



**TC03105**

**Appeal number: TC/2013/00172**

*Customs Duty - Whether matching brassières and briefs, imported in separate boxes, but generally presented together for customs purposes, and designed principally to be marketed together as matching items, were “Brassière - in a set made up for retail sale containing a brassiere and a pair of briefs” - Appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MATALAN RETAIL LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE HOWARD M. NOWLAN  
JULIAN STAFFORD**

**Sitting in public at 45 Bedford Square in London on 11 October 2013**

**Matthew Fleming of KPMG and Ms Amanda Brown of KPMG on behalf of the  
Appellant**

**Simon Charles, counsel, on behalf of the Respondents**

## DECISION

### *Introduction*

5 1. This was a customs duty appeal in which the simply described point in issue  
essentially revolved around the proper interpretation of a one-line phrase in the  
customs classification definitions. The question for us was whether brassières  
("bras") and briefs made in matching materials and with matching patterns, intended  
10 to be displayed alongside each other in the Appellant's stores, principally so that  
customers might choose to buy the matching items, but never as such packaged  
together, ranked as "sets [of those items] made up for retail sale".

15 2. Whilst the point in dispute can be simply stated, we have found the decision  
difficult, and very finely balanced. In some respects we have ended up seeking to  
balance a strict interpretation against various common sense indications (those  
themselves pointing in different directions), and our conclusion is that the matching  
items do not rank as a set, with the result that they should be classified separately.

### *The simple facts*

20 3. The dispute resulted from the fact that the customs duty on the importation of  
bras was 6.5%, and on the importation of briefs, 12%. In 1999, an insertion had  
been made into the Chapter dealing with bras, which provided that the 6.5% duty rate  
for bras also applied to "Brassières - in a set made up for retail sale containing a  
25 brassière and a pair of briefs".

30 4. The Appellant is a very major importer of fashion clothing, and amongst the  
many products that it imported were bras and pairs of briefs that were clearly  
designed to match each other. The various matching bras and briefs were always  
produced in similar material to each other, with identical patterns, and they were  
obviously intended to be regarded by the potential purchaser as matching items.

35 5. At the point of importation, the bras and briefs were packaged separately,  
doubtless in large boxes containing numerous bras and numerous pairs of briefs. In  
the agreed Statement of Facts, this was said to have been "for transport efficiency",  
which was slightly misleading since, while it was obviously efficient to pack similar  
shaped items together in boxes for transportation purposes, the bras and briefs were in  
fact never destined to be "packaged together". We were told that in the numerous  
Matalan stores, the normal arrangement was for different bras that had no matching  
40 briefs to be displayed in one section of the stores, briefs with no matching bras in  
another section, and matching bras and briefs to be displayed in a third section. In  
that third section, the matching items would often be displayed on adjacent hangers;  
they would be priced individually, and they would not be in any form of single plastic  
packing.

45 6. It seemed reasonably obvious that there were several reasons why the bras and  
briefs were never packaged together. Firstly there was the inevitable point that girls  
and women would always wish to select a bra with suitable "back" or "chest"  
measurements, i.e. 34, 36 etc, and would wish to choose the appropriate "cup size",  
50 i.e. B, C, D etc as a separate matter. Having selected the bra, there was no

expectation that the girl or woman who had chosen a particular bra would invariably select a size of briefs that would always correspond to the bra. Indeed the likelihood is that again, every customer would choose “her size” of briefs, which would bear no necessary relationship to “her” bra size.

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7. Whilst the point about choosing correct sizes is the obvious reason why bras and briefs were always displayed and priced separately, there were other reasons. One was that in some, if not all, of the ranges, a further choice was offered in that different styles of bras and briefs were offered. All of them would end up matching, but the purchaser would be able to choose, say, one of two different styles of bra, and perhaps any one of three styles of briefs. Buyers could in other words “mix and match” without forfeiting the intended feature that the two chosen garments would be seen to be matching garments. By selling the bras and briefs separately, it would also be possible for a customer to buy more briefs than bras particularly if the former might be washed more frequently. Finally, as a fourth point, there was nothing to stop any woman buying either the bra or the briefs, and simply choosing an altogether different item to wear with whatever had been selected, or indeed not buying another item at all.

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8. In many respects the marketing possibilities and motivations were very similar to those of the stores that sell jackets and trousers of suits on separate hangers, and as separately priced items. In exactly the same way, this enables customers to buy both a jacket and a pair of trousers that fit them. On occasions there may be slightly different styles of suit offered all in the same material, such as single or double-breasted jackets and trousers with or without turn-ups. Many men will opt to buy two pairs of trousers for one suit jacket because the trousers are more likely to wear out. The only difference is that it would be extremely unusual for someone to buy just a suit jacket, intending always to wear it with a quite different pair of trousers, or just a pair of “suit trousers” without having bought the jacket as well. Admittedly one item might be bought on its own if part of an existing suit had been damaged in some way.

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### *The dispute between the parties*

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9. The Appellant contended that the matching bras and briefs ranked as a set, such that they were subject to duty at the 6.5% rate. We will quote the various rules for construing the Combined Nomenclature below, though mention at this point that the Appellant’s principal contention was that the matching items constituted a set within the meaning of the product description quoted in paragraph 2 above, and that this meant that their categorisation was determined simply by Rule 1.

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10. The Appellant’s secondary argument was that Rules 2 and 3 might be relevant.

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11. The Respondents’ argument was that the whole matter was governed by Rule 1, and since the rules are manifestly to be applied in numerical sequence it was not only thus unnecessary, but actually wrong, to look beyond Rule 1. Under Rule 1, the Respondents contended that the bras and briefs never constituted a set as such. Customers could of course choose to buy matching items, but they never bought “a set”. Since, therefore, bras and briefs were very clearly defined separately under Chapters 62 and 61 respectively, once the attempt to class them together had failed,

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they fell to be classified under the separate two headings, thus attracting duty at the 6.5% and 12% rates respectively.

5 ***The relevant classification definitions within Chapters 62 and 61 and the terms of Rules 1,2,3 and 6 designed to assist the interpretation of the definitions, and the classification of products***

12. The relevant terms of Chapter 62 barely need amplification beyond the quotation that we gave in paragraph 3 above, but nevertheless read as follows:

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***“6212 Brassières***

*6212 10 10 -- In a set made up for retail sale containing a brassière and a pair of briefs*

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*6212 10 90 Other”*

13. Chapter 61 dealt with various other garments, including briefs in the following terms:

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***“6108 Women’s or girl’s slips, petticoats, briefs, panties, nightdresses, pyjamas, negligées, bathrobes, dressing gowns and similar articles, knitted or chocheted***

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*- briefs and panties:*

*6108 22 00 -- of man-made fibres”*

14. Note 2 of the chapter notes to Chapter 61 provided that:

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*“2. This chapter does not cover:*

*Goods of heading 6212”*

15. Rules 1, 2, 3 and 6 of the “General rules for the interpretation of the Combined Nomenclature” read as follows:

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***Rule 1***

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*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.*

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***Rule 2***

*(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented*

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*the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.*

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*(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.*

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### **Rule 3**

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*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:*

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*(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;*

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*(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, insofar as this criterion is applicable;*

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*(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.*

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### **Rule 6**

*For legal purposes, the classification of goods in the subheadings 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 note also apply, unless the context requires otherwise."*

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### **Our Decision**

16. This dispute revolves principally around the precise meaning to be given to the word "set" when meaning some collection of things, and in particular to the notion

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that two or more things are “in a set”. We are plainly faced with having to make and sustain some very fine distinctions in explaining our decision, and we accept that there will remain anomalies where some will believe that the connotation that we put on whether the bra and the briefs should be said to be “in a set” may not be consistent with other situations and other fairly accepted uses of the word or the phrase.

17. We consider that the most fundamental meaning of things being “in a set” is that the articles in question perform a broadly common purpose, they certainly include either a “complete” collection of things or at least a “sufficient” collection, and they are almost always packaged together. There can be some rare situations where items may still be said to constitute a “set” when they are not packaged together, but we consider that this raises the bar in relation to the test of the articles necessarily being linked together. The points that we have sought to indicate by those two sentences can best be illustrated by some examples.

18. A simple example, one certainly mentioned in the guidance given for Customs Duty purposes, is the toiletries set. If various washing and other toiletries items are contained in a leather or plastic container, and quite possibly given to a woman at Christmas, they will be “in a set” or be said to constitute a toiletries set. If the same items happen to be on the vanity unit and adjacent shelves in someone’s bathroom, someone entering the bathroom would not say that there was a toiletries set in the bathroom. If several of the bottles looked similar, one might say that the items were in matching bottles, but it would not be appropriate to say that they constituted a set.

19. When 10 spanners in graded sizes are in a plastic clip, one would invariably say that there was “a spanner set”. If a professional mechanic had bought numerous spanners over the years and there were 20 spanners in his general toolbox, possibly with some sizes duplicated, and one or two missing, nobody would say that the mechanic had a “set of spanners”. He might have a lot of spanners but not a set. If a mechanic purchased very superior spanners, which could only be purchased individually, but he nevertheless purchased what might be regarded as a complete range, and they were all stored in a particular compartment of his general tool box, he might say that he had a set of spanners. The absence of the clip around them, or the box, occasions some doubt, but may arguably be outweighed by the fact that there is a complete range of spanners, and that they are carefully kept together, albeit in a general toolbox. We are making this point as a general observation without regard to the fact that for customs duty purposes if the spanners were imported individually, they would doubtless not constitute sets.

20. The Customs guidance material also touches on the example of a table and chairs. The guidance provides that while there is otherwise a requirement that the items be packaged together, this can be ignored if the items are packed separately for transport or safety reasons, provided that the relative proportions of the different articles correspond. Accordingly the guidance indicates that there may be a set if one table and four chairs are presented together, but there would not be if three tables and one chair were presented together. Expanding on that example, we would say that it was obvious that aluminium garden furniture consisting of a self-assembly table and four chairs, all in a box and imported from China, clearly constitute a set. A table and chairs, suitable to be sold in a department store where the items might broadly “match” but each could be purchased independently would almost certainly

not constitute a set. By contrast, a very styled table, with absolutely matching chairs that could only be purchased together, would almost certainly be said to be a “table and chair set”. The absence of the packaging is arguably rendered irrelevant by the strong relationship between the articles. In other words the fact that they must be  
5 purchased together and that the highly-styled table would look odd if quite different chairs surrounded it so that it is obvious that the table and chairs must be displayed and purchased together, may justify the observation that they constitute a set.

21. We will now apply the definitions given in paragraph 17 above, and the tenor of  
10 the examples that we have given, to decide whether in this case, the bras and briefs can aptly be said to be “in a set”. We note that the requirement is that they should be in a set at the time of importation because that is when the liability for duty is ascertained. Even ignoring that point, however, our initial application of the  
15 definition is to conclude that customers buying the two items together would certainly say that they were purchasing matching bras and briefs, but that it is inappropriate to say (even where a customer purchased just one bra and one matching pair of briefs) that there was ever “a bra in a set made up for retail sale containing a bra and a brief”.

22. There would have been no sense in which the two were ever linked together by  
20 packaging. We accept that the two items were styled in a similar way to appeal to anyone who wanted a matching bra and pair of briefs, and we also accept that they serve a largely “common purpose” of constituting women’s underwear. However, the degree to which bras and briefs are commonly or necessarily regarded as an  
25 inherently linked pair of garments to link them together when there is no combined packaging is very doubtful. There was no evidence in relation to the habits of women in purchasing bras and briefs, but it seemed fairly obvious that many women would regard the two as separate purchases, not just because of size, but also because  
30 of comfort, and also because in most situations it would be unusual for anyone other than the woman or her partner to know whether she was wearing matching items or not. No evidence was given on the following point, but it did seem that it was perfectly possible that the sales statistics might have demonstrated that a reasonable  
35 proportion of the bras, and of the briefs, were purchased by women or girls who chose not to buy the other item. That possibility, coupled with the absence of combined packaging, suggests that the realistic description is as follows. The presentation in the stores enables women, if they wish, to buy matching bras and briefs. They can  
40 buy different styled bras in the same material with perhaps a choice of styles of briefs. Or they can buy one or the other item, or several of them, without buying any matching item at all. In other words they can “pick and mix” and they can buy whatever combinations they want. But nobody could realistically say, with any  
45 given combination of purchases, that a woman had either bought a set or “broken up a set”.

23. In the case of a man’s suit, it would be almost unthinkable that a man would  
wear a suit jacket with quite different trousers, or indeed the reverse combination.  
45 The usual material in which suits are made means that a suit jacket would never look like a blazer or sports jacket. Those two are almost always worn with non-matching trousers. But a suit jacket would look decidedly odd if worn with non-matching  
trousers, so that there is a virtually inevitable link between the top half and the bottom  
50 half of a suit. In the case of the bra and briefs, no girl or woman would feel remotely odd if, unknown to others, she was wearing a non-matching bra and pair of briefs.

Accordingly, with no combined packaging of any sort, and no remotely inevitable linkage between bras and briefs having naturally to constitute “a set”, we consider that the case for saying that the bras and briefs in this case were “in a set made up for retail sale” as such is very far from clear.

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24. Whilst the point made in the previous paragraphs represents our initial assumption, there are certainly some factors to set against this initial assumption.

10 25. As we understand matters, in the ECJ case of *Quelle Schickedanz AG und Co*, Case C-80/96 dated 15 January 1998 the Court had to deal with the customs classification of a case where “a set of knitted bra and briefs” had to be classified for customs purposes. At the time, the wording that we have quoted in paragraphs 3 and 12 above, that now refers to “bras in a set made up for retail sale containing a bra and a brief” did not exist. Bras were essentially covered by Chapter 62 and briefs by  
15 Chapter 61. Since the report of the case regrettably gives not the slightest indication of what actually linked the knitted bra and briefs together such that they were considered to be a set, we do not know whether the two were boxed together, boxed together in a plastic box with a plastic red rose in the box, or somehow intrinsically  
20 linked in some other way. Nevertheless the items that one would have thought would have been classified separately under the two different Chapters were treated as a blended or mixed item, and Rule 3(b) was said to be in point because the relevant linkage (whatever it was) apparently made it clear that they were “goods put up in sets for retail sale”. Since the Court reached that conclusion and then concluded that  
25 neither material or component gave the items their essential character, they were classified by the tie-breaker rule of Rule 3(c). In other words they were classified as a bra because the Chapter dealing with bras came later in the Combined Nomenclature.

30 26. That case of itself causes us some considerable hesitation in confirming our decision. After all, the Court managed to reach a decision on the basis of the clear assumption that the bra and the briefs were a composite item even though the wording on which the present Appellant relies, and understandably relies, was not even in the Nomenclature. Since we have absolutely no idea what actually linked the two  
35 garments, and we certainly do not know whether it was simply packaging, it is very difficult to know what bearing this case has on the present dispute.

40 27. More significantly, however, it was apparently because of the decision in this case that the wording in Chapter 62 was changed in 1991 in the manner quoted above specifically to refer to the previously unmentioned notion of “bra and brief sets”. This then seems to have been a very strange insertion when it is suggested (and this is  
45 certainly the Respondents’ suggestion in this Appeal) that bras and briefs could only constitute a set, if packaged together. If that is correct, however, the next observation is that bras and briefs will in practice never constitute a set, because no lingerie or fashion retailer will ever sell the two packaged together. We admit that the  
50 mail order firm involved in the *Quelle* decision appears to have achieved this, but since we have no idea how they achieved it, it is difficult to pay any attention to what they did. This thus leaves us with the seemingly universally accepted view that it is virtually impossible for bras and briefs to be packaged together because that would generally result in one or other item not fitting the intended wearer. The Respondents seemed to accept that this was the reality, and the Appellant certainly

took this view, it being perfectly obvious why the items were always displayed separately, with their size and description illustrated, albeit that they were displayed close together so that both could easily be bought together, if required.

5 28. The point made in the previous paragraph leads to one of three conclusions in relation to the policy decision of having inserted the wording in issue in this Appeal into the Combined Nomenclature in 1999. They are that:

- 10 1. The inserted reference to sets of bras and briefs is just otiose and confusing because it is almost inconceivable that the two items will be packaged together, and thus inconceivable that they will constitute a “set”;
- 15 2. As tentatively suggested during the hearing, it is just conceivable to suppose that bras and briefs might be packaged together for very young and perhaps slim girls, in whose case a consistent size, top and bottom, might be more readily assumed. Similarly it is conceivable that a sex shop might market a bright red bra and briefs in a see-through plastic box, hopefully accompanied by a tasteful plastic rose, for men to give to their girlfriends on Valentine’s Day, albeit that after trying both items on, the girlfriend might end up rather annoyed with one or the other item.
- 20 3. The third possibility is of course that in order to make sense of the inserted and plainly deliberately inserted reference to “bra and brief sets” in the Nomenclature, and recognising the reality that the two would in practice never be packaged together (if only for size reasons), we should revise our conclusion and effectively conclude that all matching bra and brief sets, even  
25 when not packaged together, should be classed as sets.

29. Before commenting on which of those three possibilities we consider to be correct, we should mention that it was said during the hearing that various Binding Tariff Rulings had been given in other countries. None of them was particularly  
30 clear, and none are binding on us, but it did seem that they had treated matching bras and briefs as sets. Furthermore, and this is almost entirely irrelevant because HMRC appears to have changed their mind on the issue, it did seem that in the past HMRC had proceeded on the basis that the matching items were sets.

35 30. There are three other matters that we have taken into consideration before arriving at a final conclusion. They are:

1. Does anything in relation to the treatment of suits assist us in reaching a decision?
- 40 2. Does the Appellant’s contention that Note 2 of the Chapter Notes to Chapter 61 have any bearing on the analysis, as the Appellant indeed suggested?
3. Does the guidance given in relation to “Classification in the Combined Nomenclature of goods put up in sets for retail sale” have any bearing on this Appeal? Whilst it would seem from the heading that it would obviously  
45 have considerable bearing, this guidance was specifically said not to apply to sets when the term “set” was used in the wording of the CN-code in issue. Obviously in this case, the term “set” is so used, but it is still worth considering the relevant guidance, albeit with considerable caution.

50 31. Note 3 to Chapter 62 states that:

*“ The term “suit” means a set of garments composed of two or three pieces made up...”*

5 and then proceeds to describe the top and bottom halves of suits in a fairly elaborate manner. Since the definition deals with the possibility of importations being in the quantities that would enable customers regularly to buy one suit top and two pairs of trousers (deeming that to be one suit and one pair of trousers) it seems implicit that the definition of suits includes those suits where the jackets and trousers are displayed on separate racks (and doubtless thus imported in separate packaging, and never  
10 inserted into combined packaging until the customer buys them at the Pay Desk and they are then packed by the sales assistant into a suit cover).

32. We do not consider that the reference in the definition of “a suit” to “a set of garments” undermines our basic interpretation of the phrase “in a set” that we  
15 advanced in paragraph in paragraphs 21 and 22 above. We have already mentioned one reason why the reference to a set in the case of a suit is more realistic in that in paragraph 23 above we commented on the reality that suits are fundamentally 2-piece or 3-piece garments where the top and the bottom parts are intrinsically linked. In the same way a bikini is usually referred to as one item, albeit composed of two parts. In  
20 contrast bras and briefs are more obviously separate items, so making it virtually essential to package them together to enable them to be said to be “in a set made up for retail sale”.

33. The other reason why we are not swayed by the reference in the definition of “a  
25 suit” to “a set of garments” is that the use of the word “set” in that context is slightly different. In the case of the suit definition, the wording really refers to a “set of garments”, meaning “a collection of garments”, or a “combination of garments”. There is slightly less stress on the feature of the parts of the suit being “**in a set**”. In the case of the toiletries, the spanners, the croquet set, and necessarily also in the case  
30 of “the set of a bra and briefs” the various items are inherently “**in a set**”. Nobody would say that their suit jacket and trousers were “in a set”. It is a very minor point but we consider the reference to the set in the case of the suit to be more a reference to a combination of two or three garments, with far less notion of their being “in a set”. But in the case of the bra and the briefs that is what must be demonstrated.

35 34. We are uninfluenced by the Appellant’s reference to the second point that we flagged in paragraph 30 above, namely the way in which Note 2 in Chapter 61 provides that nothing covered by Chapter 62 is included in Chapter 61. Whilst that reconciles a clash between the two chapters in favour of Chapter 62, there is only a  
40 clash in the case of briefs if the briefs can be said to be “included in a set with a bra for retail sale” in the first place. Because the question for us is whether they are so included in a set, the feature that if they are, then the briefs are dealt with under Chapter 62 and not 61 is not relevant.

45 35. The third matter that we referred to in paragraph 30 above was the complex and helpful guidance given in the Customs documentation that comments on when items are “put up in sets for retail sale”. We have already said that while this guidance is expressly said not to apply when the relevant phrase appears (as here) in the wording of the CN code, it is still worth looking at the helpful guidance.  
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36. The general requirement of the relevant guidance is that the goods should:

(a) consist of at least two different articles which are, *prima facie*, classifiable in different headings;

5 (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking (e.g. in boxes or cases or on boards).”

10 37. Were these guidelines to be applied in this case, the first two requirements just indicated would be satisfied. The third would not. Interestingly the third does emphasise the very significance of the combined packaging, but significantly there is an exception to the “combined packaging” requirement.

15 38. A later part of the guidance makes it clear that:

*“in order to be considered as a “set” it is necessary to fulfil ALL the following conditions:*

20 (a) all the items of the “set” are presented at the same time and in the same declaration;

(b) all the items are presented in the same package such as a carrying case, plastic bag, box, netting around, or (whether or not packed) bound together using for instance filament reinforced tape, etc.;

25 (c) all the items are put up in a manner suitable for sale directly to users without repacking.

30 *However, as an exception to [item (b) above] goods put up in sets for retail sale could be presented in separate packages when justified, for example, due to the composition of the articles (for instance size, weight, shape, chemical composition) for reasons of transport or for safety reasons, provided that they are suitable for sale directly to users without repacking.”*

35 39. We do consider that the above text has some bearing in this case. First it does very much emphasise the significance of “single packaging” for items to constitute a set. Secondly, although it gives one exception to this requirement, it seems to us to be significant that the reason in this case why the items were not packaged together is not fundamentally to do with “transport or safety”. We accept that it is obviously far more sensible to pack countless pairs of briefs together, and similarly countless  
40 bras together. One very obvious reason for not combining them however is that they are not going to be displayed, or strictly offered for sale, together anyway. In terms of moving the goods from the transport boxes to the hangers, it would make sense to remove all the bras, either in the same or graded sizes, and then put them on the racks for the bras; and then do the same with the briefs. In other words they would be  
45 packed together not just because they were being transported together, but because they would never realistically end up in sets at all. Customers would be offered the opportunity to buy matching items, or indeed just a bra and some non-matching briefs or no briefs at all, and it would be pointless to assemble them in sets, or together in  
50 any way, at any point.

40. We conclude therefore that the reality in this case is that the bras and briefs are never in sets. If we revert to trying to answer the question that we posed in paragraph 28 above, our basic answer is that we must first and foremost interpret the wording in the manner that we consider correct. Whether this means that the CN Code contains a clear reference to a non-existent “set”, or whether, as suggested during the hearing, there are a few sets to which the wording may sensibly apply we need not answer. The only material conclusion is that on a fair interpretation of the wording in this case, the bras and briefs were offered to customers so that they could choose matching items if they wished. They were not offered “sets”.

41. The Appellant finally contended that Rules 2 and 3 might be relevant in rather the way that they had been relevant in the *Quelle* decision. The Respondents contended that only Rule 1 was in point.

42. We agree with the Respondents. Once we conclude that the bras and briefs were not offered in sets, the following consequences follow. First, once there is nothing to merge the bras and the briefs into a single composite item, both separate items are clearly categorised under Rule 1, in accordance with Rule 62 which covers the bras and Rule 61 which covers the briefs. That is therefore the result. Independently, though this point is strictly irrelevant because the items have already been separately classified, Rules 2 and 3 become irrelevant for the second reason that we are no longer considering mixed items, uncompleted items or items that are to be put up for retail sale in a set in any event. Nor are we considering unassembled items that have yet to be assembled in any way. We are considering two separate, finished and fully complete items. Accordingly for that second reason, Rules 2 and 3 are irrelevant.

43. We conclude by saying, however, that while we decide that the bras are classified under Chapter 62 and the briefs under Chapter 61, we have found this case to be difficult, and finely balanced, and we have found the insertion of the relevant phrase into Code 6212 10 10 to be extremely confusing. Nevertheless this Appeal is dismissed.

### ***Right of Appeal***

44. 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.

**HOWARD M. NOWLAN**

**TRIBUNAL JUDGE**

**RELEASE DATE: 2 December 2013**