



[2016] JMSC Civ. 31

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2012HCV05293

BETWEEN	BEVERLEY SINCLAIR SENIOR	CLAIMANT
AND	THE COMMISSIONER OF CUSTOMS & EXCISE	FIRST DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	SECOND DEFENDANT

IN CHAMBERS

Yualande Christopher instructed by Yualande Christopher & Associates for the claimant

Marlene Chisolm instructed by the Director of State Proceedings for both defendants

November 15, 2015 and March 8, 2016

**CUSTOMS – WHETHER COMMISSIONER OF CUSTOMS CAN ALTER
ASSESSMENT – SECTION 19 OF THE CUSTOMS ACT**

SYKES J

[1] When this matter came up for case management, the attorneys quite sensibly agreed that there were no dispute of fact and agreed to place a statement of agreed facts before the court and then apply the law to those facts.

[2] Mrs Beverly Senior is objecting to the Commissioner of Customs & Excise ('the Commissioner') imposing a new assessment on the motor vehicle imported by her after the process for assessment and appeal had been gone through. According to her the Commissioner's action is arbitrary and she is asking the court to declare that present assessment was improper, incorrectly assessed and excessive.

The agreed facts

[3] Mrs Beverly Senior imported a motor vehicle, a Dodge car, from Canada. On arrival the declared value of the car CAD\$3,990.00. It appears that under the customs laws, the importer is permitted to say what the value of the imported car is and support that position with documentation. The Customs rejected this declared value and came up with its own value of CAD\$18,600.00.

[4] The reason for rejecting Mrs Senior's declared value was that 'the declared valued did not mirror previously accepted values, thus revaluation of declared value' (Notice of Valuation dated July 16, 2010).

[5] Mrs Senior was informed of this new value. The procedure adopted by customs permitted her to ask the Valuation Review Department ('VRD') for a review which she did. The VRD valued the car at CAD\$5,045.95. The ground advanced by Mrs Senior at the review was that the 'incorrect mark-up value assigned as well as documents submitted were not considered.' This decision was handed down on August 12, 2010.

[6] It appears that nothing was done by Mrs Senior between after August 12, 2010 when the decision was handed down in her favour until February 2012 when she instructed her customs broker to pay the duties and clear the vehicle.

[7] Unfortunately, the car was sold by the Commissioner at a public auction held February 21 – 22, 2011.

[8] In a letter to Mr Gregory Senior dated August 22, 2011, the Commissioner told him that when a vehicle is being auctioned the value is determined by the Customs Valuation Unit in accordance with the valuation schedule. From Miss Chisolm's

submission it appears that the view is that at auction the Commissioner is not bound by any previous value, however legitimate the process in arriving at that value. He is free to come up with another value. At the auction the vehicle was assessed by the Commissioner at CAD\$15,036.35 and not the VRD's CAD\$5,045.95.

[9] On hearing of the auction and that the duties were calculated on the reassessed value of CAD\$15,036.35 wrote to the Commissioner asking for a review of the re-assessment. She was told that the sale at the auction was final and therefore the request for review could not be granted.

[10] Mrs Senior states that she was never informed of the Commissioner's revaluation.

The submissions and analysis

[11] It was the Commissioner's contention that it is legitimate to sell the car at the reassessed value because Mrs Senior failed to take steps to have the car 'entered' as defined in section 2 of the Customs Act. This meant that since she failed to pay the duties and other costs based on the CAD\$5,045.95, the Commissioner was free to auction the car under section 88 (2) of the Customs Act.

[12] For her part, Miss Christopher took the view that the Commissioner ought to have informed Mrs Senior of his intention to auction the vehicle and should have informed her of his decision to reassess the vehicle so that she could exercise any right to appeal to have the reassessment set aside. It was also submitted that the Commissioner was not free to ignore VRD's valuation in these circumstances.

[13] It will be recalled that it has been said that Mrs Senior failed to have the car entered as defined in section 2 of the Customs Act. Entered in section 2 (1) of the Customs Act is defined as follows:

'Entered' in relation to goods imported, warehoused means the acceptance and signature by the proper officer of an entry, specification by the proper officer of an entry, specification, or shipping bill, and declaration signed by the importer or exporter on

the prescribed form in the prescribed manner, together with the payment to the proper officer by the importer or exporter of all rents and charges due to the government in respect of the goods, and in the case of dutiable goods ... the payment by the importer ... to the proper officer of the full duties due thereon, ...

[14] According to Miss Chisolm, after the VRD's assessment, thereafter it was up to the importer to pay the necessary duties. Mrs Senior should have prepared an entry with the value arrived at by the VRD, pay the duty and goods would be delivered. In this case Mrs Senior failed to do that and under section 88 (2) of the Act, the Commissioner is authorised to sell the vehicle. According to counsel, where goods are deposited in a Queen's warehouse under the provisions of the Act and the goods are not entered within three months of the deposit then the Commissioner may have the goods sold by public auction and deduct the relevant charges including duty.

[15] Miss Chisolm also submitted that any valuation arrived by the VRD would be provisional only. It was also submitted that until the duties were paid the car would be placed in the Queen's Warehouse and may be disposed of within three months of being placed there by public auction.

[16] On the other hand Mrs Christopher relies on section 19. According to her section 19 has a particular scheme and once the Commissioner has committed to that scheme he cannot change without informing the importer.

[17] Section 19 has these provisions.

(1) Where pursuant to the provisions of any enactment for the time being in force, imported goods are required to be entered, the value of those goods shall be determined in accordance with the provisions of the Schedule.

(2) Nothing in the Schedule shall be construed as restricting or calling into question the right of the Commissioner to satisfy himself as to the truth or accuracy of any document or information presented to him for customs valuation purposes.

(3) [Commissioner shall give written reasons, on request, for valuation]

(4) On receipt of the reasons referred to in subsection (3), an importer may –

(a) request a review of the valuation; and

(b) if dissatisfied with the review, appeal to the Taxpayer Appeals Department within thirty days of the date of receiving the Commissioner's decision.

(5)

(6) ...

(8) The Commissioner may, within two years from the date of entry of imported goods, adjust the value accepted by an Officer at the date of entry of such goods, where he discovers that the value accepted by the Officer was incorrect –

(a) based on new information concerning the goods; or

(b) for any other reason.

(9) Where the value has been adjusted pursuant to subsection (8), the Commissioner shall demand the additional duty payable or shall refund the duty overpaid based upon the new value.

[18] Before dealing further with the Act it is important to refer to Miss Christopher's submissions regarding the Schedule to the Act. It was submitted that the entire Schedule is concerned with valuation of goods for customs purposes. As I understood her submissions, the point was that once the Commissioner arrived at a value using the methodology in the Schedule, the importer may object and ask for a review. In the same way that the importer is stuck with value arrived at by the Commissioner unless she asks for a review and follows the process right through to the Revenue Court if necessary, so too is the Commissioner bound by the value produced by the review process unless he has it set lawfully aside. He is stuck with the value just as the importer is stuck with the value for the purpose of calculating duty. Counsel submitted that there is no provision in the statute authorising the Commissioner to alter the value arrived at by the VRD. Miss Christopher informed the court (and this was not dissented

from by Miss Chisolm) that the review process has five persons sitting. The Commissioner was represented as Mrs Senior and both sides submitted their arguments. The VRD gave its decision.

[19] Miss Christopher pointed specifically to paragraph 2 (2) of the Schedule which states that the importer is to make a declaration of value and it 'shall be supported by documentary evidence consisting of objective and quantifiable data that establishes the accuracy of that declaration.'

[20] Paragraph 3 states that where the customs value cannot be determined under paragraph 3 then it shall be determined by proceeding sequentially through paragraphs 4 to 7.

[21] The combined effect of section 19 and the Schedule to the Act is that there is a methodology for determining value and procedure for aggrieved persons to ask for a review of the Commissioner's decision.

[22] Therefore following the methodology laid down in the Schedule, Mrs Senior presented her declaration of value which was CAD\$3,990.00. The Commissioner, acting through the particular customs officer who dealt with Mrs Senior's car, rejected it. Section 19 (2) of the statute allows him to do this. Implicit in counsel's submission is the proposition that at this point in the process, the Commissioner can only proceed to arrive at the value by the methodology laid down in the Schedule. Implicit in her submissions is that he must have done this and that is how he came up with the valuation of CAD\$18,600.00. According to counsel, this methodology of valuation had run its course. The Commissioner cannot go back to it. Miss Christopher submitted that at this point in the process, Mrs Senior's right to ask for a review is relevant. Section 19 (4) gives her that right. Mrs Senior exercised that right. The Commissioner and Mrs Senior both appeared, through their representatives, before the VRD. Both made submissions and presumably supported their respective cases by any written material that was relevant. The VRD handed down its decision. Mrs Senior has accepted it albeit that the VRD's value was higher (CAD\$5,045.95). The Commissioner has not challenged this value in anyway. Therefore, this is the value which binds both parties. If

Mrs Senior was dissatisfied section 19 (5) tells her that she can appeal to the Taxpayer Appeals Department. If she was still dissatisfied she could go to the Revenue Court.

[23] Miss Chisolm also submitted that when the car is to be sold a value has to be arrived at. The value produced for customs duties by the VRD was provisional only and until Miss Senior acted by completing the process that value was not final. The court has not seen any provision in the statute that says what Miss Chisolm says.

[24] Miss Christopher submitted that a statutory body has no inherent rights that a private natural citizen has. Any power exercised by a statutory creation must be found in the statute either explicitly or implicitly. She relied on a number of cases. For present purposes the court will refer to just one. That is **Robinson v Daisy Coke** Claim No 81 of 2002 (unreported) (delivered July 31, 2007). That was a case of judicial review but the principles of law stated do not vary according to whether it is judicial review or not. Jones J cited dictum of Laws J in **R v Somerset County Council ex parte Fewings** [1995] 1 All ER 513, 514 which was that 'a public body may only act in fulfilment of the duty cast upon it by statute, and has no possession of legal rights, akin to those of a private person, which are truly its own.'

[25] Jones J also held that it 'is a fundamental principle of public law that there is no unfettered discretion' (para 24). Thus, where a discretion is conferred by a statute, 'but does not say how that authority is to be exercise, it is the duty of the courts to construe the language of the statute against the background of the objects and policy of the statute as a whole' (para 24).

[26] The fact that section 19 (8) of the Customs Act empowers the Commissioner to adjust the value accepted by the officer up to two years after such value was accepted is not a reason for concluding that the Commissioners discretion is unfettered. Section 19 (8) sets out two preconditions for the exercise of that power. The first is new information coming to light and the second is for any other reason. This second ground seems unlimited but it really is not. The Commissioner could not adjust the value based on a coin toss or a visit to a soothsayer or as a result of consulting the stars or gazing at the heavens.

[27] The Commissioner did not indicate why the value was adjusted for the purpose of calculating the duty after the Commissioner and Mrs Senior had appeared before the review panel and by their conduct, both abided the decision of the panel.

[28] Miss Chisolm could not point to any statutory provision or case law that permitted the Commissioner to ignore the result arrived by the dispute resolution mechanism set up by the statute. Her best response was that Mrs Senior had not completed the process by 'entering' the vehicle and paying the duty. So what? If she did not follow through then the statute says that the car can be deposited at the Queen's Warehouse and sold after the lapse of a particular period of time and from the proceeds of sale, the duty and other lawful charges are deducted but that does not mean that the Commissioner is free to disregard the value arrived at for duty purposes by the VRD.

[29] Miss Chisolm was not able to point to any provision in the statute that permits an upward adjustment in value for duty purposes after it was determined by the VRD merely because the importer had not followed through on the paper work. The remedy is sale and deduction from the sale price of the duties and other lawful charges and not an increase in value.

[30] It would seem to me that Miss Christopher is on good ground. The statute has established a methodology for determining the duty payable. That mechanism was gone through. A value was established. It has not been said that after that value was determined it was apparent that Mrs Senior had misrepresented any fact to the VRD. All that has happened is that the car was not cleared within three months.

[31] Miss Chisolm sought to say that a value had to be arrived at for the purposes of the auction. It may well be that the market price of the car at auction is greater than the value determined by the VRD but that is not a basis for saying that more duties are payable merely because the importer did not clear the goods in the required time. It seems to this court that duties cannot be increased on this basis without some statutory authority. The provisions relied by Miss Chisolm do not have that effect. It seems to this court that what Miss Chisolm was relying on was the practice of customs but that practice must be supported by the statute.

[32] The court observes that the pleaded defence of the Commissioner has not allegations of fact which points to any lawful justification for what he did. Apart from a few non-essential differences, the Commissioner and Mrs Senior's pleaded cases are substantially the same except that the Commissioner points to section 88 (2) as the lawful basis for auctioning the car. Mrs Senior has not challenged the Commissioner's power to sell the vehicle. Indeed, she has accepted that the car was lawfully sold. Her complaint is that he increased the valuation for duty purposes without lawful justification and consequently his higher deduction for duty is unlawful. The court agrees with Mrs Senior.

[33] Although section 19 does not establish the VRD in name it is obvious that the mechanism set up wanted to avoid the appeal being from Caesar to Caesar. Thus the Commissioner would appear before the body as a 'litigant' in the same way that an importer or an exporter would. The structure of section 19 permits the importer or exporter to take the case to the Taxpayer Appeals Department and ultimately to the Revenue Court. What would be the point of all that if they could not issue a decision binding on the Commissioner? In any event, no issue has been raised concerning the legality of the establishment of the VRD and so this court proceeded on the basis that it was lawfully established.

[34] This court concludes that there is no lawful justification for the Commissioner to use a higher value for the purpose of calculating duties than that found by the VRD unless that value found by the VRD has been set aside. From the scheme established by the statute the VRD has the authority to vary any value arrived by the Commissioner if that were not so then such a body would be pointless.

Disposition

[35] Mrs Senior is entitled to the declaration that the duties in fact calculated by the Commissioner based on the value for the purposes of auction was excessive and the valuation for duty purposes that ought to be used was that arrived by the VRD.

[36] Mrs Senior claimed general damages but that was proved and those damages are refused.

[37] Mrs Senior has claimed interest. She did not claim interest at a commercial rate. Interest is granted under the Law Reform (Miscellaneous Provisions) Act at a rate of 6%. The 6% is considered reasonable in all the circumstances of this case and in particular that a commercial rate of interest was not sought. The 6% is on the balance of the sale prices left after duties calculated on the value arrived by the VRD is deducted as well as other lawful charges. Interest at 6% runs from the date the next business day after the car was sold to the date of judgment. Thereafter the judgment debt attracts interest at the rate of 6%. Costs to Mrs Senior to be agreed or taxed.