[2017] UKFTT 0138 (TC)

TC05632

Appeal number: TC/2015/02606

Customs duty – flaked Asian sun-cured oriental tobacco in bags of 225g –revocation of BTI – tariff classification – whether proper to 2401 20 60 00 (unmanufactured tobacco, partly or wholly stemmed/stripped, sun-cured oriental type tobacco) or 2403 19 10 00 (Other manufactured tobacco, smoking tobacco, other, in immediate packings of a net content not exceeding 500g) – product not ready to smoke, but not requiring industrial processing to make it smokable – held proper to 2401 20 60 00 – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ALAMGEER FOODS LIMITED **Appellant**

-and-

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

TRIBUNAL: **JUDGE KEVIN POOLE**
TERRY BAYLISS

Sitting in public in Centre City Tower, Birmingham on 8 & 9 June 2016

Shane Crawford, instructed by Hanif & Co for the Appellant

James Puzey instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This appeal is against a decision by HMRC to revoke a Binding Tariff Information ("BTI") in relation to the tariff classification of flaked Asian sun cured tobacco. The BTI classified the goods to commodity code 2401 20 60 00 (covering "unmanufactured tobacco") but HMRC subsequently reached the view they should be classified to code 2403 19 10 00 (covering "other manufactured tobacco"). This appeal is therefore essentially concerned with the correct tariff classification of the product in question.

The facts

2. We received a bundle of documents and witness statements made by Majid Zeb (director of the appellant), Salma Malik (HMRC Officer who made the decision dated 4 September 2014 to revoke the relevant BTI), Mark Palmer (senior policy adviser for Tobacco Excise at HMRC) and Rangizeb Iqbal (an HMRC officer who made an unannounced visit to the appellant on 11 September 2014 concerning some of the product which had been seized by the UK Border Force). All four witnesses also gave live evidence. We found all of them to be reliable, except that we were unconvinced by Mr Zeb's attempts to maintain that there was any credible final use for the product in question apart from for smoking. We should emphasise however that this does not mean we considered him an unreliable witness, simply that he was somewhat vague about the lack of any evidence in one area (the actual end use of the product) that HMRC considered to be crucial to the case.

3. We find the following facts.

4. The appellant imports and distributes (mainly to retailers) various food and food-related products from Asia. Amongst those products is a tobacco product from Pakistan which is the subject of this appeal.

5. We were provided with a sample of the product in question ("the Product"). It consisted of a heat sealed transparent plastic bag measuring approximately 20 cm x 30 cm (about 3 cm thick) containing a quantity of small light yellowish-brown dry product which the parties agree is sun-cured tobacco leaves (i.e tobacco leaves which have been dried by exposure to the sun after picking, making them very thin, dry and brittle). The Product has been subjected to some process to break the cured leaves down into flakes rather than whole leaves. The flakes range in size from very small (less than 1 mm across) to approximately 1 cm across, and their appearance is similar to corn flakes, though much thinner. One or two larger flakes and stray dried stems can also be seen, but these are very few in number. On one side of the bag was attached a sticky label around 13 cm x 18 cm displaying graphic images of diseased and healthy lungs and the warning "Smoking causes fatal lung cancer"; on the other side of the bag was a sticky label around 20 cm x 18 cm with the appellant's details and logo, the details of the packer in Pakistan, a barcode and batch number and the following text:

"SUN CURED TOBACCO

Smoking seriously harms you and others around you

Note: Unmanufactured tobacco requires further processing

Weight: 225 g UK DUTY PAID"

6. On 2 August 2007, HMRC issued a BTI to the appellant in respect of what we understand to have been substantially the same product (though the labelling would have been different). The description of the goods given in that BTI was: Flaked Asian sun cured tobacco. Requires further processing. Supplied in 225 gm packets." The BTI confirmed the classification code 2401 20 60 00 for the goods.

7. In July 2008, HMRC visited the appellant's premises and detained 1350 kg of this product pending an enquiry into the correct import classification for them. After testing and consideration, HMRC released the goods in October 2008, confirming the commodity code in the BTI.

8. From time to time, it appears that HMRC officers visiting the appellant's customers (mostly small grocery retailers) would seize the products from those retailers and in practical terms the appellant had to issue refunds to the retailers in respect of those goods.

9. In about May 2013, the Walsall Trading Standards Department required the appellant to apply appropriate health warnings to the Product to comply with the Tobacco Products (Manufacture, Presentation and Sale) (Safety) Regulations 2002 SI 3041, as amended by 2007 SI 2473. Rather than dispute with the Trading Standards Department whether the Product actually fell within those Regulations, the appellant felt it simpler just to comply with their requirements in order to avoid any problems with them. We accept Mr Zeb's evidence that their requirements included the inclusion of the "UK Duty Paid" wording on the labelling, whether or not the Regulations actually require it.

10. As the six year life of the 2007 BTI was coming to an end, the appellant submitted an application dated 22 July 2013 for its renewal. The "Description of the Goods" contained in that application was as follows:

> "The goods Alamgeer Foods Ltd intend to import can be broadly described as a tobacco, which originates in Asia and is cured in the sun. It has not gone through any industrial or other manufacturing process and it requires further processing before it can be used. This product may possibly be smoked or used as a herb after being processed. The usual trade name for this product is sun cured tobacco. The packaging will be plastic bags with contents of 225 g per packet."

11. HMRC required to see a sample of the goods before issuing the BTI. This was sent on 30 August 2013, and on 3 September 2013 HMRC issued the renewed BTI, confirming the classification code 2401 20 60 00. The "Description of the goods" in the BTI was as follows:

> "Flaked Asian sun cured tobacco. Unmanufactured tobacco in the form of dried fragments of leaves having the appearance of small flakes. Yellow/brown in colour the tobacco has been cured in the sun without any industrial or other manufacturing process. The product requires further processing before it is ready to be smoked and is presented in plastic bags with 225 grams per packet."

12. Clearly HMRC had wider concerns about various forms in which tobacco was imported, and we were provided with a copy of a short decision of the Ipswich Magistrates Court dated 5 March 2014 in condemnation proceedings involving a consignment of tobacco imported from Pakistan by Al Noor Foods Limited. The tobacco in that short decision was described as "not only dried… but… further stemmed and stripped." It was described as having been "cut or otherwise split" from what was apparently a photograph of a large leaf, presumably of tobacco.

13. According to the evidence of Officer Malik (who attended the Magistrates Court hearing), the Al Noor tobacco was packed in 225 g bags, carried a UK smoking health warning and was labelled "Sun Cured Tobacco UK Customs & Excise Duty Paid Note: Unmanufactured Tobacco Requires Further Processing". Beyond that, and an assertion from Officer Malik that she considered them to be identical to those the subject of the present appeal, there is no detailed information about the nature of the goods in the Ipswich case. The magistrates indicated they were "satisfied that it is capable of being smoked without further industrial processing; whilst the labelling indicates further processing is required, the size of the package indicates this will not be on an industrial scale."

14. We should emphasise that the magistrates were addressing the question of whether the tobacco in that case was subject to Excise Duty under the Tobacco Products Duty Act 1979[1], they were not considering its tariff classification; however, there are close parallels between the language used in that Act (and in particular an associated Order, also referred to below) and the language of the relevant tariff classification codes.

15. In any event, the magistrates found the tobacco in that case to be subject to Excise Duty, and Officer Malik confirmed this prompted HMRC to revisit the BTIs they had issued for similar products, even though such BTIs applied for customs duty (and not excise duty) purposes.

16. On 19 March 2014, HMRC wrote to the appellant, indicating that in their view, tobacco could not qualify for tariff classification 2401 20 60 00 if it was "ready for smoking". They asked for details of how the appellant's product was further processed before it was ready to be smoked.

17. The appellant responded on 18 April 2014. In that letter, the appellant said that it imported the tobacco "in a raw, unprocessed and un-manufactured state. We

[1] The relevant legislation is set out at [37] below

are not involved in any manufacture or processing of our product before sale." It went on to say:

> "Generally we understand people may use our product as a herb for various purposes, for producing snuff, for gardening, or possibly after putting it through some sort of industrial or other manufacturing process for smoking amongst other things but we do not know the processes they use. We further understand that various processes in various stages are used. However, we can not say what or how as we have no involvement in their processes. We can confirm to you that our product is not sold ready for smoking or snuff or any other immediate use to our knowledge. We do not know of anyone that uses it directly for smoking or any other purpose."

18. Clearly HMRC were not satisfied by this response. Our bundle included a copy of what appeared to be an internal instruction of HMRC to revoke the BTI. That document was dated 22 April 2014, which must clearly have been very rapidly after receipt of the appellant's letter dated 18 April 2014. For some reason that was not made clear, however, it was not until 4 September 2014 that HMRC sent a letter to the appellant formally revoking the 2013 BTI. The decision was stated to be "following the condemnation hearing made by the Bench in Ipswich Court on 5 March 2014". The following specific explanation was given:

> "Unprocessed tobacco that is already prepared for retail distribution, i.e. it has been split from a bulk consignment into smaller quantities with the intention that it can be processed into smokeable state at home (for example in a domestic blender/shredder) is considered smokeable without further industrial processing. On that basis the product is classified to commodity code 2403191000 (Tobacco, other manufactured, smoking tobacco, other, in immediate packings of a net content not exceeding 500 g)."

19. The real underlying concern of HMRC is perhaps disclosed by the following statement then set out (in bold type) in the letter: "**This is subject to excise duty at the Other Smoking Tobacco rate.**"

20. Further correspondence ensued between the appellant and its solicitors on the one hand and HMRC on the other. HMRC supplied a copy of the Tribunal's decision in *Mariusz Wnek v Director of Border Revenue* [2013] UKFTT 575 (TC), which had been considered by the magistrates in the *Al Noor* case. In a further letter dated 11 October 2014, the appellant said this:

> "We do not sell tobacco for smoking. We do not believe that the product we sell can be smoked directly as normal tobacco for smoking because our tobacco is stripped natural leaves, in their natural state, dried in the sun and requires industrial Processes before it can be smoked. Tobacco leaves, we understand can not be smoked directly as all smoking tobacco requires some sort of industrial processes before it can become smokeable tobacco. However, as you are well aware people may do all sorts of strange things such as even smoke tea leaves and various other things. We just import and sell on the sun-cured oriental

> type tobacco, in a raw unprocessed and un-manufactured state. We are not involved in any manufacture or processing of our product before the sale."

21. The letter went on to include a paragraph very similar to that set out at [17] above, though it also referred to possible use as a "natural pesticide".

22. After further inconclusive exchanges of correspondence, a formal departmental review was requested and ultimately a decision letter was issued on 3 March 2015 confirming HMRC's decision to revoke the BTI.

23. On 2 April 2015 the tribunal received the appellant's notice of appeal against HMRC's decision.

24. Officer Palmer confirmed that the Product was not smokable when imported and sold on by the appellant. It would require to be re-hydrated and shredded down to smaller pieces before it could be smoked. This could however be done fairly easily; he had seen products which he believed were similar being re-hydrated by spraying with water, then cut up with a Stanley knife and rolled into a cigarette. He also referred to domestic paper shredders as being suitable for processing such tobacco into a smokable state. The crucial feature of his evidence, which we accept, is that the Product is not smokable when imported.

25. He also referred to the claimed other uses for the Product (pesticides, wood stainer or pet bedding) as "anecdotal" and unsupported by any evidence he had seen. In response to a public consultation exercise which sought any non-smoking uses for such products, nothing had been received by HMRC. We accept this.

The law

26. A useful high level summary of the relevant law relating to tariff classification is set out in the decision of Lawrence Collins J in the High Court in *VTech Electronics (UK) Plc v The Commissioners of Customs & Excise* [2003] EWHC 59 (Ch):

> "[6] The Common Customs Tariff came into existence in 1968. By art 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.
>
> [7] The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature ("CN") established by art 1 of Council reg 2658/1987. The CN is established on the basis of the World Customs Organisation's Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party.
>
> [8] Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes "to apply the General Rules for the interpretation of the Harmonised

System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System". The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.

[9] The CN, originally in Annex I to reg 2658/87, is re-issued annually: the version applicable to the present case is Annex I to reg 2204/99 (12.10.99 OJ L278)[2]. The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature ("CN subheadings"); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

[10] The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are "00" and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.

[11] There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System ("HSENs"). The Community has also adopted Explanatory Notes to the CN (pursuant to art 9(1)(a) of Council reg 2658/87), known as CNENs.

[12] Binding Tariff Information is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council reg 2913/92/EEC) on request from a trader. They are called "BTIs", and such information is binding on the authorities in respect of the tariff classification of goods. The BTIs issued in this matter were the subject of the appeal to the Tribunal in the present case.

III INTERPRETATION

[13] There are many decisions of the European Court on the interpretation of the tariff headings. The decisive criterion for the tariff classification of goods must be sought generally, regard being had to the requirements of legal certainty, in their objective characteristics and properties, as defined in the headings of the Common Customs Tariff: eg Case C-177/91 *BioforceGmbH v Oberfinananzdirektion Munchen* [1993] ECR I-45, where the function of the product (hawthorn drops) was decisive; Case C-309/98 *Holz Geenen GmbH v Oberfinananzdirektion Munchen* [2000] ECR I-1975, where the intended use of the product (wood blocks for window frames) was said to be such an objective criterion if it was inherent in the product; Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-

[2] The Regulation relevant to the present appeal is in respect of a later year, but nothing hangs on the difference.

6495, where the intended use of the product (pyjamas) was decisive, and the presentation of the goods was regarded as relevant.

[14] The headings and the Explanatory Notes do not have legally binding force and cannot prevail over the provisions of the Common Customs Tariff: Case C-35/93 *Develop Dr Eisbein GmbH & Co. v Hauptzollamt Stuttgart-West* [1994] ECR I-2655, para 21; Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495, per Advocate General Jacobs, para 32; Case C-309/98 *Holz Geenen Oberfinananzdirektion Munchen* [2000] ECR I-1975, para 14. But they are important means for ensuring the uniform application of the Common Customs Tariff and are therefore useful aids to interpretation: eg Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [2000] ECR I-1975, para 11; Case C-309/98 *Holz Geenen Oberfinananzdirektion Munchen* [2000] ECR I-1975, para 14. They may show that a classification by Commission Regulation is invalid, if the error made by the Commission is manifest: eg Case C-463/98 *Cabletron Systems Ltd v Revenue Commissioners* [2001] ECR I-3495, para 22.

[15] It is for the national court (even in a case which has been referred to the European Court for guidance on the applicable principles) to determine the objective characteristics of a given product, having regard to a number of factors including their physical appearance, composition and presentation: Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495, para 21.

[16] The General Rules for the Interpretation of the CN ("GIRs") are contained in s 1A of Pt 1 of Annex 1 to Council reg 2658/87 and have the force of law. They include the following potentially relevant provisions:

> "(a) By r 1, classification is to 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 succeeding provisions.
>
> (b) By r 2(b), the classification of goods consisting of more than one material or substance shall be according to the principles of r 3.
>
> (c) Rule 3 provides as follows:
>
> "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. However, when two or more headings each refer to part only of the materials or substance 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;

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

(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."

"(d) By r 4 "Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin."

(e) By r 6, r 1 is applied mutatis mutandis to the classification of goods in the subheading of a heading.[3]"

27. The two contending classifications are both under Chapter 24 of the Combined Nomenclature ("CN"), entitled "**Tobacco and Manufactured Tobacco Substitutes**". The classification for which the appellant contends (240120 60 00) is under heading 24 01 – "**Unmanufactured Tobacco; Tobacco Refuse**" with the remainder of the relevant subheadings as follows:

"**Tobacco, not stemmed/stripped:**	
Tobacco, partly or wholly stemmed/stripped:	
- Light air-cured tobacco ….	2401 20 35 ….
- *Sun-cured Oriental type tobacco*	*240120 60 00*
- Dark air-cured tobacco[4] ….	240120 70 ….

[3] It will be noted that there is no reference to Rule 5. This rule deals with the classification of cases, packing materials and packing containers, and has no relevance to *Vtech* or to the present appeal.

- Flue-cured tobacco ….	240120 85 ….
- Other Tobacco ….	240120 95 ….
Tobacco refuse	240130 00 00"

28. The classification for which HMRC contend (240319 10 00) is under heading 24 03 – "**Other manufactured tobacco and manufactured tobacco substitutes; "homogenised" or "reconstituted" tobacco; tobacco extracts and essences**", with the remaining subheadings as follows:

"**Smoking tobacco, whether or not containing tobacco substitutes in any proportion:**	
- Water-pipe tobacco specified in subheading note 1 to this chapter	240311 00 00
- *Other:* *-- in immediate packings of a net content not exceeding 500g* -- Other	 *240319 10 00* 240319 90 00
Other:	
- "Homogenised" or "reconstituted" tobacco	240391 00 00
- Other: -- Chewing tobacco and snuff -- Other	 240399 10 00 240399 90 00

29. The Notes to Chapter 24 included in our bundle of authorities were extremely brief and neither party argued they had any relevance to the issues before us. We were not referred to any notes to the Section of which Chapter 24 forms part.

[4] A subheading below this subheading reads: "Natural unmanufactured tobacco, whether or not cut in regular size, having a custom value of not less than EUR450 per 100kg net weight, for use as a binder or wrapper for the manufacturer of goods falling within subheading 2402 10 00" *[cigars, cheroots and cigarillos]*. Similar subheadings appear in a number of other places under heading 2401.

30. We were provided with a copy of the HSENs to Chapter 24, which included the following:

> "**24.01 – Unmanufactured tobacco; tobacco refuse.**
>
> 2401.10 – Tobacco, not stemmed/stripped
>
> 2401.20 – Tobacco, partly or wholly stemmed/stripped
>
> 2401.30 – Tobacco refuse
>
> This heading covers:
>
> (1) **Unmanufactured tobacco** in the form of whole plants or leaves in the natural state or as cured or fermented leaves, whole or stemmed/stripped, trimmed or untrimmed, broken or cut (including pieces cut to shape, but **not** tobacco ready for smoking).
>
> Tobacco leaves, blended, stemmed/stripped and "cased" ("sauced" or "liquored") with a liquid of appropriate composition mainly in order to prevent mould and drying and also to preserve the flavour are also covered in this heading.
>
> (2) **Tobacco refuse**, e.g. waste resulting from the manipulation of tobacco leaves, or from the manufacture of tobacco products (stalks, stems, midribs, trimmings, dust, etc.).
>
> …
>
> **24.03 – Other manufactured tobacco and manufactured tobacco substitutes; "homogenised" or "reconstituted" tobacco; tobacco extracts and essences.**
>
> …
>
> This heading covers:
>
> (1) **Smoking tobacco, whether or not containing tobacco substitutes in any proportion**, for example, manufactured tobacco for use in pipes or for making cigarettes.
>
> …."

31. We were also supplied with a copy of the CNENs to Chapter 24. These included the following text:

> "**24.01 Unmanufactured tobacco; tobacco refuse**
>
> As regards tobacco in the natural or unmanufactured state, see the HS Explanatory Note to heading 2401, first paragraph, (1).
>
> …

> ‘Sun-cured’ tobacco has been cured directly by the heat of the sun in the open air and in full daylight.
>
> …
>
> “**2403 19 10 and 2403 19 90 Other**
>
> Smoking tobacco is tobacco which has been cut or otherwise split, twisted or pressed into blocks which can be smoked without further industrial processing.
>
> Waste resulting from the manipulation of tobacco leaves or from the manufacture of tobacco products which is capable of being smoked is considered as smoking tobacco if it does not meet the description of cigars, cigarillos or cigarettes (see the explanatory notes to subheadings 2402 10 00 and 2402 20 10 and 2402 20 90).
>
> Mixtures of smoking tobacco with substances other than tobacco are also classified in these subheadings, provided that they correspond to the definition given above, the exception being products intended for medicinal use (Chapter 30).
>
> These subheadings include cut cigarette rag which is the finished mixture of tobacco for the manufacture of cigarettes.”

The issues

32. There had originally been an issue as to whether, even if HMRC’s proposed change to the classification of the Product was correct, they would be entitled to revoke the BTI. This argument was dropped at the hearing (correctly, in our view), and the issue between the parties essentially therefore boiled down to whose view of the appropriate classification was correct.

The arguments in summary

For the appellant

33. Mr Crawford argued that the phrase “industrial processing” only appears in the CNEN relating to subheadings 2403 19 10 and 2403 19 90, it does not appear in relation to heading 2401. The intentions of the ultimate purchaser could not determine the correct classification. The tobacco was clearly not in a smokable state until it had undergone some other process (re-hydration and shredding/cutting) and there was no evidence that such processing had occurred.

For HMRC

34. When comparing the competing headings for classification, Mr Puzey submitted that the tobacco in this case had “been through a manufacturing process because it is not whole leaf but rather cut or broken and then packaged for retail sale into 225g bags”.

35. He went on to submit that the Product was clearly smoking tobacco – the labelling clearly indicated as much and "the Appellant has yet to make good the claim that this product cannot be smoked in its current state". He pointed to the fact that the HSEN to 2401 stated that "tobacco ready for smoking" was not covered by that heading, whereas the HSEN to 2403 stated that "smoking tobacco" was specifically included under that heading. This was put beyond doubt, in his submission, by the CNEN to 2403 when it stated that "smoking tobacco is tobacco which has been cut or otherwise split, twisted or pressed into blocks which can be smoked without further industrial processing".

Discussion and decision

36. There are two competing headings for classification in this case: 2401, which covers "Unmanufactured tobacco", and 2403, which covers "Other manufactured tobacco". The intervening heading 2402 ("Cigars, cheroots, cigarillos and cigarettes") puts the word "Other" in heading 2403 in context – i.e. heading 2403 is intended to cover tobacco which has been "manufactured" in some way differently from the products included in heading 2402. The core question before us is whether this tobacco is "unmanufactured" or "manufactured".

"Manufactured" or "Unmanufactured" - the Wnek case

37. We were referred briefly to the case of *Wnek v Director of Border Revenue* [2013] UKFTT 575 (TC), in which the Tribunal considered the meaning of the word "manufactured" in subsection 1(1) of the Tobacco Products Duty Act 1979, which defines the "tobacco products" on the import or manufacture of which section 2 of that Act imposes excise duty. It was concerned with the question of whether a large quantity of untreated dried tobacco leaves in bales were subject to duty. That subsection provides as follows:

> "(1) In this Act "tobacco products" means any of the following products, namely –
>
> (a) cigarettes;
>
> (b) cigars;
>
> (c) hand rolling tobacco;
>
> (d) other smoking tobacco; and
>
> (e) chewing tobacco,
>
> which are manufactured wholly or partly from tobacco or any substance used as a substitute for tobacco, but does not include herbal smoking products."

38. The Tribunal said this at [90] to [91] of the decision:

> "'Manufactured' to our minds connotes the application of a process which results in a product materially different from those products which entered process *[sic]*. Thus the washing of potatoes would not be the manufacture of washed potatoes, but the squashing of grapes to produce wine would be the manufacture of wine; and it would not in our view be proper to call grain which had been dried by a farmer after harvest 'manufactured' since the grain would be recognisably be *[sic]* the same after drying even though, as a result of the drying process it would have a lesser moisture content. Nor would the mere packing of a product make it 'manufactured'.
>
> It seems to us that dried tobacco leaves fell close to the borderline. A process had been applied to the leaves – drying them in the sun or a furnace. That process would have changed the appearance of the leaves but would leave them recognisable as leaves. The process of drying however would no doubt have changed the cellular composition of the leaves making it impossible to restore them to their previous state by the simple addition of water. On balance these considerations incline us to the view that the process of drying the leaves resulted in a product which might properly be said to have been 'manufactured from tobacco'."

39. However, there was a further relevant provision which the Tribunal had only discovered after the hearing in *Wnek* as a result of its own researches, the Tobacco Products (Description of Products) Order 2003 (2003 SI 1471), as amended by 2010 SI 2852. That Order included a definition of "other smoking tobacco" for the purposes of the above Act, in article 7, which reads as follows:

> "(1) Subject to paragraph (2) below, references to other smoking tobacco in the Act include any product that is not cigarettes, cigars, or hand-rolling tobacco and comprises –
>
> > (a) tobacco that has been cut or otherwise split, twisted or pressed into blocks, and is capable of being smoked without further industrial processing, or
> >
> > …"

40. Because the dried leaves in *Wnek* had not been cut, split, twisted or pressed into blocks, the Tribunal decided they fell outside the definition of "other smoking tobacco" for the purposes of the 1979 Act and were accordingly not liable to excise duty.

41. It can readily be seen that the language of article 7(1)(a) above follows very closely the wording of the CNEN to subheadings 2403 19 10 and 2403 19 90 set out at [31] above. However, we are conscious that whilst the Tribunal in *Wnek* was considering a particular set of UK statutory provisions which are clearly modelled closely on the EU customs duty provisions, they are not the same and, crucially, the consideration of the Tribunal in that case did not extend (as our consideration must) to a full review of the customs duty provisions, in particular the terms of the HSENs and

CNENs associated with those provisions; indeed, there is no indication in the decision in *Wnek* that the Tribunal was made aware of the customs duty provisions.

"Manufactured" or "Unmanufactured" – the customs duty provisions

Heading 2401

42. Heading 2401 is specifically stated to cover "unmanufactured tobacco", and the sub-headings under 2401 make it quite clear that the process of curing (including, quite specifically, sun-curing) does not take tobacco outside the "unmanufactured" state – were it otherwise, sub-heading 2401 20 60 (for example) quite simply could not appear under the "unmanufactured" heading 2401.

43. Nor does the process of "stemming/stripping" (i.e. removing the stems and mid-ribs) take tobacco outside the "unmanufactured" state – were it otherwise, there could not be two alternative sub-headings below heading 2401, separating out tobacco which has been wholly or partly stemmed/stripped from tobacco which has not.

44. Thus, it is clear that on the wording of heading 2401 and its subheadings alone, the tobacco the subject of this appeal is capable of falling under 2401 20 60.

45. We would add that the wording in various other subheadings under 2401 take matters even further – there are various subheadings which cover tobacco cut to size in order to perform as binders or wrappers for cigars; therefore the process of cutting (even to a specific size) still results in an "unmanufactured" product for the purposes of heading 2401; in that situation, we find it hard to see how the process of flaking or breaking up the dried leaves into randomly sized fragments (as opposed to cutting leaves to a particular shape before they became quite so brittle) could lead to a different result.

46. Whilst much was made by Mr Puzey of the lack of any convincing evidence that there was any plausible use for the product other than for smoking, that does not take matters any further – it is to be expected that most or all tobacco imported under heading 2401 will ultimately be consumed by smoking, but that does not prevent it from being classified as "unmanufactured" if that is what it in fact is when imported.

47. Finally, whilst it is clear that the presentation of a product can affect its classification, there does not appear to us to be any significance, in deciding whether tobacco is "unmanufactured", in the fact that it is imported in packages of 225g, labelled with government health warnings insisted on (rightly or wrongly) by the local Trading Standards department.

HSENs and CNENs on heading 2401

48. Turning to the HSENs on heading 2401, the relevant part of the note makes it clear that "cured or fermented leaves" are intended to be included, including "stemmed/stripped" or "whole" leaves, and whether "trimmed or untrimmed, broken or cut (including pieces cut to shape, but **not** tobacco ready for smoking)".

49. If one applies this "aid to interpretation" of the heading, its effect is that the goods in question would clearly be "unmanufactured" and therefore covered by heading 2401, unless they are "tobacco ready for smoking".

50. The CNENs specifically adopt this part of the HSEN by direct reference.

51. As we have found above (see [24]) it is clear that, as imported, the Product was not "ready for smoking".

HSEN's and CNENs on heading 2403

52. Both the HSENs and the CNENs give some commentary on the meaning of the phrase "smoking tobacco" in heading 2403.

53. The HSENs do not attempt to clarify the phrase, other than by giving the example of "manufactured tobacco for use in pipes or for making cigarettes". To our mind, this reinforces the point that to fall under heading 2403, the tobacco must be "manufactured" (which we take to be a direct contrast to the "unmanufactured" wording of heading 2401).

54. The CNENs however contain extra detail. "Smoking tobacco" is described as "tobacco which has been cut or otherwise split, twisted or pressed into blocks which can be smoked without further industrial processing". On the basis of these words, Mr Puzey would have us classify the Product as "smoking tobacco" and therefore "manufactured tobacco" simply because it can be "smoked without further industrial processing", i.e by simple cutting/shredding and rehydration in a domestic setting. On this basis, even though Officer Palmer was quite clear that the Product could not be smoked in its current state, Mr Puzey seeks to persuade us that the minimal further "non-industrial" processing required to make it smokable means it should be classified as "manufactured".

55. Against that background, we consider it appropriate to follow the approach to classification set out in the Advocate General's opinion in *Uroplasty BV v Inspecteur van de Belastingdienst – Douana district Rotterdam* [2006] ECR 1-67219, in particular when she said at [43]:

> "Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first subheading can be compared only with the wording of other first subheadings of the same heading; and the wording of a second subheading can be compared only with the wording of other second subheadings of the same first subheading."

56. When doing so, we bear in mind that, as said at [41] of the CJEU's judgment in *Uroplasty*:

> "The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore

> be consistent with the provisions of the CN and cannot alter their scope (see, in particular, Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 28, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17, and *Proxxon* paragraph 22)."

57. When comparing heading 2401 with heading 2403 at the top of the hierarchy, the key question is whether the tobacco is "unmanufactured". As identified above, the wording of the various subheadings under 2401 makes it clear that the processes of sun-curing, stemming and/or stripping do not alter the Product's "unmanufactured" status; nor does cutting (still less, in our view, does flaking). HMRC's entire case rests upon the CNEN which provides an interpretation of "smoking tobacco". It is clear that CNENs, whilst a "valuable aid to interpretation", cannot alter the scope of the various headings and subheadings in the CN. We note that the HSENs do not even purport to go so far.

58. In short, under rules 1 and 6 of the GIR, we consider it clear that the Product is "unmanufactured" within the meaning of heading 2401 and that conclusion is not affected by the CNEN to subheadings 2403 19 10 and 2403 19 90; the Product therefore falls under heading 2401 and, specifically, under subheading 2401 20 60 00.

59. Even if some doubt were admitted as to the Product's possible classification under subheading 2403 19 10 00, in our view rule 3(a) of the GIR inevitably results in classification of the Product under the more specific heading of "Unmanufactured tobacco… : Tobacco, partly or wholly stemmed/stripped: Sun-cured oriental type tobacco" in preference to the less specific "Other manufactured tobacco and manufactured tobacco substitutes; "homogenised" or "reconstituted" tobacco; tobacco extracts and essences: Smoking tobacco, whether or not containing tobacco substitutes in any proportion: Other: In immediate packings of a net content not exceeding 500g".

60. It follows that the appeal must be allowed.

61. 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.

KEVIN POOLE
TRIBUNAL JUDGE

RELEASE DATE: 31 JANUARY 2017