



TC04120

Appeal number: TC/2012/05936

Customs duty – tariff classification – packages comprising waterproof plastic strapwasher, steel woodscrew and (in some cases) plastic spacer for use in fixing corrugated roofing panels in a waterproof way – whether the essential character of the packs conferred by the strapwashers (either alone or, where relevant, in combination with the spacers) – held no individual component or components confer such character – GIR Rule 3(c) therefore applies to classify the packs under the tariff heading occurring last in numerical order – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

POWELL GEE & COMPANY LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE KEVIN POOLE
MR MOHAMMED FAROOQ**

Sitting in public in Priory Court, Bull Street, Birmingham on 5 August 2014

Timothy Brown of counsel, instructed by SKS (GB) Limited, for the Appellant

Richard Chapman of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns the correct tariff classification of certain packs of items imported for use in the construction of buildings. The items in question are generally used for securing corrugated roofing materials in a waterproof way.
2. It is agreed between the parties that the packs are “goods put up in sets for retail sale”, and if possible are therefore to be classified, for customs duty (including anti-dumping duty) purposes under General Interpretation Rule 3(b) of the Combined Nomenclature as if they consisted of “the material or component which gives their essential character”.
3. The main question to be determined therefore was what was the “essential character” of the packs and, in the light of that determination, which (if any) of the component parts gave that essential character.
4. It is common ground that if it is not possible to classify the goods by following this procedure under the provisions of Rule 3(b), then Rule 3(c) will apply, which would have the result of attributing the entire pack to the tariff code for woodscrews (which would result in a significant anti-dumping duty liability for the Appellant).

The facts

5. We received witness statements made by:
- (1) Benjamin David Powell, Managing Director of the Appellant (“Mr Powell”);
 - (2) Colin Silverwood, Technical Sales Manager of the Appellant;
 - (3) Mike Mackey, Sales Director of the Appellant;
 - (4) Anthony Hobbs, Managing Partner of Southern Sheeting Supplies of East Grinstead (a customer of the Appellant); and
 - (5) Huang Welong, Director of Shanghai Prime Machinery Company Limited of Shanghai, suppliers to the Appellant of the goods the subject of this appeal.
6. We also received an agreed bundle of documents and heard oral testimony from Mr Powell and from Officer Marilyn Seago, the HMRC officer who issued the statutory review upholding the disputed decision which is the subject of the appeal. Finally, we examined specimens of the goods in question.
7. We find the following facts.

8. The goods in question comprise plain, unlabelled, sealed polythene packets containing 10 or 25 sets of their component parts. The “standard packs” contain sets of 50mm No. 8 steel Posidrive woodscrews and strapwashers. The “super packs” additionally contain sets of spacers.

5 9. The strapwashers consist of a dome-shaped moulded flexible plastic washer approximately 2cm across with a small pedestal on top and an integral waterproof cap attached by means of a short strap. They are intended for use when fixing corrugated roofing materials to the underlying structure of a building. An appropriate fastener is passed through the washer, then through a hole in the roofing material (at a point
10 where it stands proud from the underlying structure by reason of its corrugation) before being attached to the underlying structure. As the fastener is tightened against the corrugated material the dome of the washer is squeezed against it and deforms slightly to form a waterproof seal, so that water cannot enter the hole which has been drilled in the roofing material. The cap is then folded over and snapped into place
15 over the pedestal on top of the washer, covering the head of the fastener and preventing any water ingress.

10. The spacers (which are essentially reasonably rigid plastic cylinders 20mm long and about 12mm in diameter, through which the fastener passes between the corrugated roofing material and the underlying structure) can be used to provide
20 support to the roofing material, helping to prevent it from cracking or deforming when the fastener is tightened.

11. The woodscrews in the packs are intended for use with the strapwashers (and, where appropriate, the spacers) in order to fix corrugated roofing material to a timber structure. The strapwashers are capable of being used with other fasteners, depending
25 upon the context. When fixing roofing materials to a steel structure, self-tapping steel screws or hook bolts (screwed into or hooked around the steel structure) can be used; and the strapwashers can also be used simply to join two sheets of corrugated material without attaching them to an underlying structure, in which case a short roofing bolt is used as the fastener.

30 12. The packs are intended for retail sale. The Appellant supplies them mainly to distributors of building products, but also sells a few itself direct to the trade.

13. When asked why the screws were included in the packs, Mr Powell explained that by themselves, the strapwasher and spacer could perform no function; some fastener or other would always be needed by the customer, the appropriate fastener in
35 many contexts would be the woodscrews (he considered they were possibly the most used) and it was much more cost effective to have the packets made up in China to include woodscrews than it would be to package them up separately in the UK with different fasteners to customer requirements. When a different form of fastener was required for a particular job, the woodscrews would either be thrown away by the user
40 or simply set aside by him for other use. Mr Powell explained that the hole in the strapwashers was 5mm in diameter, compared to a shank diameter of 4.8mm for the woodscrews. The reason for the difference was to allow for the use of other fasteners (up to 5.5mm in diameter, due to the flexibility of the plastic) with the strapwashers.

This demonstrated, he said, that the woodscrew was not a core part of the packet as a whole, its inclusion was simply a matter of convenience for many of the ultimate users.

14. Following an international trade audit at the Appellant's premises on 13
5 October 2011, HMRC established that some of these packs had been imported on 17
August 2009, declared as "nails" at nil rate duty. Following further investigation, it
was established that there had been a number of similar imports during the previous
three years which had also, in HMRC's view, been misdeclared. HMRC took the
10 view that the packs had the essential character of woodscrews and reclassified them as
proper to TARIC code 7318129099 (under the 2011 Tariff) and 7318129090 (under
the 2009 and 2010 Tariffs). As such, they would be subject to customs duty at 3.7%
and anti-dumping duty at 85% (or, if the identity of the manufacturer could be
established as falling within a particular list, 69.9%). After a "right to be heard" letter
dated 6 December 2011, to which the Appellant replied on 26 January 2011, HMRC
15 confirmed their decision in a letter dated 1 February 2012.

15. The Appellant's advisers requested a statutory review by letter dated 29
February 2012, and set out their submissions. Essentially, they argued that a
consumer buying the packs did not do so because he wanted woodscrews but because
he wanted strapwashers and spacers; the principal components in the packs (which
20 provided the product's "essential character") were the strapwashers and spacers,
manufactured from PVC. As such, the packs were proper to the heading 3925
(builders' ware of plastics) and, in particular, to code 3925 90 80.

16. In her review letter dated 27 April 2012, Officer Seago confirmed the earlier
decision of HMRC, but on slightly different grounds. In outline, she considered it
25 was "not possible to determine the essential character of" the packs, when imported,
as "all the items in the pack have an essential function". Thus they should be
allocated to code 7318 1290 90 (7318 1290 99 for the later imports), being the last
heading in numerical order between the possible alternative headings. (From the
context, whilst nothing hangs on it, it seems to us that Officer Seago's decision might
30 perhaps have been more accurately expressed as being that it was not possible to
determine what individual component or components gave the packs their essential
character, rather than that it was not possible to determine the essential character of
the packs at all.)

17. The quantum of the disputed duty has subsequently been agreed between the
35 parties. The only outstanding issue is whether HMRC's classification of the goods is
correct. Thus we do not consider it necessary to detail the amounts involved, though
the original post-clearance demand note (form C18) was in the sum of a little over
£70,000, to include the Customs Duty, the Anti-dumping Duty and VAT.

The law

40 18. There was no dispute about the applicable law in this case, merely about its
application to the facts. For that reason, we give a summary only of the key parts of

the law, and do not feel it necessary to include in this decision a detailed account of the applicable legislation and case law.

19. The parties are agreed that (in the words of the ECJ in *B.A.S. Trucks BV v Staatssecretaris van Financiën* [2007] Case C-400/05 at [27]) “the decisive criterion for classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the combined nomenclature and of the notes to the sections or chapters.” This was to be assessed as at the time of import of the goods.

20. It is agreed that the relevant headings in the Tariff (so far as relevant) are as follows:

39 25

BUILDERS’ WARE OF PLASTICS, NOT ELSEWHERE SPECIFIED OR INCLUDED:

Reservoirs, tanks, vats and similar containers, of a capacity exceeding 300 litres	392510 00 00 ¹
Doors, windows and their frames and thresholds for doors	392520 00 00
Shutters, blinds (including Venetian blinds) and similar articles and parts thereof	392530 00 00
Other:	
- Fittings and mountings intended for permanent installation in or on doors, windows, staircases, walls or other parts of buildings	392590 10 00
- Trunking, ducting and cable trays for electrical circuits	392590 20 00
- Other	392590 80 00

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73 18

SCREWS, BOLTS, NUTS , COACH SCREWS, SCREW HOOKS, RIVETS, COTTERS, COTTERPINS, WASHERS (INCLUDING SPRING WASHERS) AND SIMILAR ARTICLES, OF IRON OR STEEL:

Threaded articles:	
- Coach screws	731811 00 00
- Other wood screws:	
-- Of stainless steel	731812 10
--- <i>For use in certain types of aircraft</i>	731812 10 10
--- <i>Other</i>	731812 10 90
-- Other	731812 90
--- <i>For use in certain types of aircraft</i>	731812 90 10
--- <i>Other</i>	731812 90 90 ²

¹ Where the last two digits are “00”, they are conventionally omitted

² 731812 90 99 for the later imports

21. It is also agreed that the key General Interpretation Rule for the purposes of this appeal is Rule 3(b), which provides as follows:

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“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 their essential character in so far as this criterion is applicable.”

22. It is also agreed that if classification is not possible under rule 3(b), then rule 3(c) will apply. That rule provides as follows:

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

23. Thus it is common ground that if the goods are not classified as plastic builders’ ware under heading 3925 90 80 by virtue of rule 3(b), they will be classified under heading 7318 1290 90 (7318 1290 99 for the later imports) as steel woodscrews.

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24. Neither party directed us to any helpful explanatory notes to the two headings in question. Volume 1 of the Explanatory Notes to the Harmonised Commodity Description and Coding System however provided some further assistance (highly persuasive, but not legally binding) in the Notes to General Interpretation Rule 3(b):

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“(VI) This second method relates only to:

25

- (i) Mixtures.
- (ii) Composite goods consisting of different materials.
- (iii) Composite goods consisting of different components.
- (iv) Goods put up in sets for retail sales.

It applies only if Rule 3(a) fails.

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(VII) In all these cases the goods are to 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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(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

...

(X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:

5 (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this rule;

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

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

Submissions of the parties

HMRC’s submissions

25. Mr Chapman submitted that no one item in the pack gave it its essential character. It could only be viewed as a composite whole.

15 26. In support of this contention, he referred to a passage in a letter from one of the Appellant’s customers, as follows, which he considered amounted to a clear endorsement of this view:

20 “As to the question you posed as to which component is more important to the fixing the screw or the strap washer, it is our opinion that neither component is more important than the other as they have a totally symbiotic relationship in the effective securing and sealing of the corrugated to the sub frame each resolving their own problem but unable to do so without the other.”

27. He pointed to this as a clear acknowledgment of his view.

25 28. He agreed that the intended use of a product could provide the basis of its classification. He referred to the decision of the ECJ in *British Sky Broadcasting Group plc and another v HMRC* Cases C-288/09 and C-289/09 [2011] STC 1519 at [76]-[77]:

30 “76. It should be recalled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties...

35 77. In that regard, as the Commission acknowledged at the hearing, it is necessary to take into account what consumers would consider to be ancillary or principal.”

29. The *BSB* case was concerned with the Tariff classification of Sky+ set top boxes, which both received and decoded satellite TV transmissions and provided a facility to record those transmissions. The ECJ had to decide whether the Sky+ box

fell within the heading which covered video recording apparatus or TV reception apparatus. On the basis that the customers who acquired it did so principally to access the Sky satellite TV service, it was proper to the latter heading; the recording function was only ancillary to the TV reception. The explanatory notes to the Combined
5 Nomenclature, insofar as they pointed to the opposite conclusion, should be disregarded.

30. In Mr Chapman's submission, the packs were intended to be used to affix corrugated roofing materials to a wooden structure in a waterproof way. No one component gave the pack this essential character; it was only by using all the
10 components together in the appropriate way that the intended purpose could be achieved. Thus Rule 3(b) did not resolve the matter and it was necessary to fall back on Rule 3(c), which allocated the packs to code 731812 90 90/99. The fact that the plastic components could also be used to affix roofing to other materials than wood, by the use of different fasteners, was entirely irrelevant as the classification had to be
15 by reference to the pack as it was imported.

Appellant's submissions

31. Mr Brown submitted that the fact that the packs could be used with different fasteners was what distinguishes them. He referred to the test laid down by the ECJ in *Panasonic Italia sPA and others v Agenzia delle Dogane di Milano* Case C-472/12
20 [2014], at [40]:

“According to that case-law, for the purposes of the customs classification of the screens at issue in the main proceedings, account must be taken of their inherent intended purpose, defined on the basis of their objective characteristics.”

25 32. He also referred to *HMRC v Epson Telford Limited* [2008] EWCA Civ 567, in which the Court of Appeal considered two decisions of the ECJ in *Turbon International GmbH v Oberfinanzdirektion Koblenz* Cases C-276/00 [2002] and C-250/05 [2006] relating to the tariff classification of printer cartridges for electronic printers, and in particular whether they should be classified as ink or as printer parts.
30 In the case, the Court of Appeal confirmed that in determining the “essential character” of composite goods, it was permissible to consider a “purpose-based test” or a “dispensable constituent test”. A purpose-based test would focus on the purpose for which the cartridge was inserted into the printer (i.e. to supply it with ink), whereas a “dispensable constituent” test would focus on the fact that the printer would
35 not function without the proper cartridge. The ECJ had given clear guidance that in that case, the purpose-based test was preferable.

33. He submitted that, in the light of the fact that the woodscrew would not always be the appropriate fastener to use, the inherent intended purpose of the pack would be to enable the creation of a waterproof seal in attaching the corrugated roofing, by
40 using the strapwasher (and, where relevant, the spacer) in conjunction with an appropriate fastener for the purposes of the particular job in hand. Viewed in that way, it could be seen that the woodscrews were merely an ancillary element in the

pack. They could easily be dispensed with, without affecting the essential character of the pack.

34. Mr Brown also submitted that a comparison of the values of the respective elements in the pack led to the same conclusion – the screws formed only around 20-25% of the overall value of each pack and therefore they could properly be regarded as ancillary. He cited *Epson* and the second of the *Turbon* cases in support of his submission that values could be taken account of in this way. We can find no relevant reference to values in those cases, but we consider that Note (VII) of the Explanatory Notes at [24] above certainly affords the necessary authority to consider values, where relevant.

Discussion and decision

35. We essentially agree with Mr Chapman.

36. As imported, both parties accepted (and we agree) that the packs were *prima facie* classifiable under both the disputed headings. Rule 3 of the General Interpretation Rules is therefore engaged.

37. We agree with the parties that Rule 3(a) does not assist, as the two relevant headings each refer to part only of the contents of the packs.

38. It therefore falls to us to determine (if we can) the component that gave the essential character of the packs, under Rule 3(b).

39. No hard and fast rule is laid down as to how this should be done. We do not consider that reference to the bulk, quantity, weight or value of the respective components (as mentioned in Note (VIII) to the General Interpretation Rules) will assist us in the present case.

40. We find the essential character of the packs is to provide a composite solution to the requirement for fixing corrugated roofing to a wooden structure. We note that an unknown number of users of the pack will discard the woodscrews and use the strapwashers (either alone, or in conjunction with the spacers) along with some other form of fastener to perform a slightly different function (i.e. fixing to steel or other structures, or joining two sheets of corrugated material). But this does not affect the fact that the packs, as imported, contained the woodscrews as well, thereby offering the user a complete solution to the requirement identified above.

41. Whether the issue is examined from the point of view of the “purpose-based test” or the “dispensable constituent test” referred to in *Epson*, it is necessary to carry out the examination on the basis of the packs as imported – otherwise, we would not be limiting ourselves to matters which form part of the “objective characteristics and properties” of the goods. It is clear from *British Sky Broadcasting* that whilst “the intended use of a product may constitute an objective criterion for classification”, this is only the case if such intended use “is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties”. There is nothing in this case to suggest that there is

any “inherent characteristic or property” in the packs to support the proposition that part of their users’ purpose may be the immediate discarding of the woodscrews.

5 42. It follows from this that we do not consider any one element of the pack provides its essential character: their essential character is inherent in the combination
10 of contents and no one component or set of components gives them that character. The removal of any one component would remove that character from the whole pack. We therefore consider that Rule 3(b) does not take effect to determine the classification of the packs. It follows that Rule 3(c) therefore applies and the packs are properly allocated to “the heading which occurs last in numerical order among those which equally merit consideration”. This is the heading for woodscrews.

43. The appeal must therefore be DISMISSED.

15 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.

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**KEVIN POOLE
TRIBUNAL JUDGE**

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RELEASE DATE: 11 November 2014