IN THE UPPER TRIBUNAL **UT/2019/0022**

(TAX AND CHANCERY CHAMBER)

ON APPEAL FROM THE FIRST-TIER TRIBUNAL

(TAX CHAMBER)

BEFORE: MR JUSTICE MARCUS SMITH

And JUDGE JONATHAN RICHARDS

BETWEEN:

RENESOLA UK LTD ("Renesola")

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS ("HMRC")

Respondents

ORDER

UPON the appeal by the Appellant against the decision of the First-tier Tribunal (Tax Chamber) released on 5 November 2018

AND UPON hearing Counsel Mr George Peretz QC and M Yves Melin for the Appellant and Mr Mark Fell for the Respondents

AND UPON FINDING that in order to enable the Tribunal to give judgment in this case it is necessary to resolve two questions concerning the validity and interpretation of acts of the institutions of the European Union (EU) and that it is appropriate to request the Court of Justice to give a preliminary ruling thereon

IT IS ORDERED that

1. The questions set out in the attached Schedule concerning the validity of Commission Implementing Regulation 1357/2013/EU and the interpretation of Article 24 of Council Regulation 2913/92/EEC be referred to the Court of Justice of the EU for a preliminary ruling in accordance with Article 86(2) of the Withdrawal Agreement between the EU and the United Kingdom and Article 267 of the Treaty on the Functioning of the European Union.

2. All further proceedings in the above named matter be stayed until the Court of Justice has given its ruling or until further order.

3. This Order be communicated to the Court of Justice forthwith.

SCHEDULE TO THE ORDER OF THE UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

REQUEST FOR PRELIMINARY RULING OF THE COURT OF JUSTICE OF THE EUROPEAN UNION

A. Referring Court and Parties to the main proceedings and their representatives

1. The Referring Court is the Upper Tribunal, Tax and Chancery Chamber, contact details uttc@justice.gov.uk.

2. The present reference is made under Article 86(2) of the Withdrawal Agreement between the European Union and the United Kingdom. It may be noted that that provision, and the provision in Article 89(1) of that agreement that requires judgments and orders of the Court of Justice to have binding force in their entirety on and in the UK, have been implemented into UK law (sections 1A and 7A of the European Union (Withdrawal) Act 2018) and so have, under UK law, direct effect in the UK.

3. The relevant parties in the proceedings (Case No: UT/2019/0022) are the Appellant, Renesola UK Ltd ("Renesola"), and the Respondents, Her Majesty's Commissioners of Revenue and Customs ("HMRC"). Renesola's solicitors are Reed Smith LLP of Rue Belliard 40, 1040 Brussels, Belgium, email ymelin@reedsmith.com. HMRC act by HMRC Solicitor's Office and Legal Services, Ralli Quays, 3 Stanley Street, Salford M60 9LB, UK; email richard.shaw1@hmrc.gov.uk. .

B. The subject matter of the dispute and the relevant facts

4. Solar "modules" are assembled from solar "cells", the latter being individual units that are capable on their own of generating electricity from sunlight. Ultimately solar modules are incorporated into solar photovoltaic systems ("PV systems") which can be connected and used in domestic electrical systems.

5. The appeal before the Upper Tribunal involved the rules potentially applicable to the determination of the place of origin of solar modules for customs duty purposes. It was common ground that the general rule applicable to the origin of goods was found at the applicable time in Article 24 ("Article 24") of Council Regulation 2913/92 (the "Customs Code") which provides as follows:

> *Goods whose production involved more than one country 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 and resulting in the manufacture of a new product or representing an important stage of manufacture.*

6. The Commission had power at the applicable time under Article 247 of the Customs Code to make regulations regarding the origin of goods. In Commission Implementing Regulation No 1357/2013 ("the Contested Regulation"), the Commission sought to exercise that power in relation to solar modules by specifying that the place of origin of solar modules is to be determined by reference to the place of origin of their constituent solar cells.

7. Renesola imports solar modules into the UK, which are consigned from India. The solar modules are assembled in India, but contain (at least in the case of the modules here in issue) solar cells manufactured in the People's Republic of China ("China"). Applying the Contested Regulation, HMRC determined[1] that the solar modules originated in China, and calculated anti-dumping duty and countervailing duty accordingly (such duties being, at the time, payable on solar modules consigned from China or of Chinese origin[2]). Renesola, however, considered that an application of Article 24 would result in the solar modules being deemed to originate in India, so that no such duties were payable (the modules having acquired Indian origin, and not being consigned from China).

8. Accordingly, Renesola appealed to the First-tier Tribunal ("FTT") against HMRC's determination, with its primary argument before the FTT being that the Contested Regulation produced an outcome that was, at least arguably, at odds with the provisions of Article 24 and

[1] HMRC decision of 28 December 2016, maintained on subsequent review. The decision is in the file sent to the Court of Justice.

[2] See: Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China OJ L 325 5.12.2013 p.1; and Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China OJ L 325 5.12.2013 p.66.

that the FTT should make a reference to the Court of Justice to determine whether the Contested Regulation was valid according to EU law. The FTT dismissed Renesola's appeal and, in doing so, declined to make any reference to the Court of Justice.

9. Before the FTT, Renesola put forward evidence as to the manufacturing process of solar modules and other relevant matters in the form of documentary evidence and a witness statement by Mr Xu Zhongyu[3]. Mr Xu was cross-examined by Counsel for HMRC.

10. The FTT concluded that on the evidence before it, the manufacture of modules from cells could not be considered to be a process that conferred origin under Article 24. It refused to make a reference to the Court of Justice of the question of whether the Contested Regulation was valid.

11. However, in its decision, the Upper Tribunal held that the FTT had overlooked or misstated important and uncontested aspects of the evidence before it. In particular, in relation to the FTT's conclusion that the manufacture of modules from cells amounted to no more than a presentational change, the Upper Tribunal held that the FTT did not take into account the unchallenged evidence before the FTT that: -

    a. if a single cell is left exposed in the air without any protection, it can easily be oxidised or corroded, or easily destroyed by external forces such as wind, hail or snow: as a result, cells need to be encapsulated within modules so as to reduce the degradation of cells and, when so encapsulated, the cell can perform for more than 25 years[4];

    b. it is only after lamination that modules acquire their basic properties such as resistance to ultra-violet radiation, mechanical loading strength, and anti-oxidisation and corrosion resistance[5]; and

    c. because solar cells are fragile, but need to be used in PV systems that are exposed to the elements, Renesola adopts a technically difficult manufacturing process

[3] That documentary evidence was attached to a letter to HMRC from Renesola's solicitors dated 19 May 2017. Mr Xu's witness statement was made on 23 May 2018. Both the letter and the witness statement, and their attachments, are in the file sent to the Court of Justice.

[4] UT decision, §28

[5] UT decision, §30

involving, for example, lamination of cells being conducted in a vacuum, in order to protect those cells[6].

12. The Upper Tribunal went on to conclude[7] that the totality of the facts demonstrated that, despite the fact that cells generate an electric current from sunlight (around 0.62v), the "specific qualities" of the solar module are only established when the solar cells are incorporated into modules and subjected to a technically difficult process of lamination, encapsulation and weather-proofing which confers durability and makes possible the practical generation of electricity in usable form. In particular, it took account of the following.

    a. While solar cells can still generate an electrical current from sunlight without having been subjected to that process, it would not be practicable to use solar cells on their own outdoors given their fragility. By contrast, by incorporating solar cells in solar modules and subjecting them to an exacting process of lamination, encapsulation and weather-proofing, the solar cells can continue to produce electricity for up to 25 years;

    b. The process of laminating, encapsulating and weather-proofing the cells is technically difficult[8]. It involves soldering by high accuracy machines under a high uniformity of soldering temperature. Lamination of cells is conducted in a vacuum. From this, the Upper Tribunal inferred that it would not be possible for an ordinary consumer to use solar cells on their own in a PV system (which will necessarily be located outdoors) so as to generate a sustainable electrical current from sunlight. The solar cells are simply too fragile for that purpose and an ordinary consumer, without access to the sophisticated manufacturing techniques employed to encapsulate solar cells in solar modules, would not be able to devise a satisfactory method of protecting solar cells used directly in a PV system. That, the Upper Tribunal considered, indicates that there is a qualitative difference (namely durability) between solar modules and their constituent solar cells.

[6] UT decision, §32

[7] UT decision, §44

[8] It was described by Mr Xu in evidence, in particular at §§5 and 21-22 of his witness statement and Annex 1 to that statement, and summarised by the FTT at §§17 and 19 of its decision.

c. An individual solar cell can produce relatively little electricity (just 0.62v) which is clearly not suitable for the domestic production of electricity. A solar module does not itself produce electricity as the electricity output of a solar module is all generated by the module's constituent solar cells. Nevertheless, it remains the case that the output of a solar module (at around 40v) is suitable for the domestic production of electricity. In part, of course, that is because a solar module contains a large number of solar cells. But the Upper Tribunal noted that the FTT had accepted that a solar module produces approximately 3% more electricity than the same number of cells linked in series: however, the Upper Tribunal did not agree with the FTT's view that 3% is such a small figure that it should be ignored. Rather, in the circumstances of this appeal it provided a further reason why a solar module is something more than the sum of its parts.

d. The Upper Tribunal acknowledged that neither solar cells nor solar modules themselves produce electricity in a form that can be used in domestic electrical systems. Solar cells produce a direct current, but domestic electrical systems require an alternating current. An "inverter box" is required to convert the direct current into an alternating current and the inverter box forms part of a PV system (rather than a solar module). However, the Upper Tribunal did not consider that that consideration reduced the force of the point that the "specific quality" of a solar module remains the production of electricity from sunlight by means of a structure that offers the solar cells robust and necessary protection from the elements; and it considered that the force of that conclusion was not diminished by the fact that a solar module needs to be connected to an inverter box in order for the electricity generated to be used in domestic electrical systems.

e. The Upper Tribunal noted that the FTT had concluded that solar cells can be used in products that do not involve the production of electricity for use in electrical systems such as irradiance meters and light sensitive switches. In its view, the fact that there are other uses for such cells pointed against any conclusion that a solar module acquires its "specific qualities" at the point of manufacture of its constituent solar cells.

13. The Upper Tribunal concluded, on the basis of those considerations, that the manufacture of solar modules does not involve a mere presentational change: solar modules have properties

and a composition that the individual solar cells did not possess[9]. It considered that the first technical criterion that the Court of Justice identified in Case C-26/88 *Brother International GmbH*[10] was decisive and resulted in the conclusion that the process of manufacturing solar modules was origin-conferring. The Upper Tribunal reached a clear but preliminary and provisional conclusion that a direct application of Article 24 of the Customs Code entailed that the modules stage was origin-conferring.[11]

14. It followed that – were the Contested Regulation not valid – the Upper Tribunal would have held that the country of origin of the modules at issue was India, not China, and the duties at issue would not have been payable. Were the Contested Regulation valid, however, the country of origin would be China (so that the duties at issue would have been payable).

15. The Upper Tribunal did not reach any conclusion on the "ancillary criterion" of "value added"[12]: that is to say, whether the manufacture of modules as a whole involved an appreciable increase in the commercial value of the finished product at the ex-factory stage vis-à-vis the value of cells: see §22 of *Brother*. There was uncontested evidence before the FTT[13] as to the cost of the module manufacturing process vis-à-vis costs of the cells, to the effect that the cost of cells is only between 22 and 25% while the costs of the module stage amounted to between 33 and 49% of the final module price. However, the Upper Tribunal's provisional conclusion was that the technical criterion regarding the manufacture of modules was decisive.[14]

16. The Upper Tribunal noted that even with its clear, if provisional, conclusion that direct application of Article 24 of the Customs Code entails that the modules stage is origin-conferring, so that the question of origin arising in this case was different, in a fairly fundamental way, according to whether Article 24 or the Contested Regulation applied[15], it is possible that that difference in outcome between the direct application of Article 24 and

[9] UT decision, §§49-50

[10] ECLI:EU:C:1989:637

[11] UT decision, §38 and §51(1)

[12] UT decision, §51(4)

[13] See the figures for cost/value added set out at page 9 of the 2014 ITRPV, annexed to Steptoe & Johnson's letter to HMRC of 19 May 2017.

[14] UT decision, §50

[15] UT decision, §51(1)

application of the Contested Regulation is justifiable by reference to the Commission's margin of discretion in defining the abstract concepts in Article 24.[16]

C: Brief summary of the arguments of the parties

17. Renesola submits that the Upper Tribunal was correct, for the reasons it gave, to hold that, applying Article 24 of the Customs Code, the process of manufacturing modules was origin-conferring. In particular, despite the position of HMRC as set out at §25 below, Renesola points out that the Upper Tribunal came to the clear conclusions on the evidence before it that "the increase in 'durability' conferred by the process of manufacturing modules is both more substantial than that identified in *Zentrag*[17] and also is qualitatively different as it enables the cells to perform their desired function: the production of electricity from sunlight in an outdoors environment in a robust and sustainable way" and that "the manufacture of solar modules does not involve a mere presentational change: solar modules have properties and a composition that the individual solar cells did not possess."[18] Those conclusions were based on the detailed (and essentially unchallenged) evidence produced by Renesola and summarised, in particular, at §§40(1) and (2) of the UT decision. The answer to the second question referred (whether the module stage, absent the Contested Regulation, confers origin) is therefore "yes".

18. As to the first question referred (validity of the Contested Regulation), on the basis of the facts as found by the Upper Tribunal, it is not open to the Commission to provide for a different rule of origin: the Commission's power to define "*the abstract concepts of [Article 24] with reference to specific working or processing operations*[19]" does not extend to laying down a rule of origin that is contrary to Article 24[20].

19. Further, that power applies where such definition is "*justified on the one hand by the need for legal certainty and on the other hand by the problems of definition in multiple economic circumstances*"[21]. But the

[16] UT decision, §51(2)

[17] Case 93/83, [1984] ECR 1095

[18] UT decision, §§48-49

[19] Case 162/82 *Cousin* [1983] ECR 1102, §17

[20] Case C-48/98 *Söhl & Söhlke v Hauptzollamt Bremen* ECLI:EU:C:1999:548, §36

[21] *Cousin*, §17

uncontested evidence before the FTT was that there was no variation in the manufacture of solar modules that could amount to "multiple economic circumstances", and HMRC did not seek to suggest the contrary.

20. Moreover, the fifth recital to the Contested Regulation records that the manufacture of the module is "*a major step*". But there is no dispute that the module manufacturing stage is the "*last*" stage. It is impossible to see how the Commission could (on the one hand) accept that the module stage is a "*major*" step while simultaneously denying (in the seventh recital) that it is a "*substantial*" step. The manifestly self-contradictory and unsatisfactory nature of the Commission's reasoning – which is sufficient on its own to lead to the annulment of the Contested Regulation – is even more starkly exposed when one considers the German text of the Contested Regulation, where the Commission simultaneously asserts in the fifth recital that the module stage is one of the *wesentlichen* stages while denying in the seventh recital that the module stage is *wesentliche*.

21. For the reasons summarised below HMRC submits the Commission acted within its powers. To the extent the second question referred arises, HMRC submits the assembly of modules from cells is not origin conferring because that process is not a substantial processing or working within the meaning of Article 24.[22]

22. Given the nature of the module assembly process, the test laid down in §19 of *Brother* is applicable, under which module assembly will only be origin conferring if it represents the decisive production stage during which the use to which the component parts are to be put becomes definite and the goods are given their specific qualities. This accords with the sixth and seventh recital to the Contested Regulation.[23] HMRC also submits, if necessary, that the changes at the modules stage are merely presentational.

23. So far as the application of the test in *Brother* is concerned, the use to which the component parts of a module are put is the production of electricity from sunlight as part of a PV system. The specific qualities of modules consist in their ability (derived from their constituent cells)

[22] HMRC has also expressly reserved the right to argue in due course and if necessary that the operation of module assembly in India is not economically necessary within the meaning of Article 24 of the Customs Code, a contention in relation to which the FTT and the Upper Tribunal have not made any findings of fact at this stage.

[23] It is apparent from the English language version of the Contested Regulation that the fifth recital simply refers to "major" steps, and is not intended to state that the legal test of last substantial transformation under Article 24 is met at the modules stage.

to convert sunlight into electricity. That use becomes definite, and those qualities are present, in manufactured cells.[24] It is cells which are able to produce electricity from sunlight, and they are able to do this prior to their assembly into modules.[25] The ancillary criterion of value added is inapplicable because origin is determined by these technical criteria.[26]

24. As regards the central issue of output, Renesola did not dispute before the Upper Tribunal that the only components of a module with the quality of being able to produce electricity from sunlight are its cells. The cells have that quality before they are assembled into modules. HMRC submits that the only material difference between the output of a single cell and a module arises from the fact that a module is an aggregation of cells. The reported 3% efficiency increase in output (which Renesola pointed out to the Upper Tribunal was not achieved by developments in solar technology until after the time the Contested Regulation was made) does not amount to a substantial change.

25. HMRC does not accept that Renesola has shown durability is a 'specific quality' of modules or something required before the use of modules becomes 'definite'. These qualities and use reside in the production of electricity from sunlight after incorporation in a PV system. HMRC respectfully does not accept that adequate explanations or evidence have been provided regarding the operation of PV systems, the use of modules therein or the nature and perspective of the 'users' who incorporate modules into PV systems, to show that the test in *Brother* is satisfied by the modules stage by reason of durability.

26. Furthermore, the Court of Justice has held that the Commission has a margin of discretion.[27] HMRC submits that the Contested Regulation is within that margin, ensuring legal certainty and addressing any problems of multiple economic circumstances arising over time from technological developments (such as the Upper Tribunal's findings regarding the subsequent 3% efficiency gain referred to at paragraphs 12(c) and 24 above).

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[24] Whilst it is accepted that this was in a different legal context, HMRC relies in this regard on the reasoning of the General Court in Case T-158/14 *JingAo Solar C. Ltd v Council of the European Union* ECLI:EU:T:2017:126, §76, §91, §92 §94, §98, §102 and §114.

[25] HMRC also respectfully submits that the fact a cell might be used in another product whose end is not electricity generation, such as an irradiance metre, a light sensitive switch or an auto control device, is nothing to the point. It is the role cells play *in modules* which must be assessed.

[26] *Brother,* §20 and §23.

[27] *Cousin*, §17

D: The Questions referred for a ruling

27. The Upper Tribunal therefore refers the following Questions to the Court of Justice for a preliminary ruling under Article 86(2) of the Withdrawal Agreement and Article 267 of TFEU:-

1. Is Commission Implementing Regulation 1357/2013/EU, to the extent that it purports to determine the country of origin of solar modules manufactured from materials coming from several jurisdictions by ascribing origin to the country where the solar cells were manufactured, contrary to the requirement in Article 24 of Council Regulation 2913/92/EEC (the Community Customs Code), namely that goods whose production involves more than one country 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 and resulting in the manufacture of a new product or representing an important stage of manufacture, and hence invalid?

2. If Regulation 1357/2013 is invalid, is Article 24 of the Community Customs Code to be interpreted as meaning that the assembly of solar modules from solar cells and other parts constitutes a substantial processing or working?

Dated 22 May 2020

The Upper Tribunal (Tax and Chancery Chamber), Mr Justice Marcus Smith and Judge Jonathan Richards

Reference to be sent to the Court Registry of the Court of Justice by email (DDP-GreffeCour@curia.europa.eu) or by post to the Registry of the Court of Justice, Rue du Fort Niedergrünewald, L-2925, Luxemburg, LUXEMBOURG).

List of documents attached to the reference: -

1. The Decision of the Upper Tribunal dated 4 March 2020
2. The Decision of the FTT
3. The decision of HMRC dated 28 December 2016
4. Letter to HMRC from Renesola's solicitors dated 19 May 2017 and attachments
5. The witness statement of Mr Xu Zhongyu dated 23 May 2018, including Annex 1