



**TC04838**

**Appeal number: TC/2014/02389**

*CUSTOMS DUTY – Post-Clearance Demand Note – Combined Nomenclature, Chapters 39 and 90; classification of UV eyewear, protective eye shields; whether goods should be classified as spectacles; goggles and the like; yes; appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**CRYSTALS LIMITED**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE J GORDON REID QC FCI Arb  
MEMBER: IAN G SHEARER**

**Sitting in public at George House, 126 George Street, Edinburgh on  
19 November 2015**

**Graham Robertson for the Appellant**

**Phillip McLean, Solicitor, HMRC Division, (Advisory, Legislation and  
Litigation) instructed by the Office of the Advocate General for HM Revenue  
and Customs, for the Respondents**

## DECISION

### Introduction

5 1. This appeal concerns the correct classification for Customs duty purposes of  
protective eye shields (which we generally refer to as the “Goods”) worn by sunbed  
users and imported from the USA by the appellant (Crystals). Crystals claims they  
should be classified under the Combined Nomenclature (CN) heading 9004 as  
10 *spectacles, goggles and the like*. The respondents (HMRC) essentially say that is  
wrong and that the Goods should be classified under their constituent material, plastic  
and thus under the CN heading 3926 as *Other articles of plastic*.

15 2. A hearing took place at Edinburgh on 19 November 2015. The appellant  
(Crystals) was represented by Graham Robertson, its managing director. He did not  
give formal evidence but provided some information and produced examples of the  
Goods. Photographs of the Goods (taken by the Tribunal - as neither party produced  
any) are appended to this decision. Phillip McLean, solicitor (Advisory, Legislation  
and Litigation) instructed by the Office of the Advocate General for HM Revenue and  
Customs, appeared for HMRC. He led no evidence but produced a bundle of  
documents and spoke to his Skeleton Argument previously lodged.

20 3. The appeal is brought under FA 1994 s16(1B) against a relevant decision<sup>1</sup>  
reviewed under s15C. S16(5) gives us full jurisdiction to quash or vary the decision  
or to substitute our own decision. The onus lies on Crystals to show that HMRC’s  
classification is wrong.

### Procedure

25 4. Crystals purported to appeal against a statutory review dated 10 April 2014,  
which upheld a C18 Post Clearance Demand Note (reference C18145306) issued on 3  
December 2013. They did so by letter dated 25 April 2014. The Tribunal service  
treated this as an appeal although the form of Notice of Appeal was not used. There  
were no grounds of appeal specified. These were requested but never produced. On  
30 8 August 2014, Mr Robertson wrote to the Tribunal making various comments and  
asking various questions; most questions were not appropriate for the Tribunal to  
answer. By email dated 28 August 2014 to Mr Robertson, the Tribunal indicated that  
he might care to obtain professional representation, and sent him the standard leaflet  
*Making an Appeal*. In the absence of any response, the file was closed on  
35 5 November 2014.

5. By email dated 2 December 2014 to the Tribunal, Mr Robertson stated that  
Crystals wished to appeal. He stated that the sole use of the product was eye  
protection; the product folded; its rim was affixed around the eye, covering and  
protecting it. He stated that he had provided information in support of the appeal. He  
40 had not, at that stage. Thereafter, the Tribunal assigned the appeal to the standard

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<sup>1</sup> 1994 Act s13A(2)(a)

category and intimated this to Crystals and HMRC. HMRC did not object to the appeal's lateness or informality.

5 6. In February 2015, HMRC applied for and were, in March 2015, granted a 30 day extension to lodge their Statement of Case which was lodged at about the beginning of April 2015.

10 7. At the end of June 2015, the Tribunal issued the usual Directions *inter alia* for the exchange of lists of documents, witness statements, bundles for the hearing and skeleton arguments. In due course, HMRC complied, lodging various documents including a drawing of the Goods provided by Crystals' supplier, Eye Pro, and intimating their last document, their Skeleton Argument, on or about  
4 November 2015. Crystals did nothing.

8. Although there was considerable doubt as to whether Crystals would be represented at the hearing, Mr Robertson attended. No objection was taken by HMRC to Crystals' failure to comply with various basic procedural rules.

15 9. Mr Robertson made some spirited and polite submissions and made a number of points of some interest. He was not cross-examined by HMRC but the Tribunal asked him a number of questions to which answers were given.

20 10. The failure by Crystals to comply with basic procedural rules has made our task more difficult. Mr Robertson explained that he was on the verge of completing the sale of part of Crystals' business, and this may have explained to some extent, his lack of attention to the appeal.

11. At the end of the appeal, we requested some further reference to authority and this was duly provided by Mr McLean, and intimated to Mr Robertson by email on the same day, who promptly replied stating

25 "For each pair of Winkease there are effectively 3 parts and they are imported unassembled in its component parts – The backing paper that needs removed at time of use (One component that is discarded) and 2 individual unassembled Wink Ease eye protectors that are individually assembled.

The backing paper is part of the product as it is WinkEase in its 'flat pack form'.

30 This patented product although 'simple' has extremely high values in both protection from UV light and eye infection and given that the use is Immediate on assembly when the conical shape is formed. The risk of contamination is therefore almost non-existent prior to use because of its imported unassembled state"

35 12. In our discussion below, we have taken account of this email and HMRC's email to which this is a response, as well as the other documents before us at the hearing. We have endeavoured to make findings of fact as best we can in the light of this unusual procedure.

## Legislative Background

13. Article 20 of the Customs Code<sup>2</sup> provides that customs duties are to be based on the Customs Tariff of the European Communities which comprises the Combined Nomenclature (CN)<sup>3</sup> and other adopted nomenclatures and the appropriate rates of duty and other tariff and related measures from time to time.

14. Section VII of the version of the CN applicable to this appeal provides, so far as material, as follows:-

“Plastics and Articles Thereof; Rubber and Articles Thereof

Chapter 39

10 Plastics and Articles Thereof

CN code	Description
<b>3926</b>	<b>Other articles of plastics and articles of other materials of headings 3901 to 3914:</b>
.....	
<b>3926 90 97</b>	- - - Other

15. Section XVIII provides, so far as material, as follows:-

Optical, Photographic, Cinematographic, Measuring, Checking, Precision, Medical, or Surgical Instruments And Apparatus; Clocks and Watches; Musical Instruments; Parts and Accessories Thereof

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CN code	Description
<b>9004</b>	<b>Spectacles, goggles and the like, corrective, protective or other:</b>
<b>9004 10</b>	- <b>Sunglasses:</b>
<b>9004 10 10</b>	-- With lenses optically worked
	-- Other:
<b>9004 10 91</b>	--- With lenses of plastics
<b>9004 10 99</b>	--- Other

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<sup>2</sup> Council Regulation 2913/92/EEC, establishing EU Customs law

<sup>3</sup> Annex 1 to Council Regulation (EEC) No 2658/87 23/4/1987 (the Tariff Regulation); a regulation is adopted each year reproducing the complete version of the CN together with the rates of duty resulting from measures adopted by the Council of the European Union or the Commission - see Article 12(1)

<b>9004 90</b>	-	<b>Other:</b>
<b>9004 90 10</b>	--	With lenses of plastics
<b>9004 90 90</b>	--	Other

16. The fundamental rule in classification cases is that goods must be classified according to their objective properties and characteristics as defined by the wording of the headings of the Common Customs Tariff and the notes to the sections or chapters.<sup>4</sup>

5 17. The classification of goods in the CN is governed by General Rules for Interpretation (GIR) set out in the Tariff Regulation.<sup>5</sup> These provide *inter alia* that

10 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.

15 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, 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.

(b) ..... The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

20 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:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description.....

25 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 notes also apply, unless the context requires otherwise.

30 18. We were also referred to the Opinion of Advocate General Kokott in *Ikegami Electronics (Europe) GmbH v Oberfinanzdirektion Nuremberg*<sup>6</sup> for guidance on the GIRs and to *Deutsche Bakels GmbH v Oberfinanzdirektion Munchen*<sup>7</sup> for guidance

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<sup>4</sup> See *Fabrica de Queijo Eru Portuguesa Ld<sup>a</sup> v Alfandega de Lisboa* 1977 ECR I-3441

<sup>5</sup> Annex 1, Part 1, Section 1.

<sup>6</sup> [2005] ECR I-2389 paragraphs 33 and 34

<sup>7</sup> [1970] ECR 1001 at paragraphs 9-10. The Customs Co-operation Council referred to therein, established in 1952 under the Brussels Convention 1950, has, since 1994, been known, informally, as the World Customs Organization, in order to indicate more clearly its world-wide status.

on the Harmonised System of Explanatory Notes (HSEN) which provide an authoritative source of interpretation of the CN where no explanatory notes have been issued by the European Union. After the conclusion of the hearing we were referred to *Hauptzollamt Hannover v Amazon EU Sàrl*,<sup>8</sup> *Skatteministeriet v Imexpo Trading A/S*<sup>9</sup> and *Develop Dr Eisen GmbH and Co v Hauptzollamt Stuttgart-west*<sup>10</sup> for guidance on additional questions raised by the Tribunal.

19. The HSEN provides guidance on Heading 9004 including the following:-

This heading covers articles (usually comprising a frame or support with lenses or shields of glass or other material) for use in front of the eyes, generally intended either to correct certain defects of vision or to protect eyes against dust, smoke, gas etc or dazzle; it also covers spectacles for viewing stereoscopic (three-dimensional) pictures.

.....

Protective spectacles and goggles generally consist of plane or curved discs or ordinary glass....., of safety glass, of plastics .....These articles include sunglasses, spectacles used for mountaineering or winter sports, goggles for airmen, motorists, motor-cyclists, chemists, welders, foundry workers, moulders, sand-blast machine operators, electricians, roadmen, quarrymen etc.

The heading also includes goggles for underwater use; removable spectacles (eg sunglasses) for fitting to other spectacles (generally corrective spectacles) and used either as protective filters or, in some cases, as additional corrective lenses, polarising spectacles fitted with lenses of plastics for viewing three-dimensional films (whether or not with a paperboard frame).

.....

The heading also excludes

(a) Contact lenses.....

## 25 Facts

20. Between about December 2010 and October 2013, Crystals imported 23 consignments of Goods with a variety of descriptions including *UV Eyewear*, *Protective Goggles*, and *Protective Eyewear*. The Goods were declared under reference to commodity codes 90049010 00 and 90049090 00. The customs duty rate was 2.9% plus Import VAT at the standard rate.

21. The Goods were imported from the USA. The supplier or at least the principal supplier was Eye-Pro Inc., Indiana. The Goods were known as *Wink Ease* eye protectors. If there were different suppliers, no points of distinction were identified or relied on.

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<sup>8</sup> [2015] ECR I-00000

<sup>9</sup> [2005] ECR I-9273

<sup>10</sup> [1993] ECR I-02655

22. In October 2013, HMRC intimated that the Goods should have been declared under reference to commodity code 39269097 90 which carried customs duty at the rate of 6.5% plus VAT. This may have followed some routine enquiries and checks.

5 23. After some correspondence with Crystals, HMRC informed Crystals that they considered that the Goods should be classified under commodity code 39269097 90 and issued a Post Clearance Demand Note (reference no C18145306) on or about 3 December 2013 for duty of £8,291.33 and VAT of £1,587.89.

10 24. Crystals sought a review of the decision and eventually produced some information to support it. The review, dated 10 April 2014, upheld the decision. The review noted that the grounds for review were

- 1) Wink Ease eye protectors have a sole use; they are patented and designed with eye protection as their sole use.
- 15 2) They arrive in a flat form. By a simple process of folding/adjusting this forms a conical shape with a formed rim and a rigid structure that allows the product then to be fixed/located on the skin surrounding the eye thus protecting the eye.
- 3) They are similar to sunglasses that are imported in a flat packed form; when in use legs have to be adjusted or unfolded and only then are the sunglasses suitable to be worn; they then provide eye protection.
- 20 4) The definition of eye protection is extremely wide and includes reading glasses, sun glasses, goggles, masks, monocles etc. The Goods fall into the disposable category within eye protection.
- 5) Crystals contended for commodity code reference 9004 9010 00 and 9004 9090 00
- 6) Various dictionary definitions were referred to (*rim, goggles, frame*).

25 25. The review proceeded on the basis that the Goods were protective eye shields made of metallised polyester with a self-adhesive edge; that they were sold in the form of flat discs on a paper backing and are worn by sunbed users; that they have no frames or rims; that the flat material needs to be removed from the paper backing, and then shaped into a cone; that a light medical grade adhesive secures the Wink Ease in place over the user's eyes; that they provide clean and easy disposable eye protection.

30 26. The review relied on the guidance of the HSEN in relation to Heading 9004 and GIRs 1 and 6; and concluded that the Wink-Ease protective eyewear were not spectacles, goggles or similar products; they were clearly not recognisable as such items; they did not consist of planed or curved discs (as referred to in the HSEs). It was a disposable disc designed to protect the eyes when using a sunbed or when  
35 undergoing tan spraying.

27. The conclusion was that the Goods should be classified according to their constituent material and therefore fell under Heading 39269097 90 which covers other articles of plastics.

28. It was also noted that the Goods had been the subject of a Binding Tariff Information (BTI) ruling classifying the product under code 39269097 90.

### *The Goods*

5 29. Having regard to our own observations, and the various points made by the parties during the hearing, we make the following factual findings about the Goods.

30. They are not spectacles and they are not goggles.

10 31. The Goods consist of two separate sticker-like objects when in their unpeeled, form. They are thin and flat and are elliptical in shape, about 47mm wide and 30mm deep. They present attached (but not to each other - there being no strap or tie to connect one to the other), side by side, to a rectangular strip of paper about 100mm by about 35mm. They have a golden coating on one side. As purchased, they are a *flat pack*.

32. The Goods are made of polyester with a metallised coating.

15 33. In order to use these eye protectors, they have to be peeled from the backing paper. The reverse side of each eye protector has adhesive across the upper third and the lower third, extending to the edge of the upper and lower third. A more or less rectangular strip about 45mm by 10mm extending horizontally across more or less the middle third of the reverse side of each protector to its edge on each side has no adhesive. This rectangular non-adhesive strip has a slightly different shade or colour  
20 and is clearly distinguishable on the samples provided to us.

34. The words *fold to here* with an arrow are on the coated side. When that is done, each protector has a more or less conical shape. While it is flimsy, it has a small degree of structural stability when the conical-like shape has been achieved. When  
25 presented to the eye with the point of the cone facing away from the face, part of the protector, at or in the vicinity of its edge, adheres to the user's skin in the vicinity of the eye. A pair of these protectors can be worn lying, sitting, standing or moving about, when carefully affixed, without holding them. While using them, the user's vision is not materially impaired. The user can see adequately through the protectors.  
30 The Goods are, at least in part, transparent, even though when first presented on the backing paper, the Goods appear to be opaque. The visual impression when wearing and looking through the protectors has a similarity with looking through darkened glasses, although the field of vision is not crisp or clear as it would or might be with a typical pair of glasses.

35 35. When in place, the eye protectors are not connected one to the other by a frame or strap or other connecting device. There is no bridge at the nose to connect them to each other. They have no legs or anything similar.

36. After use on a single occasion, the eye protectors are disposed of. They are not used again.

## Submissions

37. We have described the informal procedure at the hearing. Mr Robertson did not seek to argue that the goods were spectacles or goggles, but rather that they fell under the added words ‘...and the like...’ in Heading 9004. He said that the sole use of the product was eye protection, unlike sunglasses which can be worn above the eyes as a fashion accessory. He said there were two actions required before the Goods could be used. First, the paper had to be peeled away. Second, a folding and twisting operation was needed to achieve the conical shape. Creating the conical shape created structure and a rim. He challenged the assertion by HMRC in their Statement of Case that the Goods ‘have no frames or rims’. He relied on the dictionary definition of a rim as ‘...the outer edge of something...’. The resulting item, he said, had strength and shape and had, ‘to all intents and purposes’, a frame, albeit in the limited sense that an outer edge frames any item. Most glasses also required their legs to be opened before use (though some have no legs). He submitted that the adhesive rim of the Goods performed the same function as the legs of sunglasses in holding the eye protectors in place. It was noted that some glasses and monocles do not have a frame in the wider sense of a different material at the rim of the eyepiece.

38. He said the whole of the reverse side was adhesive. This does not appear to be correct from our observations after the hearing. The point was not discussed at the hearing.

39. He said that the eye protectors replace goggles which were found to have *infection problems*.

40. He relied on the word *usually* in the Explanatory Notes, which he said gave the classification sufficient flexibility to accommodate the Goods within heading 9004. The Goods have been imported under this heading since the 1990s without objection. The BTI ruling was flawed. He had examined the papers in that case (but did not produce any document) and said not all the arguments had been considered. He said there was an appeal but it was abandoned.

41. He submitted that ‘like’ means similar in terms of appearance. If one were to ask most people what the Goods look like when worn, they would agree that they are like spectacles or goggles.

42. After questioning from the Tribunal around whether the Goods are supplied in their finished form (as when worn), he suggested that, whilst HMRC were focussing on GIR 1 and 6, GIR 2(a) could also possibly be relevant. He said that the assembly of the eye protectors from their supplied format is a similar operation to glasses which are supplied flat and/or in a smaller case, and which then have to be opened out before use.

43. Mr McLean, for HMRC, developed his Skeleton Argument. He referred to Articles 20, 78, 201, and 220 of the Community Customs Code, and to Chapter 39 of the CN, Code 3926, Chapter 90, Code 9004. He referred to the general approach to the CN under reference to the GIR and to *Ikegami* at paragraph 33. He also relied on

the HSEs relating to 9004 and the use that may be made of these Explanatory Notes under reference to *Deutsche Bakels*.<sup>11</sup>

44. He did not rely on the BTI stating that it did not bind other traders but merely reflected HMRC's view.

5 45. He analysed the core concept in the heading of CN 9004 namely *spectacles, goggles and the like, corrective, protective or other*. Noting the words 'or other', he argued that this entailed that the question whether particular goods should be classified under this heading could not to any extent be determined by their function – because by inference the category covers spectacles, goggles and the like which might  
10 have any function unrelated to correcting eyesight or to eye protection. He submitted that therefore the question whether goods were '*spectacles, goggles and the like*' must be determined by their objective characteristics (as set out *Fabrica de Queijo*), and in his submission this should be determined largely by appearance or physical characteristics.

15 46. The Goods were simply not similar in appearance to spectacles or goggles. They were a sheet of plastic that could be shaped into a cone. The Goods did not resemble, or share physical characteristics with, spectacles or goggles. The Goods have the appearance of stickers and could be used as such (we note that this was not conceded and there was no such evidence of such use). No one would guess what the  
20 Goods were used for. It is not enough that they can be seen through and, in use, are placed over the eye. They do not share a sufficient number of the characteristics of spectacles or goggles and are, by contrast, too dissimilar to be covered by heading 9004. When used they do not have plain or curved discs. They are not joined or supported at the bridge of the nose. They are held in place by adhesive, entirely  
25 unlike spectacles or goggles. They do not share the distinctive design of spectacles or goggles. He suggested that the analogy relied upon by the appellant, that assembling the goods from their sticker format is similar to opening out a pair of glasses, was a forced one and that it was likewise not persuasive to focus on them having a 'rim'. In his view, they have a rim only in the sense of an edge – in the same sense that a piece  
30 of paper has an edge. However, he also then accepted that there are rimless spectacles, and therefore that debate over the rim question may not be relevant.

47. He submitted that the Goods should be classified according to their constituent material, namely plastic and therefore fell under heading 3926 of the CN.

### **Discussion and Decision**

35 48. The hearing proceeded on the basis that, if the Goods did not fall to be classified under heading CN9004, then they fell to be classified under heading CN3926, in accordance with the Post Clearance Demand Note.

49. Heading CN9004 refers to *spectacles, goggles and the like, corrective, protective*. These are the core concepts. They are supplemented and clarified by the

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<sup>11</sup> Paragraphs 9-10

HSEN referred to above, which are regarded as authoritative and carry equal weight<sup>12</sup>. We endeavour to identify the objective characteristics<sup>13</sup> of the Goods in order to determine whether they fall within Heading CN9004.

50. It seems clear to us that the Goods are not spectacles and are not like spectacles.  
5 The core concept of spectacles usually includes a frame or support with lenses intended to correct defective vision. Such a frame or support usually has two legs (which usually rest on the ears in some way) and a central support which lies or rests on the bridge of the nose; the frame holds the lenses as one relatively rigid unit. The Goods have none of these characteristics. They do not have much of the appearance  
10 of glasses whether in their flat or conical shape. The Goods are not spectacles and are not *like* spectacles. We next consider *goggles*.

51. It seems equally clear to us, for essentially similar reasons, that the Goods are not goggles. Goggles generally consist of plane or curved glass or plastic. They too, usually have a frame or support, or some form of strap or tie to enable them to be  
15 secured to the head. Their purpose is to provide eye protection, against a variety of perceived hazards to the eye in connection with work-related or sports activities, and some leisure activities. The distinguishing trait which normally marks the distinction between goggles and spectacles is that the function of goggles is to protect the eyes, (rather than to improve or correct defective vision) when the wearer is engaged in  
20 such an activity. This is consistent with the HSEN guidance quoted at a paragraph 19 above where use and function are expressly mentioned. Spectacles which have a protective function are specifically identified in the guidance. The line between spectacles and goggles may be difficult to draw. The use of *and the like* must at least embrace some articles which have the same function as or similar function to goggles.  
25 Are the Goods such articles?

52. It might reasonably be said that the Goods are a modern equivalent of goggles and take the place of goggles as a protection of the eye from UV light. We agree. They are articles placed in front of the eyes (as spectacles and goggles are). Their purpose and function is to protect the eyes, which is consistent with goggles and the  
30 classification heading. It might reasonably be said that they have advantages over goggles. They do; there is plainly a market for them; eye infection, from use, would seem to be virtually eliminated, as the Goods are used once, when unpeeled from the paper to which they are attached, and disposed of once used. We assume that, overall, they are much less expensive than goggles used to protect the user against UV light  
35 although we heard no evidence on this aspect, and the Goods are to be used once only, rather than repeatedly. Nevertheless, on the foregoing basis, the Goods might reasonably be said to be *like* goggles in that they have at least one identical characteristic and several others substantially in common with goggles. We take that view.

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<sup>12</sup> *Ikegami* paragraph 13; *Deutsche Bakels* paragraph 11

<sup>13</sup> *Fabrica deQueijo Eru Portuguesa etc* paragraph 13; *Hauptzollamt Hannover v Amazon* 2015 Case C-58/14 paragraph 20

53. While we consider that the appearance of the Goods, whether folded and shaped and thus conical, or unshaped and flat, bears little physical resemblance to the usual notion of goggles, that is not fatal to the appeal. It is correct that none of the illustrations in the Explanatory Notes, which describe the characteristics of goods which fall under heading CN9004, is apt to enable us to conclude that the Goods fall to be classified as *spectacles* and *the like* or *goggles*. However, we must give some content to the last part of the phrase in the heading ([goggles] *and the like*).

54. The sole function of the Goods, like goggles, is eye protection. That is the distinguishing trait of goggles and is the fundamental function and purpose of the Goods. That fundamental function and purpose of the Goods is their principal objective characteristic. That characteristic is precisely the same characteristic which, possibly along with some other characteristics distinguishes goggles from spectacles. One dictionary definition of goggles is simply spectacles for the protection of the eyes.

55. HMRC seek to minimise the notion of function, and effectively to ignore it, concentrating instead, exclusively on physical characteristics. No authority was cited to support that approach which seems to us to raise a question of law. Is the fundamental or principal function and purpose of the Goods relevant to their classification in this appeal? And if it is, does it outweigh the absence of certain physical similarities to goggles.

56. The answer to the first question is not in doubt. In *Ikegama*, Advocate General Kokott, in the opinion cited to us by HMRC, stated that the two relevant criteria for classification of an article are its material composition and its intended use, the intended use being determined by recourse to objective criteria.<sup>14</sup> We therefore reject the submission that the classification cannot be determined to any significant extent by reference to the intended use of the Goods.

57. The decisive criterion for the customs classification of goods must be their objective characteristics and properties as defined by the wording of the headings of the Common Customs Tariff and to the notes to the sections or chapters.<sup>15</sup>

58. In our view, the intended use, function and purposes of the Goods constitute important characteristics of the Goods, considered objectively. That is their distinguishing trait or characteristic. That same characteristic distinguishes spectacles from goggles. Spectacles do not usually have a protective function but goggles always have such a function. The protective characteristic of goods which fall within the heading appealed to is expressly mentioned (*protective*). The Goods have no

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<sup>14</sup> Paragraph 35 (concerning the classification of a computer based monitoring system)

<sup>15</sup> *Fabrica de Queijo Eru Portuguesa etc* paragraph 13

function other than eye protection. The same can be said of goggles. This is not a case, where, for example, an article has principal and ancillary functions.<sup>16</sup>

59. While spectacles and goggles may have legs that when folded, have to be unfolded and extended in order for such articles to be worn and to enable them to remain in place without being held, we would not describe this as an act of assembly. It is questionable whether the Goods can be described as being imported unassembled in their component parts. However, the fact that the backing paper has to be removed before the Goods can be shaped and used does not affect our views on the core concept or fundamental objective characteristics of the Goods, which is eye protection against UV light.

60. There are some physical characteristics of the Goods that are similar to goggles. When worn, the Goods cover each eye and have a similar size and shape to the human eye socket. It is within common experience that some goggles do so, too. The Goods are made of a form of transparent tinted plastic. It is within common experience that some goggles or parts of them are so made. When worn (ie when being used as intended) the Goods, to some extent at least, have the appearance of, and the look and feel of an article akin to goggles (*the like*). If asked to describe what a user of the Goods was wearing, any reasonable person might readily say *some form of goggles or eye protection*.

61. The Goods are also the subject of a patent at the forefront of which is the design, purpose, function and use of an article for eye protection from a hazard in a particular environment, namely UV light.

62. Overall, we consider that the issue before us is finely balanced. However, the objective characteristics of the Goods as we have found them to be, tip that balance in favour of Crystals. The Goods are worn in front of the eyes. Like glasses and goggles they do not need to be hand-held. They cover the eye sockets. They are transparent. Their sole function, like goggles, is to provide eye protection. Eye protection is an element of the relevant classification heading. They are readily describable by any reasonable person as a form of goggles or eye protection.

63. All this and the other physical characteristics mentioned in paragraph 60 seem to us to outweigh the absence of certain physical similarities to spectacles and goggles. This answers the second question posed above in paragraph 55, and seems to us to bring the Goods just within the classification for which Crystals contend, particularly as we find no support in the authorities or in the classification heading itself for putting to one side or minimising the importance of the sole intended use of the Goods. In these circumstances, we consider that the appeal must be allowed.

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<sup>16</sup> *Amazon* at paragraphs 23-25; in that case, too, the Court emphasised that the decisive criterion for the classification of goods for customs purposes is to be sought in the objective characteristics and properties as defined in the wording of the relevant heading of the CN

64. We should also record that, having regard to our findings of fact, we do not consider that the Goods are *prima facie* classifiable under two or more headings. Accordingly, GIR 3 has no application.<sup>17</sup>

5 65. Further, while we note that the General Rules of Interpretation refer to an article presented unassembled or disassembled,<sup>18</sup> we do not consider that assessing the characteristics of the Goods in their unassembled state (while attached to the backing paper; or detached but unfolded and unshaped) adds to or detracts from Crystals' case.

10 66. In these circumstances, Crystals has established that the Goods have been wrongly classified. On that basis, the assessment should (as HMRC accept) be **reduced to nil**.

### **Disposal**

67. **The appeal is allowed and the assessment is reduced to nil.**

15 68. 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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**J GORDON REID QC FCIarb  
TRIBUNAL JUDGE**

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**RELEASE DATE: 15 JANUARY 2016**

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<sup>17</sup> See for example *Eisbein v Hauptzollamt Stuttgart- West 1994 Case C-35/93*

<sup>18</sup> GIR 2(a)

**APPENDIX  
PHOTOGRAPHS**



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