LJN: BC4052, Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het Bedrijfsleven*), AWB 07/402

Date of judgment:	29-01-2008
Date of publication:	12-02-2008
Field of law:	Administrative law, other
Type of proceedings:	First instance – three-judge panel
Indication of contents:	Dutch Hallmarking Act (*Waarborgwet*)

Judgment
Trade and Industry Appeals Tribunal

AWB 07/402 29 January 2008

31200 Hallmarking Act

Judgment in the matter of:

Edelmetaal Waarborg Nederland B.V., of Joure, the Netherlands, appellant,
Representative *ad litem*: Mr J.H. van der Meulen, lawyer practising in Joure,

versus

the Dutch Junior Minister of Economic Affairs, respondent,
Representatives *ad litem*: Mr E. Simon and Mr G.W.N. Hesselink, both employed by the respondent,

to which proceedings the following is also a party:

Waarborg Platina, Goud en Zilver N.V. (hereinafter: WaarborgHolland), of Gouda, the Netherlands.

1. The proceedings

In a letter dated 1 June 2007, which arrived at the Tribunal on 4 June 2007, the appellant lodged an appeal against the decision of the respondent dated 24 April 2007.

In this decision the respondent decided on the appellant's objection against the respondent's refusal to issue binding instructions to WaarborgHolland pursuant to the Hallmarking Act 1986.

In a letter dated 3 July 2007, the respondent filed a statement of defence and submitted documents in relation to the case.

In a letter dated 20 July 2007, WaarborgHolland explained its viewpoint.

In letters dated 7 and 9 November 2007, the appellant entered additional documents into evidence.

On 20 November 2007, the hearing was held, at which the appellant and the respondent were represented by their counsel. On behalf of the appellant, its director, A, was also present. WaarborgHolland was represented by its director B.

2. The basis of the dispute

2.1 The Hallmarking Act 1986 includes the following provisions:

"Section 5

1. The assay obligation shall apply to platinum, gold or silver works manufactured in the Netherlands, imported into the Netherlands or being released on the Dutch market having previously formed part of the assets of non-businesses, insofar as the works are not provided with the required stamped marks.
2. The provisions of subsection 1 hereinbefore shall not apply to:
   a. gold or platinum works containing a total mass in gold and platinum which is less than 0.5 grammes;
   b. silver works containing a total mass in silver which is less than 1 gramme;
   c. other works than those referred to sub a. and b. hereinbefore insofar as such works are intended for export and have been separately stored in areas not intended for sale to the public.
3. The limits imposed pursuant to subsection 2 sub a. and b. hereinbefore may be expanded pursuant to an Order in Council. Different limits may be defined for the various precious metals in this context.

Section 5a

1. The assay obligation referred to in Section 5(1) shall not apply to works provided with a hallmark by an independent institution in another Member State of the European Union or in another state that is party to the Convention on the European Economic Area, provided that the hallmark is recognised pursuant to a statutory regulation in effect in that country and provided that the mark indicates the nature and grade of the precious metal.
2. Sections 47 to 47c shall apply by analogy to the works referred to in sub-section (1) above.

(...)

Section 7

1. Our Minister of Economic Affairs shall appoint one or more legal persons that shall be responsible for assaying works submitted to it for their grade of platinum, gold and silver and for marking such works, in compliance with the provisions of and pursuant to this Act.
2. An appointment within the meaning of sub-section (1) above shall be made only if the legal person in question satisfies the following requirements:
   a. It should be capable of proper performance of the tasks described in sub-section (1)
   b. The conditions should exist for decision-making within the legal person that ensure independent performance of the tasks described in sub-section (1) to the extent possible.
3. Our Minister may withdraw an appointment referred to in sub-section (1), if the legal person in question so requests or if that legal person, in the Minister's opinion, does not perform the tasks referred to in sub-section (1) properly or no longer complies with the requirements imposed in sub-section (2).
4. Appointments within the meaning of sub-section (1) and withdrawals of such appointments shall be

reported by means of publication in the State Gazette.

5. For the purposes of this Act and the provisions based on it, an Assay Institution shall be deemed to be a legal person appointed pursuant to sub-section (1) above.

(…)

Section 9

The stamping of the platinum, gold and silver works, under the scenario referred to in Section 1 hereinbefore as well as that referred to in Section 3 hereinbefore, shall be performed using stamps the shape and use of which shall be subject to rules imposed by Our Minister of Economic Affairs."

The Hallmarks Regulation, based on Section 9 of the Hallmarking Act, include the following provisions:

"Section 10

1. The Assay Institution having carried out the examination shall apply the hallmark defined for the grade in question to works complying with the requirements imposed by Sections 1 or 3 of the Act which have not been exempted from stamping pursuant to Section 11 of the Act.
2. In the event that more than one hallmark has been defined for a specific grade, it shall be at the discretion of the party having offered the work for assaying which mark is to be stamped on such work. "

2.2 On the basis of the documents and the hearing in this case, the following facts and circumstances were found in the Tribunal.

- WaarborgHolland and the appellant have both been appointed assay offices as meant in Section 7(1) of the Hallmarking Act 1986.

- WaarborgHolland supervises a company in China that, with its permission, applies hallmarks as meant in the Hallmarking Act 1986 to works assayed by WaarborgHolland in the Netherlands.

- In a letter dated 6 October 2006, the appellant asked the respondent to issue binding instructions to WaarborgHolland to cease and desist from applying hallmarks as meant in Section 7(1) of the Hallmarking Act 1986 to the extent that they are applied in offices or business locations outside the European territory of the Kingdom of the Netherlands.

- In a letter dated 29 January 2007, the appellant filed a notice of objection to the fictitious refusal to decide on the request.

- In the decision of 30 January 2007, the respondent informed the appellant that it was unable to comply with the request because the Hallmarking Act 1986 did not give it authority to issue such instructions to an assay office.

- In a letter dated 13 February 2007, the appellant informed the respondent that it did not agree with the decision of 30 January 2007, and that it maintained its objection.

- In a letter dated 19 March 2007, the appellant filed a supplementary notice of objection.

- The respondent subsequently took the contested decision.

3. The contested decision

In the contested decision the respondent declared the objection of the appellant against the fictitious refusal to be inadmissible and declared the appellant's other objections to be unfounded. To this end,

the respondent considered that the Hallmarking Act 1986 did not give it authority to issue instructions to an assay office, nor did this Act provide for the conditional withdrawal of an assay office's appointment. Moreover, the respondent concluded that no circumstances had appeared that would lead to its being able to definitively withdraw the appointment of WaarborgHolland as an assay office and that it saw no reason to conduct any further investigation.

The respondent considered to this end that WaarborgHolland does not act contrary to the Hallmarking Act 1986 by conducting certain activities in China. The foreign activities of WaarborgHolland solely involve the application of the hallmarks. The technical assay in the laboratory (the actual assay) is conducted in the Netherlands. The Hallmarking Act 1986 says nothing about the place where hallmarks may or must be applied – in the Netherlands or abroad – and thus does not in any way prevent an assay office from having a portion of its tasks performed in another country.

4. The viewpoint of the appellant

In the appeal proceedings, the appellant pointed out that the Netherlands has been a party to the Convention of Vienna (Convention on the Control and Marking of Articles of Precious Metals) since 1999 and that this Convention has developed the so-called Common Control Mark (CCM), which may be applied by the assay offices of the signatory states alongside the recognised national standard marks. This is set forth in Sections 22 et seq. of the Hallmarking Act 1986.

In the appeal proceedings the appellant took the viewpoint that the activities of WaarborgHolland in China are contrary to the line of conduct concerning the admissibility within the scope of the Hallmarking Act 1986 of assay activities in foreign countries made known by the respondent, because this case does not involve outsourcing (subcontracting) to a foreign company or subsidiary, nor does it involve accreditation of the foreign laboratory by the Dutch Accreditation Council RvA.

In addition, the appellant argued that the case involved incompatibility with the Hallmarking Act 1986 or its tenor, because the rates used by WaarborgHolland in China have not been approved by the Minister, because the government cannot effectively supervise the performance of the tasks of the assay office in China, and because no separate identifying mark for the office or separate fineness marks have been established for the branch in China.

5. Assessment of the dispute

5.1 The Tribunal starts by establishing that the appellant has not put forward any grounds against the disallowance of its objection to a fictitious refusal.

5.2 The Tribunal goes on to hold that the remarks of the appellant on the Convention on the Control and Marking of Articles of Precious Metals are not relevant to the present dispute, since the appellant did not dispute that, at the time of the contested decision, WaarborgHolland had already ceased applying CCM marks in China. The contested decision does not relate to the CCM marks and the appellant has not made any submissions from which it could be inferred that the decision ought to have related to this.

5.3 The Tribunal furthermore holds that, in the contested decision, the respondent was correct in stating that it had no authority to issue binding instructions pursuant to the Hallmarking Act 1986. The statutory system solely provides authority to appoint an assay office and authority to withdraw this appointment, stated concisely, in the event of neglect of duty or if the requirements laid down (Section 7(1) and (3)) are no longer met.

5.4 In relation to the non-exercise of the latter authority, the Tribunal holds the following. In relation to the alleged incompatibility with the line of conduct concerning the admissibility within the scope of the Hallmarking Act 1986 of assay activities in other countries made known by the

respondent, the Tribunal holds the following. As m the statement of defence shows, and as has not been contradicted by the appellant, WaarborgHolland has not established a subsidiary company in China, contrary to what the appellant assumes, so no work is outsourced to a subsidiary. Because the technical assay in the laboratory continues to take place in the Netherlands, there is no laboratory in China that has been separately accredited by the Dutch Accreditation Council (*Raad voor Accreditatie*). This Council did in fact include the activities in China in its assessment when considering renewal of the accreditation of WaarborgHolland. The respondent therefore rightly held that the arguments of the appellant, to the effect that it acted contrary to the policy line it had made known, are incorrect.

5.5 Lastly, the Tribunal has not been able to establish that the activities of WaarborgHolland in China are contrary to the Hallmarking Act 1986 or its tenor. The respondent rightly submitted that the Act does not require Dutch hallmarks to be applied in the Netherlands. Although Section 5a of the Hallmarking Act 1986 stipulates that the obligation to conduct an assay does not apply to articles that bear a fineness mark applied in a different country referred to in that section, it cannot be inferred from this that articles that are subject to assay in accordance with the main rule stated in Section 5 of that Act must in all circumstances be given a fineness mark in the Netherlands.

Furthermore, Section 10 of the Assay Regulation stipulates that the fineness mark established for the content in question is applied by the assay office that has investigated articles that meet the requirements set forth in Section 1 or Section 3 of the Act, and that have not been exempted from hallmarking pursuant to Section 11 of the Act. However, it must be assumed that hallmarking need not necessarily be done by an authorised employee of the assay office, but may also be done under his supervision by an employee of the company that presented the articles for assay, whereby the assay office does retain the full responsibility. It is important that this is laid down in clear procedures by the assay office. The Tribunal understands that this has indeed been the case in the Netherlands for years and that both assay offices (both the appellant and WaarborgHolland) take advantage of this possibility. To this extent, actual practice in China does not differ essentially from that in the Netherlands.

However, it is not inconceivable that hallmarking outside the Netherlands could lead to problems in the implementation of the Act, for example because the supervisory employees of the legal person appointed pursuant to Section 52 of the Act cannot exercise their authority outside the Netherlands, or may only do so to a limited extent, or because Chapter VI of the Act seems to assume that imported articles are assayed in the Netherlands. However, the respondent has emphatically denied, and also did so at the hearing, that the activities of WaarborgHolland in China, which have its approval, would cause any problems in practice from the point of view of effective supervision and assaying in accordance with the statutory requirements. The appellant has not put forward anything concrete that offers support to the opinion that the respondent erroneously takes this view. At the hearing, WaarborgHolland also explained the course of affairs in relation to its activities in China, which was intended to indicate that no doubts need to be had as to the reliability, the effectiveness and the quality of the assay it conducts of Chinese products, which explanation was not challenged by the appellant.

Under these circumstances the Tribunal sees no room for the opinion that the questions specified hereinbefore as to whether the hallmarking activities of WaarborgHolland in China are compatible with the tenor of the Hallmarking Act lead to the conclusion that the contested decision cannot be upheld. It should be taken into account that the review to be conducted in this context in light of Section 7 of the Act revolves around the question whether it should be held that the respondent, based on the details that were known to it or ought to have been known to it when it took the contested decision, could not reasonably decide that it saw no cause to withdraw the appointment. Moreover, in this case, such cause for the respondent would have to be found in that WaarborgHolland, in its opinion, does not perform its tasks properly.

Lastly, in relation to the appellant's ground of appeal that the rates used by WaarborgHolland in

China have not been approved by the minister, the Tribunal holds that WaarborgHolland naturally must adhere to the approved rates, but the Tribunal fails to see that this might not be possible, or in fact is not done, with the activities in China.

5.6 The foregoing considerations lead to the conclusion that the respondent had valid grounds on which to hold that there was no cause to withdraw WaarborgHolland's appointment as an assay office. This means that the appeal of the appellant must be dismissed.

5.7 There is no reason to issue a costs order.

6. The decision

The Tribunal dismisses the appeal.

Pronounced by Justices B. Verwayen, J.A. Hagen and A.J.C. de Moor-van Vugt, in the presence of Mr M.A. Voskamp, as clerk of court, and pronounced in open court on 29 January 2008.

sgd. B. Verwayen sgd. M.A. Voskamp