



Case Number: TC/2022/00612

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Heard in person in London:

Appeal reference:

Anti-dumping duty - whether factory in Thailand for production of aluminium foil breached the anti-avoidance rule in Article 33 Commission Delegated Regulations (EU) 2015/2446 - application of Harley Davidson - whether the process in the factory was the last, substantial, economically-justified processing or working for Article 60 UCC

Heard on: 14-18 October 2024

Written submissions on: 13 December 2024, 6
January 2025 and 20 January 2025

Judgment date: 22 September 2025

Before

**TRIBUNAL JUDGE BOWLER
MS SONIA GABLE**

Between

WM MORRISON SUPERMARKET LIMITED Appellant

and

**THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS
Respondents**

Representation:

For the Appellant: Mr Fergus Randolph KC of Counsel, instructed by Squire Patton Boggs (UK) LLP

For the Respondents: Ms Joanna Vicary of Counsel, instructed by Louise Kolmer of Customs, Excise & Environmental Taxes Litigation

DECISION

INTRODUCTION

1. HMRC has sought to impose anti-dumping duty (“ADD”) on the Appellant in relation to the imports of household aluminium foil from Thailand between 22 March 2018 and 19 November 2020. HMRC maintains that the foil originates in China; that a Thai factory was set up by the exporter to avoid ADD; and the processes carried out in Thailand are insufficient to change its origin to that country because they are not the last, substantial, economically-justified processing in making the aluminium foil.

SUBMISSIONS MADE AFTER THE HEARING

2. The Appellant sought permission to make submissions after the hearing in relation to the Court of Justice of the European Union’s (“CJEU”) decision in the Case c-297/23 P: *Harley Davidson Europe Ltd & Others v. European Commission*, both parties having previously addressed the Advocate General’s opinion in that case before us. Permission was granted for both parties to exchange submissions and we address those in this decision.

THE ASSESSMENTS UNDER APPEAL

3. On 10 June 2021, HMRC issued a Post-Clearance Demand against the Appellant in the sum of £5,073,187.80, in relation to imports of household aluminium foil from Thailand between 22 March 2018 and 19 November 2020.

4. The Appellant sought an independent review of that demand on 8 October 2021. Further to that review, HMRC issued a Review Conclusion letter dated 17 December 2021, pursuant to which the amount to be levied was varied to £4,758,276.97. The reduction in the sum sought from the Appellant was on the basis that the initial sum had included imports that were more than three years old and were therefore ‘timed out’ under the relevant legislation.

5. On 14 January 2021 the Appellant lodged a Notice of Appeal against the decision of 17 December 2021. The sum of £4,758,276.97 comprises ADD of £3,961,194.52 and VAT of £793,046.16. The Appellant disputes the ADD. It is accepted that import VAT is due on the value of goods imported into the UK. However, as the ADD is in dispute the quantum of the VAT remains to be determined.

JURISDICTION

6. The rules in relation to origin applicable to the present appeal are set out in the Union Customs Code, the provisions in relation to which are set out in Regulation (EU) No 952/2013, as amended (the “UCC”).

7. 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 s13A of the Finance Act 1994 (“FA 1994”) which sets out the meaning of a “relevant decision”.

8. The decision made by HMRC with which this appeal is concerned is a “relevant decision” in relation to which the right of appeal to the Tribunal is conferred by s16 FA 1994. Section 16(5) sets out the Tribunal’s powers on such an appeal which include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal. Therefore this Tribunal has a full appellate jurisdiction in these appeals.

9. The Tribunal’s jurisdiction is not supervisory. We are not making a decision as to the reasonableness of HMRC’s processes and/ or decision making in this case. Although this

conclusion was initially challenged by Mr Randolph, during the course of the hearing he accepted the position as we have stated.

THE GROUNDS OF APPEAL

10. The Notice of Appeal sets out grounds of appeal which can be summarised as follows:

- (1) HMRC's review decision incorrectly took into account evidence which had not been before the original decision maker. In addition, the grounds of appeal challenge the weight given to the "OLAF" decision (see below) and social media postings made by, and in relation to, the exporters of the aluminium foil;
- (2) HMRC's review decision failed to give adequate weight or indeed any consideration to many aspects of its representations, in particular in relation to Thai authority certificates of origin;
- (3) HMRC incorrectly interpreted and applied the rules for establishing origin. HMRC had also wrongly relied upon the conclusions of OLAF who had not visited the Thai factory;
- (4) HMRC incorrectly applied Article 33 of the Commission Delegated Regulation; and
- (5) The Appellant's rights of defence were infringed when HMRC had taken into account evidence from OLAF which had not previously been provided to the Appellant.

11. By the time of the hearing Mr Randolph's skeleton focussed on the substantive issues concerned with the application of the rules of origin and the procedural grounds that HMRC's decision was flawed, that it failed to take into account the Appellant's evidence and that it breached the Appellant's rights of defence.

12. During the course of the hearing Mr Randolph accepted that the reasonableness of HMRC's decision and whether it was flawed in its approach to evidence were not matters before us. The hearing focussed on the substantive issues concerned with the rules of origin.

BURDEN OF PROOF

13. Section 16(6) FA 1994 provides that in relation to a relevant decision the burden is on the Appellant: "to show that the grounds on which any such appeal is brought have been established." Therefore, the burden of proof lies with the Appellant. The ordinary civil standard of the balance of probabilities applies.

EVIDENCE

14. The written evidence was contained in hearing bundles A-I together with some additional documents provided at or shortly before the hearing.

15. We heard oral evidence from:

- (1) Mr Liu Wei, the General Manager of Loftan (Thailand) Co Ltd, who manages the operations of the factory in Thailand;
- (2) Ms Karena Hung an employee of the Appellant who is currently Senior Buying Manager – Home and Stationery;
- (3) Mr Timo Pulkkinen, lead investigator for the European Anti-Fraud Office's ("OLAF") investigation into the origin of aluminium foil rolls exported from Thailand by Loftan (Thailand) Co Ltd, Wohler Household Products (Thailand) Co Ltd and other companies and imported into the EU; and
- (4) Mr Alexander Bolton, the officer of HMRC who issued the decision dated 10 June 2021.

16. We also had written evidence from Dr Robert Maclean (partner of the Appellant's solicitors acting in this case) which was taken as read. He had travelled to the Thai factory to collect samples of aluminium foil from before the Thai processing and afterwards which were provided to us. He sets out what he saw at the factory when he collected the samples. That evidence has not been challenged by HMRC. Indeed, the processes are not in dispute. The dispute concerns the extent and effect of the processes.

Mr Liu

17. Mr Liu gave evidence by way of video link. We were satisfied that the link worked well and that Mr Liu was able to provide his evidence satisfactorily and be cross examined effectively. Although Ms Vicary appeared to suggest in submissions that reduced weight should be given to Mr Liu's evidence because it was by way of video link we find no basis to do so purely because of the format of his evidence.

18. Unfortunately, however, the Appellant's representatives appeared at the hearing with their own interpreter for Mr Liu's evidence. This is not acceptable procedure. Where an interpreter is needed a request must be made in advance of the hearing so that the Tribunal can provide an independent interpreter.

19. It was extremely fortunate that in this case an interpreter could be organised by the Tribunal on the day and the hearing continued after only a short delay. However, when the Tribunal asked Mr Liu to confirm that his Witness Statement had been read to him in Mandarin before he signed it, Mr Liu told us that he told someone from the sales team of the business what he wished to say and that was translated by that person into English for the Statement. It had not been read back to him in Mandarin. It was then agreed with both parties that the interpreter would read the entirety of the Witness Statement to Mr Liu in Mandarin so that he could confirm its contents or amend if necessary. Mr Liu commented that the Witness Statement did not express what he wanted to say clearly. He asked to add one clarification to the Witness Statement which we have taken into account.

20. We reduced the weight given to the evidence of Mr Liu for the following reasons:

(1) Mr Liu said that he told the person who had asked him to write a witness statement (Feng Pan) what he wanted included in the statement. That statement was then prepared by Feng Pan. However, it was never read back to Mr Liu in Mandarin. The first time it was translated back to him was at the hearing.

(2) Although Mr Liu affirmed the Witness Statement with only one small amendment, cross examination showed (as we explain below) that the Witness Statement included elements which Mr Liu could not properly explain or which his oral evidence showed to be incorrect:

(a) For example he was asked about a statement that social media postings had been made in order to make the company's aluminium foil range distinguishable from other offerings by Far East manufacturers and suppliers. His reply was that there was no difference in what the factory offered.

(b) Mr Liu's comments in his Witness Statement on social media posts saying: "I have read them..." but at the hearing he confirmed that he had not read them. They are written in English and had not been translated for Mr Liu. Instead, in cross examination he said that he was told what the postings said by the same salesperson who asked him to provide a Witness Statement.

(3) Mr Liu's evidence was substantially based on what he had been told by others in the business, in particular, the sales force:

(a) He said that decision to open the factory in Thailand was driven by customer requests to set up supply operations closer to their home markets, referring to markets in the USA, India and Vietnam. However, he could not explain in cross examination why customers in India and Saudi Arabia would ask for a factory to supply them from Thailand when the goods were previously supplied from a factory in Qingdao in China (a city with a large port from where goods are easily exported). He said he was not involved and therefore could not explain. It was what he had been told by salespeople;

(b) Mr Liu was not involved with the Thai operations when they started. When asked what percentage of the product went to Europe in the first year he said he did not know as he was not at the factory then. However, in his Witness Statement Mr Liu said that the European market was not a very significant one when the factory was started. When pressed on this in cross examination Mr Liu said he was told this in meetings with the salespeople;

(c) Mr Liu had limited basis on which to provide evidence as to the parent company's reasons for setting up the Thai factory. He told the Tribunal that he learnt the reasons from daily conversations with the salespeople in China. He was not involved in the decision to open the factory in Thailand in 2017.

21. There is no rule against hearsay in this Tribunal. However, we are concerned that in various respects his Witness Statement was written on the basis that matters are from Mr Liu's own knowledge or experience rather than the reality which was that it was an expression of what others had told him. At the very least this should have been made clear in his Witness Statement.

22. It is notable that the same person who asked him to write the Witness Statement also provided him with much of the information contained therein and wrote the Witness Statement in English for him. The obvious question is why that person did not give evidence himself. Although Mr Liu said that that person had left the company, that was only after the date of Mr Liu's Witness Statement.

23. Mr Liu was entirely competent to give evidence about the day to day operation of the factory of which he was general manager although that was not in fact in dispute before us. We have made various findings about the factory's operation relying upon his evidence. However, he was not in the same position of knowledge to describe the purpose of setting up the Thai factory.

Ms Hung

24. Ms Hung explained that she has a chemistry degree and relied on that to proffer her opinion about the processing in Thailand. However, she is not an expert witness and to the extent that her evidence strays into the areas covered by the two experts we give it reduced weight. Furthermore, other opinion evidence offered by her as to whether the processes in Thailand are substantial are given no weight. That is a matter for this Tribunal to decide.

Mr Pulkkinen

25. Mr Pulkkinen gave evidence about the OLAF investigation. The history of that investigation is set out in our findings of fact. However, Mr Pulkkinen expressed views as to whether the Thai factory was economically justified or the processing undertaken there was substantial. Those are matters for this Tribunal to determine and his evidence regarding his views on them is given no weight by us.

Mr Bolton

26. Mr Bolton set out the background correspondence to his decision and the basis on which he reached his conclusions in his Witness Statement. Little, if any, of that has relevance for this decision. To the extent Mr Bolton expresses opinion about the Thai processing and the application of the law that is disregarded by us.

27. In cross examination Mr Randolph sought to probe what was before Mr Bolton when he made his decision. We made clear that we were not considering the reasonableness of Mr Bolton's decision.

Absence of evidence

28. As Ms Vicary submitted, a Court or Tribunal may draw adverse inferences from a party's failure to deploy forms of evidence which it could reasonably have been expected to adduce. So "a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action", unless a credible reason is given for the witness's absence: *Wisniewski v Central Manchester HA* [1998] PIQR P324 at 340. In this case there was evidence missing from those who were involved with the decision to move the processes to Thailand. Evidence of the Thai manufacturer's sales in Thailand was also absent.

29. Mr Randolph submitted that Mr Liu had offered to obtain evidence about Thai domestic sales. He had said that he had not been asked to do so before. We are clear that an offer to provide missing evidence at the hearing is too late. The Appellant, which is legally represented, has had ample time to provide all relevant evidence on which it seeks to rely. If it seeks to rely on Lofton saying that the Thai factory was driven by Thai local demand it should have considered how best to evidence that before the hearing.

30. Even without drawing adverse inferences there was quite simply a paucity of evidence in relation to various key elements of the Appellant's case; notably the purpose of the setting up of the Thai factory. We note that in the grounds of appeal the Appellant challenges HMRC's reliance on the social media posts saying that HMRC did not examine any internal corporate documentation or company records even though they may have been available. The Appellant itself therefore alleged paucity of evidence relied upon by HMRC but then did little to remedy the gap.

31. In this case there is an absence of evidence in particular from a member of management who was involved with the decision to open the Thai factory. To a lesser extent we also noted that we would expect sales data showing the proportions of sales to Europe to be easily provided and indeed sales local to the Thai operation which are said to have driven the relocation. Instead, we are left, at best, with the limited evidence of a person who is not in the sales team but has been provided with some information from the sales team.

32. In relation to the evidence that the relocation to Thailand of some of the process "was driven by customer requests to set up supply operations closer to their home markets" there is very little explanation of this statement. The aluminium was transported to the Thai factory for minimal extra processing to take place (at least as a proportion of the overall processing) and was transported as huge, heavy rolls. Mr Liu said that: "We had a talk with a few clients in Thailand, and we learned their demand, and we thought there could be a big market there, and we were confident that we could develop it, and some clients from neighbouring countries also raised these issues." However, he was not involved in any such discussions as he told us that he was not involved in the original setting up of the Thai factory. We consider that Mr Liu's vague assertions provided insufficient explanation of how the opening of the factory satisfied customer demands in any way.

33. There is no requirement for supporting evidence but the more implausible a statement is the more the Tribunal can expect to see further evidence to support it. This is a particular issue with Mr Liu's evidence about benefits to customers in India and the USA from setting up the Thai factory.

34. Mr Randolph submitted that if HMRC was saying that account should be taken of the fact that Mr Liu was called to give evidence when he was limited in addressing some of the pertinent matters, the Appellant similarly should be able to say that account should be taken of HMRC's failure to call the reviewing officer to give evidence. We do not agree. The burden of proof is on the Appellant. HMRC are not required to prove the basis of their decision making. As Mr Randolph accepted in the hearing, we are in effect standing in the shoes of the decision maker to make the decision based on all the evidence before us. To be clear that evidence does not include the opinion of Mr Bolton as to how the law applies.

35. The parties rely upon expert evidence from Professor Nicola Symonds for the Appellants and Mr Vincente Martin for HMRC. Both experts also gave evidence orally and were cross-examined.

36. We have fully considered those opinions and we address their evidence more fully later in the decision. However, we note at this point that:

- (1) Their qualifications as experts were not challenged by the parties;
- (2) Mr Martin was not cross-examined by Mr Randolph;
- (3) The experts were substantially in agreement. Their disagreement centred upon the microscopic changes to the foil as a result of annealing. We address these differences later.

FINDINGS OF FACT

Background

37. The foil was declared on import by the Appellant as originating in Thailand having been exported by Loften (Thailand) Co. Ltd ("Loften") and Wohler Household Products (Thailand) Co. Ltd ("Wohler"). Those two companies belong to the wider "Loften Group" operating from the same premises in Rayong, Thailand.

38. It is an agreed fact that Loften and Wohler are companies whose management is exclusively based in China; it is they who control both the Chinese and Thai operations involved in manufacturing the aluminium foil with which this case is concerned.

39. Before May 2017, Loften/Wohler manufactured the aluminium foil bought by the Appellant entirely in China. The Appellant was buying directly from the Chinese factory.

40. In May 2017, the Loften Group moved the final stages of production to Thailand.

Social media descriptions of the move to Thailand

41. Wohler's website - en.wohler.com.cn – in an article published on 31 May 2017 (captured on 29 January 2020) described the 'Grand Opening of Wohler Thailand Factory' on the company's webpage in the following manner:

'In order to response (sic) the important instruction of President Xi's 'The Belt and Road' promote the globalization of the company and serve its customers better, also eliminate the anti-dumping rate for European and Indian regions, wohler group invested and set up wohler Household products (thailand) ltd in 2016. After a year of planning and preparat (sic) Wohler thailand co. opens in May 26 2017 which marks an important step in the globalization strategy of Wohler group.'

42. A screenshot taken by Timo Pulkkinen from the LinkedIn page of Qingdao Wohler Household Products Co. Ltd says:

“Thailand factory is established for eliminating anti-dumping rate of European and Indian markets.”

43. A Facebook post of 31 October 2017 describes the Thai factory in exactly the same terms.

44. On a buyer-to-buyer website www.made-in-china.com in a post from on or before 11 April 2017 the following was said about the Thai factory:

“We establish this factory so that to eliminate anti-dumping rate.”

45. On the website tigerhuang923.en the following was said about the Thai factory:

‘Wohler has two factory each located in Qingdao, China and Thailand, with high educated staff working at factory. to solve problem of anti-dumping duty, we build another factory in Thailand.

46. We were asked by Mr Randolph to take into account Mr Liu’s evidence that only 30% of the Thai factory’s goods are exported. However, when asked to clarify how he knew this Mr Liu said that of 1000 tons produced only 300 tons were exported. He did not say whether that was the current position or the historic one. We were given no basis on which to assess the level of exports in the relevant period of this dispute. Furthermore, we have reduced the weight given to Mr Liu’s evidence for the reasons we have explained above. Mr Randolph confirmed that he did not challenge the reliability of the screenshots and we are satisfied that there is no reason to reduce the weight of that evidence.

47. We therefore find that the evidence of the screenshots carries more weight than Mr Liu’s statements about exports and therefore we find as a matter of fact that the Thai factory was set up to “eliminate anti-dumping duty” otherwise imposed in Europe and India.

The processes involved in making aluminium foil

48. The table below summarises the Lofton Group processes involved in changing the raw aluminium ingots into household aluminium foil with the disputed process of annealing highlighted in bold.

Description	Operational cost %	Capital Cost USD	Location
Melting of raw ingots and holding in furnaces	15%	5 million	China
Casting and metal treatment	18% (twin roll casting) or 3% (DC ingot casting)	5 million	China
Ingot sawing and scalping	N/A	N/A	China
Homogenising, hot flat rolling and hot coiled rolling	15%	200-400 million	China
Cold rolling, edge trimming and inter annealing	27%	28 million	China
Foil rolling, doubling and pack rolling	20%	15 million	China

Separation and slitting	1.7%	3.5 million	Thailand
Final annealing	1.5%	0.5 – 1 million	Thailand
Rewinding onto tubes and boxing	2%	1 million	Thailand

49. The processes in Thailand therefore account for only 5% of the overall cost of production. The annealing alone is only 1.5% of the cost.

50. Loften Thailand certified that the value added in Thailand was over 40%. However, there is little further explanation of this statement.

51. The steps involved in the process are not in dispute. It is also agreed that the last stage completed before receipt of the foil in Thailand was the double foil rolling stage such that the material became:

- (1) 8011/H18 aluminium alloy of 7-21µm thickness (1 µm = 1/1000mm);
- (2) Within BS-EN 546-2:2006.

52. It is agreed that the annealing oven chambers changed the temper of the foil from H18 to H0 and removed to some extent the oil present from foil rolling. The foil remained within BS-EN 546-2:2006.

53. We note that British Standard BS-EN 546-2:2006 specifically envisages household foil of both H18 and 0 temper.

54. We rely on Mr Liu's evidence about the operation of the factory to find that the annealing process in Thailand takes about 30 hours. We have no evidence regarding what proportion of the total production time that constitutes.

The Thai factory processes

55. The machinery situated within the Thai factory (at the time in question) was:

- (1) One Separator ('Vertical rewinding machine'), capable of separating doubled foil, slitting it into narrow strips with the correct width and rewinding onto cores in a shared large central shaft;
- (2) Two Annealing oven chambers, capable of heating and holding the sets of rolled foil at elevated temperatures, thereby annealing it, changing the temper from H18 to O and also removing to some extent the oil present from foil rolling;
- (3) Three Rotomac rewinding machines, capable of rewinding the foil onto domestic sized cardboard tubes;
- (4) Two Rotomac automatic packing machines, capable of individually boxing up the final domestic foil product.

56. The processes that were carried out in the Thai factory were:

- (1) Separation and slitting (rewinding);
- (2) Final annealing;
- (3) Rewinding onto tubes and boxing.

57. The input to the Thai factory was:

- (1) Double as-rolled coil at rolling mill width;
 - (2) Unseparated foil rolled aluminium (typically 7-21 µm thick);
 - (3) Consistent with material EN AW 8011 alloy H18 within BS EN 546-2:2006
58. The output of the Thai factory was:
- (1) Separated to a single strip and slit to a width of 30mm;
 - (2) Described as Domestic sized rolls (cardboard wound and boxed);
 - (3) Foil rolled aluminium (typically 7-21 µm thick);
 - (4) Consistent with material EN AW 8011 alloy O within BS EN 546-2:2006;
 - (5) Reduced residual oil level to unspecified degree of wettability.
59. The parties agree that the separation, slitting and rewinding are not relevant processes for this case because of the application of Article 34 UCC DA (see below).
60. The relevant process for this appeal is the annealing in which the temper of the foil changes from H18 to 0.

The nature of the annealing changes

61. Prof Symonds said that “the foil material leaving the Thai factory (at the time in question) had significantly different metallurgical and mechanical properties than the foil entering the factory.” However, in cross examination it became clear that the significant changes were at microscopic “sub-granular” level. They can only be seen through an electron microscope. When measuring the changes, the size of changes is at a level measured in microns (µm) (1 µm = 1/1000mm).
62. The experts have agreed that the annealing leads to some element of recrystallisation – Mr Martin described this as “partial recrystallisation of the material to a level that can be considered 0 temper with some change in microstructure”. Prof Symonds confirmed at the hearing that she agreed with that description.
63. It is agreed by the parties that the temper of the foil has changed from H18 to 0. That means it has become softer and more ductile or pliable.
64. Mr Martin said that the change in metallurgical properties is consistent with what would be expected from an annealing process.
65. We were provided with two samples of the foil: one from before the Thai annealing and one from after that process. To look at, the samples appeared to be identical. Both pieces were of aluminium foil of thickness not exceeding 0.2mm – in accordance with HS 7607.
66. We were invited to scrunch the foil and it was noticeable in doing so that the foil from before the Thai annealing was sharper to the touch when scrunched hard in one’s palm. However, the foil from before the processing wrapped a wallet and could then be unwrapped to then re-wrap the wallet (as a substitute for a sandwich) again; although we noticed that it tore more easily than the sample of foil from after the Thai processes.

The OLAF investigation

67. OLAF conducted a joint mission with the Thai Department of Foreign Trade (“DFT”) in Thailand between 27 November 2019 and 9 December 2019. Its objective was to establish whether the aluminium foil exported by various Thai exporters to the EU was of Thai origin.
- On 19 September 2019 a representative of the DFT visited Loften/Wohler. He was granted access to the premises but not to the processing records.

68. On 26 November 2019 Loften wrote to the Thai DFT to say that it had not received enough details of the people who would visit the factory and therefore a previously planned and agreed visit by the joint mission to the factory was cancelled.

69. On 28 November 2019 there was a meeting between OLAF, the DFT and Royal Thai Customs in Bangkok. Information about the operation of the Thai factory obtained by the DFT during their visit to Loften was presented.

70. On 29 November 2019 a further meeting took place between OLAF, DFT and Loften's sales manager together with Mr Liu. The sales manager confirmed that the imported rolls were heated, cut and packed for household purposes in Thailand. Pictures of the aluminium coils, the heat treatment machine and cutting machines were provided.

71. Minutes of the 29 November meeting show that Mr Liu and Ms Miao (Sales Manager based in Qingdao, China who said that she visited the Thai plant regularly) were provided with information about the members of OLAF who would attend the factory. Mr Liu explained that as Loften (Thailand's) General Manager he is not in a position to give access to the company premises or the company documents. Mr Liu said that his role is just to run the daily operation of the Loften (Thailand) plant. Mr Liu explained that as the leadership of the company was in Qingdao, China the authorisation had to come from the parent company. Mr Liu said that he could not get the authorisation as the "owner of the company group" was on a flight to the US and could not be contacted at that stage. Mr Liu said that he would get back on the matter by the 2 December 2012. OLAF warned that further delay would not be justified and that it might well compromise the outcome of the visit. In case the visit could not be arranged in due course, OLAF would consider this to be non-compliance. On 2 December 2012 OLAF was again told that it was not possible to visit the factory and the company would not co-operate further.

72. Mr Liu said that he was concerned that OLAF was connected to, and involved members of, trade associations and this was a reason to refuse OLAF access to the Thai factory. However, we give full weight to the evidence of Mr Pulkkinen which was clear that while trade associations may lobby in Brussels, OLAF was very strict about never disclosing operational information to them and maintained complete independence from them. Mr Liu gave us no basis for his conclusion and we find that none exists.

73. OLAF decided that:

(1) As a result of the website information that we set out in our findings earlier, Article 33 applied; and

(2) As a result of what appeared, from the information provided, to be a part of the processing which added little value, the processing in Thailand was not substantial

74. OLAF opened another investigation into the processing after 1 December 2019 but minutes of meetings between OLAF and the DFT in November 2022 show that OLAF was again refused entry to the Thai factory. The DFT had been able to visit in September 2022. The DFT said that no significant changes to the production process since the last DFT visit in 2019 were observed during the DFT factory visit on 29 September 2022. Therefore although the company had ceased exporting to Europe by November 2022 a visit to the factory would have been informative as to the processing before the European exports had ceased.

The Thai authorities' actions

75. On 9 December 2019 during the final meeting of the joint mission it was agreed that the DFT would pursue the matter further with Loften/Wohler. The DFT requested that the companies provide supporting documents relating to the raw materials used and the production process for the goods concerned for further evaluation by the DFT. In a letter of 16 June 2020

the DFT told OLAF that Loften/Wohler had declined to declare information of production process and as a result the DFT imposed sanctions on the companies.

76. The Thai Ministry of Commerce issued Thai origin certificates for the foil leaving the Thai factory during the relevant periods of this dispute. Those certificates state that it is “certified” that the goods described originate in Thailand.

HMRC’s actions

77. HMRC issued a decision letter on 10 June 2021. It stated that Article 33 applied because the Thai factory was not economically justified as it was established for the purpose of avoiding anti-dumping duty and the processing at the factory was not sufficiently substantial for the foil to be treated as having Thai origin.

78. In the review HMRC relied upon the conclusion that the Thai factory had been set up to avoid anti-dumping rules to conclude that the processing there was not economically justified.

THE LAW

79. Article 1(1) of Council Implementing Regulation (EU) No 217/2013 (the “2013 Regulation”):

“[a] definitive anti-dumping duty is hereby imposed on imports of aluminium foil of a thickness of 0.007 mm or more but less than 0.021 mm, not backed, not further worked than rolled but whether or not embossed, in low weight rolls of a weight not exceeding 10 kg currently falling under CN codes ex 7607 11 11 and ex 7607 19 10 (TARIC codes 7607 11 11 10 and 7607 19 10 10) and originating in the People’s Republic of China.”

80. It is common ground that the Appellant’s exports during the relevant period for this appeal fell within those product definitions.

81. Article 1(2) of the 2013 Regulation provides that the default anti-dumping duty on such imports amounted to 35.6%. It is common ground that if the Appellant’s imports during the relevant period were of Chinese origin, they would have been subject to the default duty of 35.6%.

82. The rules in relation to origin applicable to the present appeal are set out in the Union Customs Code, the provisions in relation to which are set out in Regulation (EU) No 952/2013, as amended (the “UCC”).

83. Article 1(1) of the UCC provides as follows:

“This Regulation establishes the Union Customs Code (the Code), laying down the general rules and procedures applicable to goods brought into or taken out of the customs territory of the Union.”

84. The customs territory of the Union, for the purposes of the present appeal, includes the UK.

85. Article 59 UCC provides as follows:

“Articles 60 and 61 shall lay down rules for the determination of the non-preferential origin of goods for the purposes of applying the following:

- (a) the Common Customs Tariff, ...;
- (b) measures, other than tariff measures, established by Union provisions, governing specific fields relating to trade in goods; and
- (c) other Union measures relating to the origin of goods.”

86. This appeal concerns the non-preferential origin of goods; preferential origin arises under specific trade agreements with the EU.

87. Article 60 UCC provides as follows:

“(1) Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.

(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.” (underlining added)

88. The parties agree that Article 60 is engaged: the foil underwent a production process in both China and Thailand.

89. There are then two elements to the origination test. It must be both the last substantial and economically justified processing or working.

Economically justified

90. Commission Delegated Regulations (EU) 2015/2446, as amended (the “UCC-DA”) contains secondary legislation implemented under powers contained in UCC (Article 62). In those Regulations it is stated in Article 33 (so far as relevant):

“Any processing or working operation ... shall be deemed not to be economically justified if it is established on the basis of the applicable facts that the purpose of that operation was to avoid the application of the measures referred to Article 59 of the Code.

91. In its Guidance on Non-Preferential Rules of Origin, the European Commission sets out its position as follows at §2.1.2(b) on economic justification:

“It is necessary to identify whether the working or processing is economically justified. In accordance with Article 33 UCC-DA, the criterion of economic justification is not respected ‘if it is established, on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the Code.’ The application of this criterion can only be established on a case-by-case basis, taking into account all the elements of the last processing operations and the purposes of those processing operations in the last country of production. The question of compliance with the criterion ‘economically justified’ arises especially where anti-dumping measures are in force.”

92. The parties agree that in the case of *Harley Davidson* the CJEU decided (at paragraph 61) that “the decisive test in applying Article 33 of Delegated Regulation 2015/2446 is the principal or dominant purpose of the operation at issue.”

93. At para 78 of that decision the CJEU also set out the position in relation to the evidence needed in order to demonstrate whether the above-mentioned test had been met, in the following terms:

“It is true that the first paragraph of Article 33 of Delegated Regulation 2015/2446 requires the identification of a subjective element, namely the intention to avoid the application of a commercial policy measure. Nevertheless, that provision is intended to establish the principal or dominant purpose of the operation examined objectively, on the basis of the available facts. Accordingly, as stated in paragraph 75 of the judgment under appeal,

the finding that the intention is to avoid the application of the commercial policy measure is decisive must be based on objective evidence.”

94. At para 79 the CJEU stated that in that case it had been *prima facie* established that Harley Davidson’s relocation had been aimed at avoiding the application of the commercial policy measures. As a result the CJEU said that it was then for Harley Davidson to prove that there was a different reasonable ground showing that the principle or dominant purpose of the operation was unconnected with that aim.

Substantial processing

95. Article 34 UCC-DA provides as follows:

“The following shall not be considered as substantial, economically justified processing or working for the purposes of conferring origin:

- (a) operations to ensure the preservation of products in good condition during transport and storage (ventilation, spreading out, drying, removal of damaged parts and similar operations) or operations facilitating shipment or transport;
- (b) simple operations consisting of the removal of dust, sifting or screening, sorting, classifying, matching, washing, cutting up;
- (c) changes in packing and the breaking-up and assembly of consignments, the simple placing in bottles, cans, flasks, bags, cases, boxes, fixing on cards or boards, and all other simple packaging operations;
- (d) putting up of goods in sets or ensembles or putting up for sale;
- (e) affixing of marks, labels, or other similar distinguishing signs on products or their packaging;
- (f) simple assembly of parts of products to constitute a complete product;
- (g) disassembly or change of use;
- (h) a combination of two or more operations specified in points (a) to (g).”

96. In its Guidance at 2.2.2, the European Commission says:

“It follows from the Court’s case-law that the determination of the origin of goods must be based on a real and objective distinction between the basic product and the processed product, depending fundamentally on the specific material qualities of each of those products. It is also important to note that the last processing or working is ‘substantial’, for the purposes of Article 24 of the Customs Code (provision which is now Article 60 of the UCC), only if the product resulting there from [sic] has its own specific properties and composition, which it did not possess before that process or operation. Activities altering the presentation of a product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of that product.”

97. It is agreed by the parties that the substantial processing test can still be met when there is no change in the tariff heading (as is the case here) – Case C-260/08 *HEKO Industrieerzeugnisse*.

98. We were referred to various examples of processes found not to be substantial.

99. In the case of Case 49/76 *Gesellschaft für Überseehandel*, raw casein (emulsifier in milk) was cleaned, ground to various degrees of fineness, graded and packaged. The CJEU decided (at paragraphs 6 and 7) that:

“6...the last process or operation ... is only 'substantial' ... if the product resulting therefrom has its own properties and a composition of its own, which it did not possess before that process or operation. In providing that the said process or operation must, in order to confer a particular origin, result in the manufacture of a new product or represent an important stage of manufacture, ... shows in fact that activities affecting the presentation of the product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of the said product.

7. The grinding of a raw material such as raw casein to various degrees of fineness cannot be considered as a process or operation ...because the only effect of doing so is to change the consistency of the product and its presentation for the purposes of its later use; it does not bring about a significant qualitative change in the raw material.”

100. In the case of 93/83 *Zentralgenossenschaft des Fleischergerwerbes E.G. v Hauptzollamt* the CJEU considered a meat processing operation. Cows had been slaughtered, eviscerated, skinned and cut into quarters in Hungary. The meat was then processed in Austria by boning, trimming, drawing the sinews, cutting into pieces and vacuum packing.

101. The court referred to the principles described above from *Gesellschaft* and said (at para 14) that:

...these operations do not produce any substantial change in the properties and the composition of the meat, and their main effect is to divide up the different parts of a carcase according to their quality and pre-existing characteristics and to alter their presentation for the purposes of sale. A certain increase in the time for which the meat will keep and a slowing down in the maturing process do not constitute a sufficiently pronounced qualitative change in substance to satisfy the requirements mentioned above. Finally, while the market value of a whole beef quarter which undergoes the operations at issue is increased, according to the calculations supplied by Zentrag at the hearing, by 22%, that fact is not in itself of such a nature as to enable those operations to be regarded as constituting the manufacture of a new product or even an important stage of manufacture.

102. In the case of *Hoesch Metals and Alloys* C-373/08 the processes concerned silicon imported from PRC. The silicon had been delivered, in two-by-three metre blocks, to Metplast, a company established in India. Metplast subjected the blocks to various processes: the blocks were separated, crushed and purified. The grains produced by the crushing were sieved, then sorted by size and, finally, packaged. The purification of the silicon was carried out in such a way that unwanted slag residues were removed, partly manually and partly by machine, from the silicon grains produced by crushing the blocks. The loose iron in the silicon was then extracted by a magnetic process.

103. The CJEU referred (at para 46) to the need for a significant qualitative change in an item's properties. At para 47 it referred to the need for a substantial change in the product's properties and composition. (In relation to the silicon, it was taken into account that purification removing at least 80% of impurities was specifically capable of conferring origin under the specific rules relating to silicon but in this case that level had not been reached.)

Status of the CJEU caselaw

104. As noted already the UK was still part of the Customs Union at the relevant time with which we are concerned.

105. As a result of the United Kingdom's withdrawal from the EU, courts in the UK are not generally bound by decisions of the CJEU made after 31 December 2020: section 6(1) of the European Union (Withdrawal) Act 2018 ("the 2018 Act").

106. However, in the case of *HMRC v Perfect* [2022] EWCA Civ 330 the Court of Appeal said at that:

“...the agreement between the United Kingdom and the EU setting out the arrangements for the United Kingdom's withdrawal from the EU ("the Withdrawal Agreement", Treaty Series No . 3 (2020)) provides for judgments of the CJEU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom" if given in respect of references made by United Kingdom Courts and Tribunals before the end of 2020.”

107. In *Harley Davidson*, Harley-Davidson Europe Ltd and Neovia Logistics Services International NV sought to have set aside the judgment of the General Court of the European Union of 1 March 2023, *Harley-Davidson Europe and Neovia Logistics Services International v Commission* (T-324/21, EU:T:2023:101; ‘the judgment under appeal’), by which the General Court dismissed their action for the annulment of Commission Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information (OJ 2021 L 119, p. 117; ‘the decision at issue’), addressed to the Kingdom of Belgium.

108. Although the decision in *Harley Davidson* therefore does not result from a referral made by the UK courts and tribunals, the parties both sought to apply the *Perfect* principles and rely upon it. Given that this case concerns matters arising while the UK was still a member of the Customs Union we agree that the CJEU decision is pertinent and we have therefore proceeded on that basis.

THE ISSUES

109. There are two issues in this case:

- (1) Was the Thai processing economically justified; and, if so
- (2) Was the Thai processing the 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

110. In other words it is only if the anti-avoidance “economic justification” rule does not apply that it is necessary to consider the second issue concerned with substantial processing. However, given the extent of argument before us we have considered both issues, even though we have decided that the Thai factory was not economically justified.

THE PARTIES’ CASES

111. We heard extensive submissions from both parties which we have considered in full. Given the extent of the submissions, we only summarise key points in this decision.

DISCUSSION

112. One issue which we will initially address is the interaction between Article 33 UCC-DA and Article 60 UCC.

113. Mr Randolph submitted that HMRC incorrectly jumped straight to the economic justification test as described in Article 33 UCC-DA in the review letter. HMRC had wrongly failed to address the substantial processing part of the Article 60 UCC test. The criteria “last substantial, economically justified processing or working” were conjunctive.

114. We agree that the criteria are conjunctive – both elements must be satisfied in order to rely upon the Thai factory. We are therefore clear that failing one or other of them will result in ADD.

115. The other issue to be addressed by us at this stage is the relevance of the Thai certificates of origin on which the Appellant seeks to place reliance referring to the fact that the DFT visited the Thai factory.

116. Ms Vicary submitted that little weight should be given to those certificates given the approach set out in the Guidance on Non-Preferential Rules of Origin produced by the European Commission.

117. We have taken into account the fact that the Thai authority issued the certificates of origin, but we consider that we have insufficient information to know on what basis the Thai authorities reached their decision to issue them. Indeed, the evidence shows that the DFT sanctioned Loften/Wohler for failure to provide requested information in 2019. Therefore whilst the certificates of origin are relevant, they are not determinative of the issues before us.

Economically justified

The parties' submissions

118. The parties' written submissions post hearing related to the application of the economic justification test as set out in Article 33 and the decision of the CJEU in *Harley-Davidson*.

119. As explained earlier, the CJEU decided in *Harley-Davidson* that the “decisive test in applying Article 33 is the principal or dominant purpose of the operation at issue”. This is to be determined objectively, on the basis of the available facts.”

120. Mr Randolph submits that this case is markedly different to the situation in *Harley Davidson*. In that case the only reason given for the relocation of Harley-Davidson's production was ‘to avoid the tariff burden’ arising from the commencement of the additional customs duties. In contrast here, Mr Liu gave evidence that the reason for the Thai factory was “to develop the Thai market”. Mr Liu stated that the avoidance of anti-dumping duty was not the purpose of the Thai factory. Furthermore, Mr Randolph submitted that Mr Liu's evidence was supported by the export figures from the Thai factory. Mr Liu had said that the percentage of the product from the Thai factory sent to Europe was about 10% and the percentage of product exported to any country was less than 30%. This evidence supported the conclusion that the purpose of shifting production to Thailand was not to avoid anti-dumping duties but to respond to local demand.

121. Ms Vicary and Ms Kollmer replied that the relevant objective evidence is provided by the contemporaneous assertions made by Loften/Wohler on online platforms and the company's own website.

122. They went on to submit that it had not then been proven that there was a different reasonable ground showing that the principal or dominant purpose of the operation was unconnected with the aim of avoiding the anti-dumping duty (para 79 of *Harley-Davidson*). The Appellant failed to provide cogent evidence for splitting the process between China and Thailand. Instead, the Appellant relied upon Mr Liu's evidence the weight of which had been challenged. Furthermore the uncontested expert evidence of Mr Martin was that the processing at the Thai factory only amounted to some 5% of the overall processing costs and there was no explicable reason for moving such a minor element of the production to Thailand beyond avoidance of the ADD.

123. In response Mr Randolph relied upon the evidence of Mr Liu who had challenged the social media postings about Loften Wohler establishing the Thai factory. Those postings were

at most only marketing. Mr Liu's evidence should be given full weight. Setting up the Thai factory meant that the transport costs from China would no longer be incurred.

Our decision

124. We have set out above why we have given Mr Liu's evidence reduced weight. In contrast, we see no reason to give the evidence of the company's own website reduced weight. The other social media postings to which we were referred are simply consistent with the company's own statement. Mr Randolph confirmed that the screenshots were not disputed. Instead the Appellant relied upon *Harley Davidson*.

125. Mr Liu's evidence that 70% of the products of the Thai factory were destined for the Thai market was not supported by any other evidence and given the reduced weight we have given to his evidence we are not prepared to rely on mere assertion by him.

126. Mr Randolph's submission that the Thai factory saved transport costs made little sense given that the aluminium rolls still had to be transported from China to the Thai factory. Moreover, Mr Randolph could not direct us to any evidence to that effect apart from Mr Liu's assertions. The evidence before us was simply insufficient for us to find that such reasoning had been proven applying the civil standard.

127. Therefore given the limited evidence to the contrary, we find that the website evidence shows the primary or dominant purpose of the Thai processes was the avoidance of ADD.

128. Given the conclusions we have reached about the evidence regarding other reasons for the Thai factory, we also find that the evidence was insufficient to show that there was a different reasonable ground showing that the principal or dominant purpose of the operation was unconnected with that aim.

Substantial process

129. It was not disputed that the cutting, packing, and rewinding of the foil taking place in Thailand is minimal processing under Article 34 UCC-DA.

130. This leaves the question of whether the annealing was the 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. At this point we address the "last substantial" element of that test.

131. The experts agree that the annealing process produces metallurgic changes at a sub-structural level and a change in temper of the material (from H-18 to O) as well as reducing the level of residual oil. They disagreed about the description of the metallurgical changes which resulted from the annealing: Professor Symonds considers that there is evidence of recrystallization whereas Mr Evans considers that there is partial recrystallisation. Mr Evans also challenges Professor Symonds' conclusions about tensile strength of the foil.

132. The question for us is whether the changes brought about by the annealing amount to a substantial process.

The parties' submissions

133. The Appellant has sought to challenge the conclusions of OLAF on the basis that it had not visited the factory. Ms Vicary relied on the fact that OLAF was denied entry on more than one occasion.

134. Mr Randolph submitted that there was no authority that microscopic level changes would not suffice to be a substantial process. The annealing makes the foil more suitable for domestic use in making it softer as well as in removing oil residue; and the fact that the changes are at a microscopic level does not matter. He submitted that the processing in the Thai factory did

bring about a significant qualitative change in the raw material. In particular, it changed temper from H18 to 0. Accordingly, the test as laid down for ‘substantial processing’ in the *Gesellschaft* case is made out.

135. Mr Randolph submitted that it was not surprising that the court in *Zentralgenossenschaft des Fleischergewerbes* found the meat processing in Austria was not substantial enough as it was described by the court as being equivalent to, and no more than, retail butchery. He referred to the court’s decision where it was stated (at paragraph 14) that:

“these operations do not produce any substantial change in the properties and composition of the meat, and their main effect is to divide up different parts of a carcass according to their quality and pre-existing characteristics, and to alter their presentation for the purpose of the sale.”

136. He submitted that the situation in this case was entirely different to the presentational changes considered in *Zentralg*.

137. In relation to *Hoesch Metals* Mr Randolph submitted that, it was clear from the papers in the court’s file that the silicon operations in no way altered its properties or composition since, following the processing operations, it continued to be a metallurgical silicon for use. This should be compared and contrasted with the present case where the annealing changed the foil from one type to another.

Our decision

138. Dealing first with the relevance of the OLAF conclusions, while we consider it to be unfortunate and unhelpful that OLAF was denied entry to the factory, the processes taking place there are not in fact in dispute. We have been referred to no authority to suggest that we should give weight to the OLAF conclusions, which are statements of their opinion of the application of the law. Furthermore, the history of the engagement between Loften/Wohler and OLAF has no bearing on our decision.

139. We consider that the CJEU authorities principally show us that the question is highly fact sensitive. Each of them comes back to the formulation in the UCC Guidance:

- (1) the determination of the origin of goods must be based on a real and objective distinction between the basic product and the processed product, depending fundamentally on the specific material qualities of each of those products;
- (2) the last processing is substantial if the product resulting therefrom has its own specific properties and composition, which it did not possess before that process or operation;
- (3) there needs to be a significant qualitative change in a product’s properties.

140. We agree with Ms Vicary that the processes in China under which the ingots are processed into aluminium foil imbue the foil with its essential characteristics. We bear in mind that Prof Symonds confirmed in cross examination that if a piece of aluminium foil is placed in a domestic oven at 220 degrees for a few hours it would potentially change its sub-structure. She clarified this in re-examination to say that a significant amount of change would take “lots of hours”. This explanation of what we are considering reflects the fact that the essential characteristics of processing ingots into foil had been completed before the rolls reached Thailand.

141. We refer in particular to the CJEU authority of *Gesellschaft für Überseehandel* where it was stated that:

“the last process or operation ... is only 'substantial' ... if the product resulting therefrom has its own properties and a composition of its own, which it did

not possess before that process or operation. In providing that the said process or operation must, in order to confer a particular origin, result in the manufacture of a new product or represent an important stage of manufacture, ... shows in fact that activities affecting the presentation of the product for the purposes of its use, but which do not bring about a significant qualitative change in its properties, are not of such a nature as to determine the origin of the said product.”

142. In this case we find that:

(1) The foil exported from the Thai factory had its own properties and a composition of its own which it did not possess before that process or operation at a sub-structural or granular level only. That change resulted in the temper changing from H18 to 0 with the consequence that the Thai product was slightly softer, more malleable and less likely to tear. Oil residue was also removed;

(2) However, as was noted by us at the hearing, it was very difficult to tell the samples of the foil pre-Thai processing and after Thai processing apart. The foil pre-Thai processing appeared to our non-expert eyes to be useable. This usability was consistent with the fact that both samples comply with the British Standard for household aluminium foil. That standard expressly envisages foil of both H18 and 0 temper.

143. We therefore do not consider that the annealing changes satisfy the criteria set out in *Gesellschaft für Überseehandel*, which, as we explain earlier, are consistent with other CJEU authorities and reflect the UCC Guidance. Furthermore, the annealing changes are far less substantial than the changes considered, for example, in *Hoesch Metals* to the silicon blocks processed in India.

144. We therefore conclude that the changes brought about by the annealing process are not a substantial change in the properties and the composition of the foil and do not give rise to a significant qualitative change in the foil’s properties.

CONCLUSION

145. The Appellant’s appeal is dismissed for the reasons we have set out.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

146. 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.

Release date: 22 Sep. 25