between the company in Malaysia and a company in Germany. The repackaged goods were then shipped to Belgium. In these movements, two different transport documents (bills of cargo) have been drawn up for the movement of goods from Vietnam to Malaysia and those from Malaysia to Belgium. In this case, there is no delay in transport. There are gaskets, repackaging and new sales. Different destinations have been given for sales and transport movements. In this case, the goods are consigned from Malaysia and the anti-dumping and countervailing duties imposed on consignments from Malaysia are due.
Lock [sic]
Both cases are constructed cases. In practice, each case is in itself; each case must be assessed separately.
At the request of Customs, the companies shall cooperate in the Customs investigation. All documents, data and information must be provided. The goods must be made available for physical inspection .
The goods must not be transported; additional security must be provided where appropriate.