

CATCHWORDS

CUSTOMS - anti-dumping - clear float glass from Indonesia and China - calculation of export price - goods shipped directly from manufacturer - commission on sale by intermediary - whether commission should be deducted as a matter arising after importation - identity of importer

Customs Act 1901 (Cth) ss.269T (1), 269 TAB (1)

Pilkington (Australia) Limited v Anti-Dumping Authority, Minister of State of Science and Small Business, Asahi Glass Company Limited and P T Asahimas Float Glass Co Limited
No. NG 811 of 1992

Judge: Heerey J
Date: 14 September 1994
Place: Adelaide (heard in Sydney)



IN THE FEDERAL COURT OF AUSTRALIA)

NEW SOUTH WALES DISTRICT REGISTRY)

GENERAL DIVISION)

No. NG 811 of 1992

B E T W E E N:

PILKINGTON (AUSTRALIA) LIMITED

Applicant

- and -

ANTI-DUMPING AUTHORITY

First Respondent

- and -

MINISTER OF STATE FOR SCIENCE AND SMALL BUSINESS

Second Respondent

- and -

ASAHI GLASS COMPANY LIMITED

Third Respondent

- and -

P. T. ASAHIMAS FLOAT GLASS CO LIMITED

Fourth Respondent

JUDGE: Heerey J

DATE: 14 September 1994

PLACE: Adelaide (heard in Sydney)

MINUTE OF ORDERS

The Court orders the application will be dismissed with costs, including reserved costs.

NOTE: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules

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REASONS FOR JUDGMENT

The applicant attacks a number of decisions made by the Anti-Dumping Authority (ADA) in its report number 81 dated 10 September 1992 and the acceptance of the recommendations in that report by the Minister of State for Science and Small Business on 15 October 1992.

The report concerned the export of clear float glass (CFG) from a number of countries including Indonesia and the Peoples Republic of China.

Indonesia

P T Asahimas Flat Glass Co Limited (Asahimas) is the only Indonesian producer exporting CFG to Australia. Australian buyers place orders for CFG with an Australian company Overseas Glass Agencies Pty Limited (OGA) which is based in Melbourne. OGA places orders with Asahi Glass Company Limited in Singapore (Asahi Singapore), a branch of the Asahi Glass Company Limited of Japan. Asahimas is partly owned by Asahi whose strategy is to export glass from companies partly owned by it in Indonesia, the Philippines and Thailand and co-ordinate these exports through trading agencies in Singapore or Hong Kong. The CFG is shipped directly from Asahimas in Indonesia to the ultimate Australian customer, for example, Westgate Glass Pty Ltd of Canning Vale, Western Australia.

Asahimas charges Asahi Singapore for cost and freight, with payment to be made within 15 days after invoice date. It advises Asahi Singapore of the shipping date to Australia. Its invoice to Asahi Singapore refers to the CFG as being "sold by order and for account and risk of" Asahi Singapore.

Asahi Singapore invoices OGA. Again the invoice states that the glass is "sold by order and for account and risk of" OGA. The invoice in the example mentioned states that the CFG is shipped from Jakarta to Fremantle.

The price invoiced by Asahi Singapore to OGA is the Asahimas price plus a percentage for Asahi's commission on the sale.

OGA then invoices the Australian buyer.

In calculating the "export price" of the goods the ADA deducted the commission charged by Asahi Singapore as being "a charge in respect of any other matter [i.e. other than the transport of the goods after exportation] arising after exportation" within the meaning of s.269TAB (1)(a) of the *Customs Act 1901* (Cth) (the Act).

The first complaint of the applicant is that the ADA failed to take into account relevant considerations, namely that the price determined under s.269TAB (1)(a) has to be a price payable by the "importer" and s.269T(1) relevantly defines "importer" to mean "the beneficial owner of the goods at the time of their arrival within the limits of the port or airport in Australia at which they have landed". The applicant argued that the material before the ADA did not enable it to determine when property passed between the various parties and that there was apparently no investigation or documentation to indicate when the parties intended property in the goods to pass. This argument appeared to proceed on the assumption that the ADA had found that Asahi Singapore was the importer. The applicant's submissions urged that there was "a likelihood in the absence of evidence to the contrary ... OGA and not Asahi Singapore was the 'importer'".

The attack is misplaced. A fair reading of the report indicates that the ADA did treat OGA as the importer. Thus at

par.5.4.2 it is stated

"The Authority notes that while the glass is shipped directly to purchasers in Australia the export invoice drawn up by the exporters in those countries are directed to Asahi trading agencies. The agency then invoices the Australian purchaser. The invoice by the Asahi agency reflects the original export price and an amount for the commission charged by the agency."

The reference to invoicing "the Australian purchaser" can only mean OGA. Certainly there is no suggestion in the report that Asahi Singapore was considered to be the importer.

The applicant's case is an attempt to introduce legal complexity and puzzlement into a straight forward commercial transaction. The invoices are consistent with a sale by Asahi Singapore to OGA and a shipment of the CFG itself by the Indonesian manufacturer to the ultimate Australian customer, in the example given Westgate Glass Pty Ltd in Canning Vale. The only reasonable conclusion is that OGA is the importer.

It was then argued that, assuming OGA to be the "importer", the ADA and the Minister erred in law in determining that the Asahi Singapore commission was a matter arising after the exportation of the goods. In my opinion the commission was such a charge. "Exportation" in s.269TAB (1)(a) means, in the circumstance of the present case, the physical departure of the goods from Indonesia. It was after that charge that the Asahi Singapore commission arose. It seems reasonable to infer that if the goods had not been exported from Indonesia, in the sense mentioned, no charge would have been payable to Asahi Singapore.

Peoples Republic of China

Several producers of CFG in China export to Australia. The largest is Guandong Float Glass (GFG). An Australian firm George Fethers & Co (Fethers) acts as a selling agent for GFG in Australian. Australian buyers place orders with Fethers which then passes the orders to GFG. GFG invoices Australian customers at a landed duty paid into store (LDPIS) price and purchasers make payments direct to GFG. Fethers is responsible for clearing the CFG through Australian customs and shipping it to customers, but does not purchase it at any time.

GFG pays two commissions to Fethers. The rate of commission was a matter of confidential evidence. The purpose of the first commission was as "complete compensation for services as an independent sales representative" and the second for

"additional management services provided by Fethers involving free inter store delivery to the customers ... there will be no compensation paid on C & F shipments to customers."

The ADA assessed export prices of such sales by GFG under s.269TAB (1)(c) of the Act on the basis that GFG was both the exporter and the importer of the goods. The ADA treated the commission paid by GFG directly to Fethers as a cost incurred after the exportation of the goods. The ADA said in its report par.5.4.2

"The FOB values of these exports were assessed by deducting the cost of overseas and Australian freight, marine insurance, customs duty, port and handling charges, the commission paid to Fethers and other costs incurred after exportation of the goods from the LDPIS price."

The applicant challenges the first of the two commissions as something arising before exportation and not after. However, in this instance, once it was determined that the goods were not exported to Australia "otherwise than by the importer" (a finding which is not challenged by the applicant) paras. (a) & (b) of s.269TAB (1) did not apply. The matter fell to be determined under par.(c) which provides:

"(c) In any other case - the price that the Minister determined having regard to all the circumstances of the exportation."

It could not be said that it was unreasonable for the ADA to treat both commissions in the way it did. Indeed that was not the case of the applicant, which was confined to an argument that the commission did not arise after exportation. The way the ADA treated the matter was a rational one in that it sought to arrive at the equivalent of an FOB value. As such, both lots of commission paid to Fethers were logically deductible. The question remained a matter of fact for the ADA to determine.

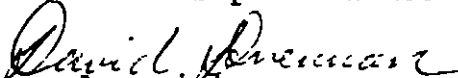
Conclusion

The application will be dismissed with costs including reserved costs.

7.

I certify that this and the preceding six (6) pages are a true copy of the reasons for judgment of his Honour Mr Justice Heerey.

Dated: 14 September 1994


Associate

Appearances

Counsel for the applicant:	Mr B Walker SC and Mr M Speakman
Solicitor for the applicant:	C G Gillis & Co
Counsel for the respondent:	Mr A Robertson and Ms N E Abadee
Solicitor for the respondent:	Australian Government Solicitor
Date of hearing:	30 June 1994



JUDGES' CHAMBERS
FEDERAL COURT OF AUSTRALIA
450 LITTLE BOURKE STREET
MELBOURNE, 3000

14 September 1994

Sonia Cornale
Federal Court of Australia
Principal Registry
Law Courts Building
Queens Square
SYDNEY NSW 2000

Dear Sonia,

Pilkington (Aust) Ltd v Anti-Dumping Authority & Ors

No. NG 811 of 1992

Pilkington (Aust) Ltd v Anti-Dumping Authority & Ors

No. NG 715 of 1993

H J Heinz Company Australia Ltd v Canned Food Information
Services Inc. & Ors

No. NG 707 of 1993

I enclose copies of judgments delivered by his Honour Mr Justice Heerey in the above matters on 14 September 1994.

A diskette record of the catchwords, minutes and reasons for judgment are also enclosed.

These judgments are for general distribution.

Regards,

David Brennan
Associate to Heerey J

enc.