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TC02049

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Appeal number: TC/2011/06081

CUSTOMS DUTY – classification – Combined Nomenclature – “Two-Ram Baler” – whether objective characteristics were “other packing or wrapping machinery” within heading 8422 40 – yes – appeal dismissed

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**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BLUE MACHINERY (ADVANCED TECHNOLOGIES) LTD Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

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**TRIBUNAL: JUDGE JONATHAN CANNAN
MR PHILIP JOLLY**

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Sitting in public at Manchester on 24 April 2012

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Mr Neil Marchi, operations manager for the Appellant

Mr Julian Winkley of HM Revenue and Customs Solicitors’ Office for the Respondents

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DECISION

Background

5 1. The appellant acts as a dealer importing specialist machinery into the UK. The machinery in question in this appeal is known as a Galaxy 2R Two-Ram Baler (“the Machines”) and they are imported from the United States. The issue between the parties is as to the correct classification of the Machines for customs duty purposes.

2. On 9 February 2011 the appellant applied for a binding tariff information (“BTI”) in order to establish the correct customs classification. The classification envisaged by the appellant in that application was nomenclature code 8474 20 00 00. A BTI was issued by HMRC on 4 March 2011 which classified the Machine to code 8422 40 00 00.

3. On 12 May 2011 the appellant asked for a reconsideration of the decision. A reconsideration was carried out and sent to the appellant on 13 May 2011. The decision was confirmed. On 30 June 2011 the appellant sought a further review of the decision. HMRC wrote on 12 July 2011 again confirming the original decision. The appellant then lodged a notice of appeal dated 4 August 2011.

4. Before setting out the law and the competing classifications we shall deal with the evidence as to the nature of the Machines. There was no real dispute as to the evidence and we find the following facts.

Findings of Fact

5. The Machines are purchased from a company called Nexgen. Mr Marchi provided a brochure from Nexgen Baling Systems which briefly describes the Machines. Mr Marchi expanded upon this description in his evidence to the tribunal and in his oral submissions.

6. The Machines are very powerful and able to produce dense bales of what were described as secondary commodities, that is certain types of recycled material in which there is a commercial market. The Machines can deal with any form of non-ferrous material, for example old corrugated containers, sorted office paper, old news print, different grades of plastic, steel cans and municipal solid waste. The particular market which the appellant is keen to exploit is Refuse Derived Fuel (“RDF”). The Machines can be used to compress and pack certain types of municipal waste which can then be sold as fuel. At the present time Mr Marchi told us that in the UK it is only cement manufacturers which are licensed to burn RDF although the market is wider elsewhere in Europe.

7. The Machines include a conveyor belt which carries the relevant material to the top of a hopper. A ram then pushes the material against a solid wall in the Machine and when sufficient material has been loaded a second ram ejects it. The Machine can compress the material to one sixth of its original size. When the bales are ejected they

are then tied by the Machine either with a number of steel or plastic straps depending on the material which has been baled. Compressing the material into bales allows easier movement and transportation. For example 6 lorry loads of material can be reduced to 1 lorry load where it has first been baled by the Machine. Where RDF has been baled, the bales will be ripped open at the furnaces and burned to produce energy.

8. The marketing description of the Machines in the brochure provided by Mr Marchi is as follows:

“... [the Machines] feature a combination of the latest electronics technology and advanced structural engineering to make the most powerful and efficient balers available.”

9. The brochure goes on to describe a variety of applications including use by scrap dealers, material recovery facilities, recycling centres, distribution centres and large paper and plastic processors. Options are available which include stampers and blades to clear jams in loading the hopper.

The Law

10. The legal framework against which goods are classified for customs duty purposes is well established. For the sake of convenience we take the description of Henderson J in *HMRC v FLIR Systems AB* [2009] EWHC 82 (Ch) where he summarised the legal framework in the following terms:

“6. A full account of the legal background to the EU customs tariffs, and the principles to be followed in their interpretation, was given by Lawrence Collins J (as he then was) in *Vtech Electronics (UK) Plc v Customs & Excise Commissioners* [2003] EWHC 59 (Ch) (“*Vtech*”). What follows is intended to be a relatively brief summary.

7. The EU is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System, generally known as “the Harmonised System”. The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System, and all contracting states therefore use the headings and sub-headings of the Harmonised System. The system is administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as “HSENs”.

8. At Community level, the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature (“CN”) established by Article 1 of Council Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:

- (a) the nomenclature of the Harmonised System;
- (b) Community sub-divisions to that nomenclature; and

(c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

5 9. *The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are "00". There may also be ninth and tenth digits which identify further Community (TARIC) sub-headings, of which there about eighteen thousand.*

10 10. *Apart from the HSENs to which I have already referred, the European Commission also issues Explanatory Notes of its own to the CN which are known as "CNENs".*

15 11. *The Court of Justice of the European Communities ("the ECJ") has repeatedly stated that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The two categories of Explanatory Notes, that is to say the HSENs and the CNENs, are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 Intermodal Transports BV v Staatssecretaris van Financien, [2005] ECR I-8151, at paragraphs 47 and 48.*

25 12. *Part 1 of the CN contains at Section 1A the General Rules for the Interpretation of the CN. These General Rules are known as "GIRs". Unlike the Explanatory Notes, they have the force of law (see Vitech at paragraph 16).*

13. *So far as material, the GIRs provide as follows:*

30 *"Classification of goods in the Combined Nomenclature shall be governed by the following principles:*

35 1. *The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.*

2 (a) ...

40 (b) *Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of*

more than one material or substance shall be according to the principles of rule 3.

5 3. *When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:*

10 (a) *the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;*

15 (b) *mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;*

20 (c) *when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.*

25 4. *Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.*

5. ...

30 6. *For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."*

35 14. *It can be seen that the General Rules quoted above provide a hierarchical set of principles, and if the correct classification can be ascertained at a given stage it is unnecessary to proceed any further."*

40 11. Mr Winkley also drew our attention to the judgement of the ECJ in the joined cases of *British Sky Broadcasting Group plc v HMRC, Pace plc v HMRC (C-288/09, C-289/09)* which describes the same approach to classification.

12. In addition, *Article 12 Regulation 2913/92* provides as follows:

“1. *The customs authorities shall issue binding tariff information... on written request, acting in accordance with the committee procedure.*

2. *Binding tariff information shall be binding on other customs authorities as against the holder of the information...*”

Competing Classifications

13. We set out below the competing classification codes which we must consider in this appeal. In each case save one we are concerned only with the first 6 digits of the code which, as set out above, derives from the Harmonised System.

14. The BTI issued by HMRC and against which the appellant appeals is 8422 40. The headings and sub-headings of the CN are as follows with relevant parts in bold:

8422 Dishwashing machines; machinery for cleaning or drying bottles or other containers; machinery for filling, closing, sealing or labelling bottles, cans, boxes, bags or other containers; machinery for capsuling bottles, jars, tubes and similar containers; **other packing or wrapping machinery (including heat-shrink wrapping machinery)**; machinery for aerating beverages:

...

8422 40 - other packing or wrapping machinery (including heat-shrink wrapping machinery)”

15. During the course of the correspondence and at this hearing the appellants have contended for a number of alternative classifications. Mr Marchi very sensibly elected not to pursue one of those alternatives, namely 8430 61 which relates to tamping or compacting machinery but clearly in the context of earthworks. He did pursue the following alternatives: 8422 20; 8433 40; 8474 20; and 8474 80 90. The relevant headings and sub-headings are as follows with relevant parts in bold:

8422 20 - Machinery for cleaning or drying bottles or other containers

8433 Harvesting or threshing machinery, **including straw or fodder balers**; grass or hay mowers; machines for cleaning, sorting or grading eggs, fruit or other agricultural produce, other than machinery of heading 8437:

...

8433 40 - Straw or fodder balers, including pick-up balers

5	8474	Machinery for sorting, screening, separating, washing, crushing, grinding , mixing or kneading earth, stone, ores or other mineral substances, in solid (including powder or paste) form; machinery for agglomerating, shaping or moulding solid mineral fuels, ceramic paste, unhardened cements, plastering materials or other mineral products in powder or paste form; machines for forming foundry moulds of sand:
	...	
10	8474 20	- Crushing or grinding machines
	...	
	8474 80	- Other machinery:
	8474 80 10	-- Machinery for agglomerating, shaping or moulding ceramic paste
15	8474 80 90	-- Other

Respondents' Submissions

16. Mr Winkley relied in particular on GIRs 1 and 6, and acknowledged that the Appellant might rely on GIR 4. The relevant heading he submitted was the machines described in 8422 and the relevant sub-heading was 8422 40. He submitted that it was not necessary for there to be any nexus between the other packing or wrapping machines described in that sub-heading and the machines described in the main heading. The Machine itself did have a nexus with a packing or wrapping machine. It operated to pack materials into more manageable shapes for ease of transport.

17. Mr Winkley also relied on the HSEN to heading 8422 as an aid to interpretation which supported this classification. In so far as relevant the HSEN reads as follows:

“... The heading also covers machines of different types designed ... generally, for packing (including heat-shrink wrapping) goods for resale, transport or storage. These include:

30 ...

(7) Baling or banding machines, including hand-operated portable appliances, provided with plates or similar devices enabling them to be rested, while in use, on the bales, cases or other packages to be strapped.”

18. Classification under 8422 40 did no great violence to the language of the CN or the HSEN. In contrast, Mr Winkley submitted that the classifications put forward by the appellant involved a forced construction. He dealt with each alternative as follows.

5 19. Mr Winkley said that it was difficult to see how heading 8422 20 could apply to the Machine – it was not machinery for cleaning or drying bottles. Similarly 8433 40 – it was not a straw or fodder baler.

20. Mr Winkley submitted that 8474 20 and 8474 80 90 related to machines used in mineral extraction from the earth and the construction industry. Again, he relied upon the HSEN for this heading which states as follows:

10 *“This heading covers:*

(I) Machinery of a kind used mainly in the extractive industries, for the treatment ... of solid mineral products ...

(II) Machinery for agglomerating, shaping or moulding solid mineral products in powder or paste form...

15 *(III) Machines for forming foundry moulds of sand”*

21. Mr Winkley suggested that there was no nexus between a baling machine and a crushing or a grinding machine in this context, or indeed any of the other machines referred to in the context of this heading. Whilst there may not be an exact fit, it was a case of obtaining the best fit which he submitted was 8422 40.

22. Finally Mr Winkley confirmed that there were no explanatory notes to the CN which were relevant to the classification issue on this appeal.

Appellant’s Submissions

23. Mr Marchi submitted that 8422 40 was not an appropriate description for the Machine. In particular it appeared to him that this code was dealing with machines used in the food and drink industry. He submitted that the most appropriate heading was 8474. Either 8474 20 (crushing or grinding machines) or 8474 80 90 (other machines within the 8474 heading).

24. Mr Marchi took issue with the relevance of the Note (7) in the HSEN for 8422 referred to above. He stated that in August 2010, when the issue had first arisen with HMRC, Note (7) was not present in the HSEN. He suggested that it had been added later and he inferred it had been added because of the argument being raised by the appellant. Mr Marchi wanted to know from HMRC the circumstances in which Note (7) had been added to the HSEN. We decided during the course of the hearing that the circumstances in which it was added would not assist us in determining the correct classification of the Machines. At the time of the BTI decision, and indeed at the time

of the BTI application, Note (7) was a part of the HSEN for heading 8422 and was therefore a legitimate aid to construction for classification purposes.

25. To be fair, Mr Marchi did not really press us to classify the goods under headings 8422 20 (Machinery for cleaning or drying bottles or other containers) and
5 8433 40 (Straw or fodder balers, including pick-up balers). Indeed Mr Marchi told us that the main reason he referred to the latter was because it is the only reference to balers in the whole of the CN.

26. Mr Marchi also told us, and we accept, that the Office for National Statistics had questioned non-customs declarations made by the appellant which classified the
10 Machines under heading 8422 40. However he said that they did not suggest any alternative classification.

Decision

27. In our view the objective characteristics of the Machines are that they operate and are designed to pack and wrap materials. They pack materials by compressing
15 them into bales which are the most suitable form for ease of transport. The bales are then tied or wrapped with steel or plastic straps to keep them together during storage and transportation. Otherwise the bales would fall apart during transportation.

28. We do not consider that heading 8422 is limited to the food and drink industry. Rather it is concerned with machinery used to package products of any description.
20 We note and accept that the packaging specifically referred to in the heading involves placing products into a form of container which is not the case with the Machines in this appeal. However we consider that the overall process of compressing the materials and then tying them with straps can fairly be described as a process of packing and/or wrapping.

29. We gain comfort in that construction from the HSEN for heading 8422 relied upon by Mr Winkley. The HSEN identifies the purpose for which goods are generally packaged, that is for ease of resale, transport or storage. That is plainly the objective purpose of the Machines in the present case. In Note (7) the HSEN then goes on to give baling or banding machines as examples of machines included in the heading.
30 We have already indicated to the parties that the circumstances in which Note (7) came to be introduced are not relevant to the classification of the Machines.

30. The headings suggested by the appellant do not in our view fairly describe the objective characteristics of the Machines which we have identified. We need say little more about headings 8422 20 (Machinery for cleaning or drying bottles or other
35 containers) and 8433 40 (Straw or fodder balers, including pick-up balers). The Machines plainly do not have the objective characteristics referred to in these headings, the latter being clearly limited to agricultural uses.

31. The sub-headings in heading 8474 again do not fairly describe the objective characteristics of the Machines. In particular the Machines do not operate on earth,

stone, ores or other mineral substances. Mr Marchi emphasised the use of the machine in compressing RDF. However that is merely one of its uses in baling recyclable material and in any event the material used to produce RDF is not a “*solid mineral fuel*” for the purposes of heading 8474.

5 32. We are satisfied that heading 8422 40 defines the objective characteristics and properties of the Machines. Even if it did not, we are satisfied that GIR 4 would operate so as to classify the Machines under the same heading on the basis that it is “*appropriate to the [Machines] to which they are most akin*”.

33. In all the circumstances the appeal is dismissed.

10 34. 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
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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TRIBUNAL JUDGE

RELEASE DATE: 31 May 2012

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