[2017] UKFTT 0160 (TC)

TC05653

Appeal number: TC/2014/03670

CUSTOMS DUTY– classification – Combined Nomenclature – long-life woven polypropylene shopping bags – correct classification –whether bag has outer surface of plastic sheeting visible to the naked eye – whether any customs debt eligible for remission under Articles 220, 236 and 239 Community Customs Code

FIRST-TIER TRIBUNAL
TAX CHAMBER

EURO PACKAGING UK LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
RUTH WATTS DAVIES

Sitting in public at the Royal Courts of Justice, Strand, London on 3 – 6 October 2016

Valentina Sloane, counsel, for the Appellant

Joanna Vicary, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Euro Packaging UK Limited ("the appellant") is a UK manufacturer and supplier of packaging products. It supplies over 3,000 different products and employs approximately 1,500 people. It supplies many customers including a number of the major supermarkets.

2. This appeal relates to the customs duty to be paid on the importation from countries outside the EU (e.g. China) of long-life woven polypropylene shopping bags ("the bags" or "the bag"). The appellant says that the bags should be classified under heading 4202 929890, which carries a rate of duty of 2.7%, that it relied on the advice and the conduct of HMRC and believes that this was the correct classification heading. Even if the appellant were to be mistaken as to the correct heading for the bags, the guidance provided by HMRC and the conduct of HMRC was such as to justify remission of the customs duty.

3. HMRC, on the other hand, dispute this. They say that the correct classification heading is 4202 921900 and that therefore the rate of duty is 9.7%. HMRC argue, in outline, that whatever guidance and actions HMRC gave or took the appellant is not entitled to rely upon it to obtain remission of the correct amount of duty.

4. There are, thus, two main questions in this appeal: first, what is the correct classification of the bags and, secondly, if the full rate of 9.7% duty is payable, is the appellant entitled to remission of that duty. Remission is sought on two bases: first, by virtue of Articles 220 and 236 of the Community Customs Code ("the Code") and, secondly, under the general equity clause of Article 239 of the Code.

5. In this decision, for simplicity, we refer to the Court of Justice of the European Union and to its predecessor as the "CJEU".

Evidence

6. There were two bundles of witness statements and documentary evidence.

7. The following witnesses gave evidence for the appellant and were cross-examined:

   (1) Mr Marghub Shaikh, import manager for the appellant since 1992;

   (2) Mr Gary Weaver, senior buyer for the appellant since 1996 and member of the Chartered Institute of Procurement and Supply; and

   (3) Mr Peter Hitchin, an employee of WM International Ltd, clearing agents for the appellant. Mr Hitchin had cleared the appellant's products for approximately 22 years.

8. The following witnesses gave evidence for HMRC and were cross-examined:

(1) Ms Salma Malik, an HMRC officer who had worked in tariff classification for 16 years and who carried out the visual examination for the tariff liability rulings in October 2013 and the Binding Tariff Information ("BTI") rulings in March 2014;

(2) Ms Elizabeth Bowden, an HMRC officer who was the decision-maker for the appellant's application for remission, which was made on 28 February 2014, and who took over from Mrs Ford (see below) during her absence from work;

(3) Mrs Rachel Ford, an HMRC officer who initially considered the appellant's claim for remission from customs duty; and

(4) Mr Michael Garbett, an HMRC officer who carried out the enquiry in relation to the bags in October 2013 and who issued the subsequent liability notices.

9. We considered all the witnesses to be reliable and honest. Ms Vicary, on behalf of HMRC, made it clear that HMRC made no allegation of bad faith against the appellant.

The decisions under appeal

10. There are three disputed decisions and the appeals against them have been consolidated by directions of this Tribunal on 11 December 2015, so that this decision will deal with all three matters. The decisions are as follows:

(1) A decision issued on 27 February 2014 to issue a C18 post clearance demand note in the sum of £989,689.19 (comprising £824,742.87 of customs duty and £164,946.32 of import VAT). This related to bags which were imported by Euro Packaging during the period 1 March 2011 to 15 January 2014. The decision was upheld on review in a letter dated 17 July 2014. Euro Packaging submitted a notice of appeal on 30 July 2014.

(2) A decision issued on 26 March 2014 to classify the bags at issue to Combined Nomenclature heading CN 4202 92 1900. The decision was upheld on review in a letter dated 6 June 2014. Euro Packaging submitted a notice of appeal on 1 July 2014.

(3) A decision issued on 10 July 2015, refusing Euro Packaging's claim for remission of the customs duty charged in the C18. The refusal was upheld on review in letters dated 19 August 2015 and 29 October 2015. Euro Packaging submitted a notice of appeal dated 23 November 2015.

Legal background to the Combined Nomenclature

11. A basic feature of the European Union is that it has established a customs union, involving the prohibition of customs duties on imports and exports between Member States and the adoption of a common customs tariff as regards imports from countries outside the EU. The legal basis for this common customs tariff is provided by Council Regulation (EEC) 2658/87 of 23 July 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff (the Tariff Regulation). Each year the Commission adopts a regulation reproducing a complete version of the Combined Nomenclature and Common Customs Tariff duty rates, taking all amendments since the last version into account. Tariffs are fixed by reference to a

very extensive list of goods categories, with a code of up to eight digits and a description.

12. Explanatory notes to the Combined Nomenclature (CNENs) are published by the European Commission which have consistently been held by the CJEU to be highly persuasive and an important aid to the interpretation of the scope of the various headings, albeit that they do not have legally binding force.

13. The same is true of the Explanatory Notes to the Global Harmonised System for classifying goods, organised by the World Customs Organisation. The EU Combined Nomenclature and the Global Harmonised System are very similar, although the latter uses six-digit codes as opposed to eight-digit codes.

14. The relationship between these two systems was succinctly explained by Arden LJ in *Amoena (UK) Ltd v HMRC* [2015] EWCA Civ 25 at [7]:

> "In the EU, customs classification is carried out under a system known as the Combined Nomenclature ("CN"). It is based on the customs classification scheme agreed and used internationally by a large number of countries, called the Convention on the Harmonised Commodity Description and Coding System ("HS"). The EU is a party to this Convention. The HS consists of some 5,000 groups of goods with 6-digit codes. The CN integrates the HS but in addition contains further subdivisions with 8-digit codes, specifically adapted for the EU. Both the HS and the CN have explanatory notes (HSEN and CNEN respectively), which are prepared by experts. Courts generally give weight to these notes even though they are not legally binding."

15. We should add, however, that the content of the CNENs must be compatible with the provisions of the CN and cannot alter the meaning of those provisions: see C-376/07 *Kamino*, at paragraphs 47-49.

16. The CN contains general rules of interpretation ("GIRs") for the nomenclature. These general rules are mandatory and hierarchical. GIR 1 provides:

> "The title 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".

17. Thus, reference to the headings of the CN and any relevant section or chapter notes is the primary method of determining classification. The other general rules of interpretation apply only if the application of GIR 1 does not enable classification to be made and only in so far as they are not inconsistent with the headings (Case C-379/02 *Imexpo Trading* [2004] ECR I-9273 at paragraph 16).

18. GIR 3 sets out three sub-rules which are to be applied sequentially where goods are prima facie classifiable under two or more headings:

> "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 substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;
>
> (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 occurs last in numerical order among those which equally merit consideration".

19. GIR6 provides that 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 preceding GIRs, on the understanding that only sub-headings at the same level are comparable.

The principles of classification

20. It was common ground that it is well-established in CJEU jurisprudence that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN.

21. The CJEU has made clear that, in the interests of legal certainty and ease of verification, the product must be assessed on the basis of the objective characteristics present at the time of its presentation for customs clearance: see Case 175/82 *Hans Dinter* at [10] and Case C-395/93 *Neckermann* at [8]. Those objective characteristics must be capable of being ascertained and assessed at the time of customs clearance: Joined Cases C-208/06 and C-209/06 *Medion* and *Canon*.

22. The Court has also consistently emphasised that subjective factors, in particular "factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities", may not be used as criteria for classification of goods for customs purposes: see Case C-228/89 *Farfalla Flemming* [1990] ECR I-3387, at paragraph 22. Similarly the manufacturing process is not relevant save where expressly referred to in the heading: Case C 40/88 *Paul F. Weber*.

The provisions of the CN applicable in this appeal

23. The following extracts are taken from the CN issued for 2014 (being the version which was in force when the C18 was issued and we were informed that it is not materially different from the versions in force for the period of importations covered by that C18).

24. Chapter 42 covers "Articles of leather; saddlery and harness; travel goods, handbags and similar containers; articles of animal gut (other than silkworm gut)". Heading CN 4202 provides as follows:

> **"4202 Trunks, suitcases, vanity cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverages bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle cases, jewellery boxes, powder boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanised fibre or of paperboard, or wholly or mainly covered with such materials or with paper;**
>
> **– Trunks, suitcases, vanity cases, executive-cases, briefcases, school satchels and similar containers:**
>
> – **Other**
>
> **4202 91** --**With outer surface of leather of composition leather:**
>
> **4202 91 10** ---Travelling-bags, toilet bags, rucksacks and sports bags
>
> **4202 91 80** ---Other
>
> **4202 92** -- **With outer surface of plastic sheeting or of textile materials**:
>
> --- Of plastic sheeting;
>
> **4202 92 11** ----Travelling-bags, toilet bags, rucksacks and sports bags
>
> **4202 92 15** ----Musical instrument cases
>
> **4202 92 19** ----Other *[the heading contended for by HMRC]*
>
> ---Of textile materials:
>
> **4202 92 91** ---- Travelling-bags, toilet bags, rucksacks and sports bags
>
> **4202 9298** ----Other *[the heading contended for by the appellant]*
>
> **4202 99 00**--Other"

25. The Chapter Notes provide as follows:

(1) "[H]eading 4202 does not cover bags made of sheeting of plastic, whether or not printed, with handles, not designed for prolonged use (heading 3923)" [Note 3(A)(a)];

(2) "For the purposes of the subheadings of heading 4202, the term 'outer surface' is to refer to the material of the outer surface of the container being visible to the naked eye, even where this material is the outer layer of a

combination of materials which makes up the outer material of the container" [Additional Note 1].

26. The CNEN gives the following guidance on the meaning of "In the form of plastic sheeting":

> "If a container has an outer material that is a combination of materials where the outer layer being visible to the naked eye is plastic sheeting (for example, woven fabric of textile fibres in combination with plastic sheeting), it is irrelevant for classification purposes whether the sheeting was manufactured separately before creating the combined material or whether the plastic layer is the result of applying a coating or covering of plastics to the material (for example, woven fabric of textile fibres), provided that the resultant outer layer being visible to the naked eye has the same visual appearance as an applied layer of manufactured plastic sheeting".

Relevant case-law – classification

27. The expression 'can be seen with the naked eye' has been considered by the CJEU in *Howe & Bainbridge BV v Oberfinanzdirektion Frankfurt am Main* C-317/81 ("*Howe & Bainbridge*") which concerned a similar provision in heading 59.08 relating to "Fabrics in which the impregnation, coating or covering cannot be seen with the naked eye…." In that decision the court explained what should be taken into account when deciding whether the surface in question could be seen with the naked eye and who should make that determination:

> "[14] …'can be seen with the naked eye'…is to be interpreted as meaning that the impregnation, coating or covering of the fabric must be directly visible on simple visual examination and that the wording of the note does not allow the conclusion to be drawn from the stiffness of a fabric that it has received such treatment.
>
> [17] …it is for the Member States to designate the authorities and persons required to undertake the tariff classification of products and to decide their training in order to enable them properly to fulfill [sic] such tasks."

28. The Court continued at [20]:

> "In cases where the persons entrusted with the task by the Member State are not able by simple visual examination to ascertain that the fabric has been treated it follows from the note that such treatment, if it has in fact taken place, is not sufficient to transfer the fabric from the tariff heading normally applicable to a fabric of that type to the specific heading provided for under No 59.08"

29. In *Lloyd Pascal v CC & E* (2001) C0135, the question was whether the coating on a polypropylene tarpaulin "can be seen with the naked eye" in applying the Note to CN heading 59. The VAT Tribunal held that the coating was not visible to the naked eye and, referring to *Howe & Bainbridge,* said:

"[5]… [I]t must be possible to observe the coating directly and not to infer it from other properties, such as the stiffness of the fabric.

…

[9] We remind ourselves that the issue is not whether the product is coated with plastic but whether one can see that it is by applying the naked eye test".

30. The VAT Tribunal considered the meaning of "*plastic sheeting*" in the case of *Optoplast* [2003] UKVAT (Customs) C0017. In that appeal, the issue was whether the outer layer of a spectacle case visible to the naked eye had the same visual appearance as an applied layer of manufactured plastic sheeting. The appellant in that case argued that the correct heading was 4202 39 00 and HMRC argued that the correct sub-heading was 4202 32 10. Thus, the *Optoplast* appeal dealt with the same Chapter of the CN as the present appeal. The Tribunal made the following observations:

"23. *Howe & Bainbridge* is authority for the principal that the phrase 'can be seen with the naked eye' means that which is directly visible upon simple visual examination. The reason for the test is to allow speedy checking on customs clearance. The phrase does not allow any inferences to be drawn from other properties, for example, the feel of the fabric….

31. We have not found these references [to headings 3920 and 3921] to be very helpful because note 2 (ij) to Chapter 39 states that that Chapter specifically does not cover containers of heading 4202. Further, Chapter 39 does not define plastic sheeting. It seems to us, however, that headings 3920 and 3921, and Note 10 to Chapter 39, support the conclusion that there is a difference between plastic sheet and plastic film and that each of "plates, sheets, film, foil and strips" would be of a different thickness. These references also support the conclusion that the combined nomenclature differentiates between plastic sheet and plastic film.

32. Mr Cohen [witness for HMRC] also referred us to Council Regulation (EC) 20/2000 about the suspension of tariff duties on certain industrial products. This referred to heading 3920 and in particular to embossed polyester sheeting, polyvinyl chloride sheeting of a thickness of less than 1mm; polythene sheet of a thickness of 0.025mm or more in rolls. Mr Cohen also referred to the US standards for defining sheets and film and they read:

'film- in plastics, an optional term for sheeting having a nominal thickness not greater than 0.25mm.

sheet - an individual piece of sheeting

sheeting - form of plastic in which the thickness is very small in proportion to length and width and in which the plastic is present as a continuous phase throughout with or without filler.'

33. Mr Cohen also referred us to the British Standard Plastics Vocabulary which defined sheet, sheeting and film as:

"film - a thin plane product of arbitrarily limited maximum thickness in which the thickness is very small in proportion to length and width , generally supplied in roll form.

> **sheet**, sheeting, a thin, generally plane product in which the thickness is small in proportion to length and width
>
> **sheeting** - sheet made in continuous lengths and generally supplied in roll form; a synonym for sheet."
>
> 34. Again, these definitions support the view that plastic film is a thinner version of plastic sheet. The extremely thin nature of the remaining plastic coating which remains on the surface of the spectacle cases in these appeals leads us to conclude that such layer would be more correctly classified as plastic film (or even something thinner) and not as plastic sheet. Sub-heading 4202 32 10 uses the words "of plastic sheeting" and could have used the words "of plastic" but did not do so. In any event, the proviso to the CNEN uses the words "applied layer of manufactured plastic sheeting" when it could have used more general words. Also, the words "applied" and "manufactured" support the view that the visual appearance must be of plastic sheet which was manufactured first, had an independent existence, and was then applied to another layer".

31. We accept, of course, that a decision of the VAT Tribunal is not binding upon us.

32. Where the CN uses an undefined term, it must be interpreted according to its customary meaning: see Case C-379/02 *Imexpo Trading*, at paragraphs [17]-[19]. We note that there is no definition of "plastic sheeting" in Chapter 42.

Jurisdiction

33. It was common ground that, as regards the appeals relating to the liability decisions and the BTI, this Tribunal has full appellate jurisdiction under section 16(5) Finance Act 1994.

34. There was disagreement, however, as to the nature of the Tribunal's jurisdiction in relation to the claim for remission. We shall deal with that point later when we consider the remission issues.

The late application to admit new evidence

35. On 27 September 2016, HMRC applied to admit new evidence in the form of an audit report by Officer McKenna (dated 3 May 2011 following an inspection some three weeks earlier of the long-use shopping bags in dispute in this appeal). The report indicated that Officer McKenna may not have actually inspected the bags but simply identified them from a catalogue made available by the appellant.

36. In making the decisions which are the subject of this appeal and in the review of those decisions, HMRC had previously accepted that Officer McKenna had carried out a visual inspection of the bags.

37. HMRC's application was refused by Judge Poole on 30 September 2016. Judge Poole decided that this additional evidence should not be admitted unless it was of sufficient significance to warrant an adjournment of the whole hearing to enable the

appellant to respond properly. Judge Poole's view was that it was not and, therefore, refused the application to admit new evidence. Nonetheless, conscious that it was a late application and that he had not heard full argument, HMRC were given permission to renew their application at the start of the hearing.

38. Ms Vicary did, indeed, renew the application on the first morning of the hearing.

39. We refused the application. The application was made at a very late stage. Hearing bundles were to be produced no later than 13 May 2016, in accordance with directions of the Tribunal dated 31 March 2016. HMRC were unable to offer any good reason why Officer McKenna's report could not have been produced at an earlier date and in accordance with the timetable set out by the Tribunal. It seemed clear to us that no one had taken the trouble to look for it. Furthermore, it seemed to us that there would be considerable prejudice to the appellant. Fairness would dictate that the appellant should be entitled to call evidence to clarify the circumstances of Officer McKenna's inspection. We were informed that the appellant's employee responsible for providing samples of the bags to Officer McKenna, Mr Varghese, was no longer employed by the appellant and they did not know when or whether they would be able to contact him. At the very least, it appeared that it would be necessary to abandon the hearing timetable and reschedule a new hearing.

40. For these reasons, we refused the application.

The facts

41. The appellant has imported into the UK woven and non-woven bags. The bags at the centre of this appeal are made of woven polypropylene. It is accepted, for the purposes of this appeal, that woven polypropylene is a textile for the purposes of Chapter 42 of the CN.

42. When it first started importing the bags approximately 15 years ago, the appellant proceeded on the understanding that the bags were classified under CN Chapter 39 as articles made of plastic. Accordingly, the appellant declared the bags under that Chapter.

43. At some point in 2006, an issue arose in relation to the application of anti-dumping duty to some of the bags. During this period, the appellant applied a customs tariff of 6.5% for woven bags and anti-dumping duty (which was subsequently found to be incorrect). Mr Marghub Shaikh, an employee of the appellant, telephoned HMRC to check the CN heading for the bags on or shortly before 4 October 2006. Mr Shaikh spoke to an officer called Jane Martin. He described the products over the telephone and was told that they should be declared under tariff heading 4202929890 as an "other" type of bag, with an outer surface of textile materials. Ms Martin gave Mr Shaikh a reference for the telephone advice: KLO62283.

44. As the conversation took place almost a decade ago, Mr Shaikh could not remember the exact words he used to describe the bags. He believed, however, that he gave a fairly detailed and accurate description of the bags because it was in the

appellant's interests to obtain accurate guidance from HMRC on the correct code to be used.

45. After his conversation with Ms Martin, on 4 October 2006 Mr Shaikh sent an email to WM International Ltd, a freight forwarding agent, which had dealt with customs clearances for the appellant since 1994, to inform it of the advice from HMRC and the appropriate tariff heading. The email also contained the reference provided by Ms Martin.

46. Mr Shaikh could not recall being given a warning by Ms Martin that he could not rely on the CN code. Furthermore, Mr Shaikh did not recollect being told that it was not possible for HMRC to give him a CN code over the telephone or that he would have to apply for a binding tariff information ("BTI") or provide a sample which would be inspected by an HMRC officer.

47. We saw no reason to doubt Mr Shaikh's evidence. He seemed a perfectly straightforward and reliable witness. Mr Shaikh, of course, accepted that he could not recall the details of a telephone call made more than 10 years ago.

48. WM International Ltd acted as customs clearing agents for the appellant. On 4 October 2006, Mr Peter Hitchin, an employee of WM International Ltd, telephoned HMRC to confirm the advice received by Mr Shaikh. This was in accordance with WM International Ltd's usual practice. Mr Hitchin spoke to an HMRC officer on 4 October 2006 and provided the reference number given by Ms Martin to Mr Shaikh. The officer confirmed that the bags should be declared under tariff heading 4202 929890 and the rate of customs duty was 2.7%.

49. Mr Hitchin said that the subheadings in Chapter 42 were clarified by HMRC during the call.

50. Mr Hitchin, like Mr Shaikh, accepted that, with the passage of time, he could not recall specifically the description of the goods that he gave to HMRC. However, he said that normally the telephone conversations were "in-depth". It was, he said, in his interests to make sure that he gave an accurate description to HMRC in order that they gave him the correct CN code.

51. On the basis of the advice received by Mr Shaikh and Mr Hitchins, the appellant thereafter declared the bags under CN heading 4202 929890 and paid duty at the rate of 2.7%.

52. We find that HMRC, in the telephone calls made by Mr Shaikh and Mr Hitchens, did indicate that bags should be declared under CN heading 4202 929890. However, we can consider that it was unclear exactly how Mr Shaikh and Mr Hitchens described the bags to HMRC.

53. On 21 November 2006, WM International Ltd, on the instructions of the appellant, submitted an application to reclaim customs duty which had been overpaid in the previous three years in respect of the bags. HMRC requested technical information/samples in order to process the claim. Under cover of a letter dated 10 January 2007, WM International Ltd provided HMRC with the requested technical literature and samples of the bags. The correspondence is clear that the appellant, via

WM International Ltd, supplied both samples of the bags and technical literature to support the change of the commodity code. We also consider that the commodity code was changed to 4202 929890, in accordance with the earlier telephone conversations between HMRC and Mr Shaikh and Mr Hitchins respectively.

54. Thereafter, the appellant imported the long-life woven polypropylene bags under the CN heading 4202 929890. HMRC subjected the bags on importation to "Route 1" and "Route 2" inspections on numerous occasions. Route 1 involved an examination by HMRC of the supporting documentation and Route 2 involved the goods and documents being examined by HMRC. The documents evidencing the Route 2 checks indicate that the shipments were cleared after the goods were examined by HMRC.

55. On 29 March 2011, Officer McKenna wrote to the appellant indicating that he wished to conduct an audit of its import and export declarations. In his letter, Mr McKenna requested that examples of imported goods may need to be examined as part of his audit of the appellant's customs declarations.

56. On 11 April 2011, Officer McKenna visited the appellant's premises to carry out his audit.

57. In his letter of 13 April 2011 to the appellant, Officer McKenna stated that the specific consignments that he verified "were found to be satisfactory."

58. Mr Weaver's evidence was that Mr Varghese, an employee of the appellant, had made the bags available for Officer McKenna to inspect. We saw no reason to doubt Mr Weaver's evidence on this point and we find that the bags were, indeed, made available for Officer McKenna to examine. In particular, one of the exhibits (sample F) produced at the hearing (pursuant to Mr Weaver's witness statement) was a bag which was provided by Mr Varghese to Officer McKenna. Mr Weaver had a record (in the form of a sample pack) of the bags that were provided to Officer McKenna. The pack had been stored in the appellant's archives.

59. On 3 October 2013, Mr Michael Garbett, an HMRC officer, visited the appellant and queried the customs classification of the bags. The appellant confirmed that the long use textile shopping bags had been declared under CN code 4202 929890. He was initially concerned that all textile bags belonged under CN code 6305. Mr Shaikh informed Mr Garbett that he had obtained the CN code through a telephone enquiry with the HMRC Tariff Helpline. The appellant agreed to provide a representative sample of the bags to obtain a liability ruling. On 16 October 2013 six representative types of bags were provided by the appellant, each with a product specification attached. Mr Garbett then sent the samples to HMRC's Tariff Classification Service, requesting a liability ruling for each type of bag.

60. On 18 November 2013, Ms Malik, an officer in HMRC's Tariff Classification Service, issued two liability rulings which decided that the bags should be classified under heading 4202921900, which carried a rate of customs duty of 9.7%. It is these two decisions which relate to this appeal. We should note that four of the six liability rulings related to other bags which it was decided were classified under 4202 929810 – a code which was virtually identical to that declared on import and which carried the same rate of duty.

61. As a result of the liability rulings issued by Ms Malik, HMRC issued the appellant with a C18 post clearance demand note in the amount of £989,689.19 (comprising £824,742.87 of customs duty and £164,946.32 of import VAT). We understand that this amount has been reduced by agreement between the parties to £741,433.44 of customs duty together with £148,284.60 import VAT.

62. Ms Malik described the bag as a "long life Polypropylene (PP) woven shopping bag with a print of a ladybird, blue in colour" which was constructed of "76% textile fabric, 14% plastic sheeting and 10% of the material with an outer surface of plastic coating visible to the naked eye on a backing of woven filament strip not exceeding 5 mm."

63. Ms Malik stated:

> "11. The inside white layer of the bag was clearly made of a woven warp on weft filament strip not exceeding 5 mm but the outer blue surface was made up of a combination of woven textile with an applied plastic sheeting (14% as described on the BTI application) or coating to the outer surface. The plastic sheeting or coating is the top layer of the outer surface that was visible to the naked eye.
>
> 12. The outer surface of the bag was a combination material. The plastic sheeting, perhaps was applied over a woven textile fabric, for example. The plastic sheeting can either be made separately (before the combination material is created), or it had been made by applying a coating or covering of plastic to the underlying material. The finished outer surface looks the same as an applied layer of manufactured plastic sheeting."

64. Ms Malik also carried out the visual examination for the review requested in respect of the BTI decision. She said that she carried out a visual naked eye test for the bag, looking at the fabric in daylight conditions next to a window "to check whether the weave of the fabric has been obliterated, obscured or fallen by the coating or whether there is any pooling of the coating." Ms Malik stated:

> "23. The test showed that the bag is a combination of textile and plastic. The outer layer being visible to the naked eye was plastic sheeting for example woven fabric of textile fibres in combination with plastic sheeting. It was smooth and the warp and weft of the weave could not be seen to be sticking up or standing proud of the surface, this inferred [sic] that this is because the plastic coating is holding down the weave. I could not see any loose fibres sticking up, this also proved that this is due to the plastic sheeting. If there was no plastic sheeting there would be gaps or small holes between the textile, however I could see the plastic coating where the gaps would otherwise be. I could see that the outer surface of the bag had a shine. It was waterproof and had a plastic feel, but I could not use any of this criteria as they are not part of the naked eye test."

65. Ms Malik concluded that, since the outer surface of the bag was covered with plastic sheeting visible to the naked eye, it was to be classified as a bag with an outer surface of plastic sheeting and consequently classified to CN code 4202 921900.

66. In the course of giving her evidence at the hearing, Ms Malik was shown a sample of the polypropylene textile material. She examined the sample in daylight conditions outside the courtroom. She was unable to see any loose fibres sticking up from the material nor could she see any gaps or holes in the material. It was clear to us that Ms Malik had made an erroneous assumption of what the bag would have looked like without the bonding and Bopp films (as to which, see below). Moreover, during Ms Malik's examination of the material and the bag during the hearing, we observed her touching or picking at the material – a process which was not consistent with the naked eye test required by the CN.

67. Ms Malik also said that she checked the European Binding Tariff Information database and considered that her classification decision was consistent with other EU member states. She referred to other BTI classification decisions issued, for example, by Germany. We found the reference to other BTIs of limited assistance because it was impossible to determine, in relation to a naked eye visual test, exactly what properties the products, referred to in those other BTIs, displayed.

68. Ms Malik accepted that she had not taken account of any specialised industry meaning of the words "plastic sheeting" (see below as regards Mr Weaver's evidence) nor had she considered the decision in *Optoplast*.

69. Mr Weaver explained that the bags were produced from woven polypropylene. The printing on the bags was applied as follows: a "flexographic" printer printed directly onto bi-orientated polypropylene known as "Bopp film". Bi-orientation meant that the film was stretched in two directions when being manufactured and this gave it certain properties of its own. For example, it was hard to stretch. The Bopp film was then bonded to the woven polypropylene as follows: another extruder was used to cast extrude polyethylene and bond it to the woven polypropylene. Then, on top of this, the Bopp film was laminated to both the polyethylene resulting in a laminated fabric. The polyethylene film and the Bopp film were very thin with a thickness of 0.02 mg each. Printing onto the Bopp film allowed customers to have more specific and complex designs.

70. Mr Weaver had been working as a senior buyer with the appellant, or its predecessor, since 1996. His evidence was that, from his experience in the packaging industry, "plastic sheeting" referred to thick continuous polymeric material. He referred to an extract from Wikipedia which gave the common definitions of "plastic film" and "plastic sheets". Mr Weaver said that the plastic layer used in the production of the bags was referred to in the industry and, in particular, by the appellant, the manufacturers and the appellant's customers as "film", not as plastic sheeting. Mr Weaver said that the bags had only a very thin film which showed the ridges of the warp and weft of the woven polypropylene very clearly. There was, therefore, a clear distinction in the terminology used in the industry, in Mr Weaver's experience, between plastic film and plastic sheet – the former being very thin and the latter being markedly thicker.

71. One of the exhibits to Mr Weaver's witness statement was referred to as the "Bloomingdales Bag". Mr Weaver's evidence was that this bag was covered in plastic sheeting, as that expression was understood in the industry. This bag, which was not one of the bags giving rise to this appeal, had a visual external appearance (when we

examined it) which was smooth and shiny. We note, however, that Bopp film (according to Mr Weaver's evidence) can be produced either with a matt or gloss finish and we, therefore, disregard its glossiness or shininess. The Bloomingdale Bag's smooth appearance, however, obliterated any evidence of the warp and weft of the textile material underneath. It had a wholly different visual appearance from the bags examined by Ms Malik and which form the subject matter of this appeal.

72. Ms Vicary cross-examined Mr Weaver on his evidence. He acknowledged that he had not produced technical trade publications to support his claim that "plastic sheeting" with an industry-recognised term and was different from much thinner films such as Bopp film. Nonetheless, he maintained his evidence. We considered that Mr Weaver was a reliable and knowledgeable witness and we accept his evidence.

Submissions and decision on classification issue

73. Ms Sloane submitted that Ms Malik's decision was fundamentally flawed. Ms Malik, she said, had drawn inferences and made assumptions rather than relied on what was directly visible. Ms Malik had made the assumption that there should be loose fibres and gaps and holes when she examined the bags. However, when she examined the un-coated material she thought that it had been coated because there were no gaps and holes or loose fibres and she instinctively picked it.

74. *Howe & Bainbridge* established that plastic sheeting had to be directly visible to the naked eye and that its presence should not be inferred from other properties. Ms Sloane also relied on the decision in *Optoplast*, which was the one decision which addressed Chapter 4202 and the naked eye test, but which HMRC simply ignored in their submissions.

75. Moreover, Ms Sloane submitted that the fact that the bag may be laminated or coated did not prevent it from being a textile fabric (see Chapters 54 and 59). The coating lamination used on the bag was different from "plastic sheeting"

76. In this case, the relevant heading used words "of plastic sheeting". These words were undefined by the CN and it was, therefore, necessary to look to their customary meaning (*Imexpo*). Mr Weaver's evidence was that the customary meaning of "plastic sheeting" was different from the covering applied to the bag.

77. Furthermore, Ms Sloane observed that Ms Malik did not consider what "plastic sheeting" meant and assumed that it encompassed all types of films and coating.

78. Ms Vicary submitted that the only question was whether we could see on the bag plastic sheeting or textile fabric. There was no distinction between a thick sheet of plastic and film, although it must be a continuous covering. The Tribunal should not be distracted by talk of "film", this was wholly irrelevant. Ms Vicary submitted that plastic film was in "plastic sheeting". Secondly, Ms Vicary argued that a distinction should be drawn between Ms Malik's evidence given the classification requests from Mr Garbett and in response to the appellant's application for a BTI and her responses to questions from the witness box. Only the former was relevant

79. This was, Ms Vicary said, a simple classification case. The bag was covered in a layer of plastic sheeting. Had the layer of plastic been a coating on the weave, Ms

Vicary considered that that may be more difficult, although HMRC's position might be that that would be a "sheet."

80. In our view, in order for the bag to fall within CN code 4202 921900, the outer surface of the bag must be covered with plastic sheeting visible to the naked eye. There is, therefore, a two-stage test. First, the bag must actually be covered in plastic sheeting (or have a coating which had the same appearance as an applied layer of manufactured plastic sheeting) and, secondly, the plastic sheeting must be visible to the naked eye.

81. We have carefully considered the evidence before us and we have examined the bag visually with the naked eye. It is clear from a visual examination that the outer surface of the bag is covered in some form of plastic. Although the warp and weft of the woven polypropylene is visible they appear to be covered by a matt plastic layer. It is a continuous layer and extends over the whole surface of the outside of the polypropylene woven material.

82. The starting point for any classification exercise must be the wording of the relevant CN heading. In this case, the heading requires the outer surface to be "of plastic sheeting". Like the Tribunal in *Optoplast*, we note that the heading does not simply say, "of plastic" or, as used elsewhere in Chapter 42, "moulded plastic".

83. The question then arises as to the meaning of "plastic sheeting". We can see from the CNEN that it is irrelevant whether the sheeting was manufactured separately or as a result of applying a coating or covering of plastics to the material, provided that the outer layer being visible to the naked eye has the same visual appearance as an applied layer of manufactured plastic sheeting.

84. An undefined term used in the CN headings should be given its customary meaning (*Imexpo*).

85. In this context, we consider the evidence of Mr Weaver to be significant. His evidence was, in effect, that in industry usage "plastic sheeting" referred to a covering which was thicker than that applied to the bag. He referred to that covering used on the bag as a "film". We do not think it is necessary to decide whether the covering was a "film" because the question is whether it is "plastic sheeting" or has the same visual appearance as an applied layer of manufactured plastic sheeting.

86. In our view, the bag was not covered in "plastic sheeting". It was covered in a very thin layer of plastic which allowed the underlying texture of the woven material to show through, something which would not be evident if the bag had been covered in plastic sheeting. We accept that it was apparent that this material had a thin covering of plastic but we do not consider that this covering was either "plastic sheeting" or had the appearance of an applied layer of manufactured "plastic sheeting" in the sense explained by Mr Weaver.

87. As regards Ms Vicary's challenge to Mr Weaver's evidence on the meanings of plastic sheeting and film in cross-examination, we note that Mr Weaver had many years of experience in this field. We also considered Mr Weaver to be a reliable and credible witness. Accordingly, we accepted his evidence.

88. It follows, therefore, that the appellant's appeal in respect of the matters referred to in the first two sub- paragraphs of paragraph 10 above is allowed.

Remission

89. In the light of our decision on the substantive issue of classification, it is not strictly necessary to consider the remission issue. Nonetheless, recognising that the issue was fully argued before us, we shall deal with it in any event.

Factual background to remission claim

90. The appellant applied for remission of the customs duty charged by the C18 on 25 February 2015 pursuant to Articles 236 and 239 of the Code.

91. On 10 July 2015, Ms Rachel Ford, an HMRC officer, informed the appellant by letter of her intention to refuse their application for remission and invited the appellant to produce any further evidence which could change her decision within 30 days.

92. The appellant wrote to HMRC on 3 August 2015 requesting that they reconsider the preliminary decision expressed in Ms Forde's 10 July 2015 letter and set out a further basis upon which it was asserted that the relevant error could not have been easily detected.

93. On 19 August 2015 (whilst Ms Forde was on leave) Ms Libby Bowden, an HMRC officer, refused the claim for remission and stated that she could see no new information or arguments raised by the appellant.

94. Finally, HMRC upheld the original decision on a review and communicated this decision by a letter dated 26 October 2015.

Relevant legal provisions and case-law – first basis of claim for remission

95. Article 220(2)(b) of the Code provides that subsequent entries in the accounts shall not occur where:

> "the amount of duty legally owed was not entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration".

96. Article 236(1) provides that:

> "Import duties or export duties shall be repaid in so far as it is established that when they were paid the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).

> Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2).
>
> No repayment or remission shall be granted when the facts which led to the payment or entry in the accounts of an amount which was not legally owed are the result of deliberate action by the person concerned".

Relevant legal provisions and case-law – second claim for remission

97. Article 239 of the Customs Code provides:

> "Article 239
>
> 1. Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:
>
> - to be determined in accordance with the procedure of the committee;
>
> - resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions.
>
> 2. Duties shall be repaid or remitted for the reasons set out in paragraph 1 upon submission of an application to the appropriate customs office within 12 months from the date on which the amount of the duties was communicated to the debtor.
>
> However, the customs authorities may permit this period to be exceeded in duly justified exceptional cases."

98. Article 239 was described by both parties as "a general equity clause". Advocate General Trstenjak in *Heuschen & Schrouff Oriental Foods Trading BV* C-375/07 noted at [53] that there was an overlap between Article 220 (2) of the code and Article 239(1) "but they were not entirely coextensive resulting in a wider scope for Article 239 (1)… as compared with Article 220 (2)…."

99. The CJEU in *Eyckeler & Malt v The European Commission* T-42/96 has held that if the person liable for payment can demonstrate both the existence of a special situation and the absence of deception and obvious negligence on his part, he is entitled to repayment or remission of the amount of duty legally owed.

100. In *Trans Ex-Import* C-61/98 the CJEU said at [21-22]:

> "21. In undertaking its examination, in the light of the objective of fairness underlying Article 239 of the Code, the customs authority must confine itself to verifying whether the circumstances relied on are liable to place the applicant in an exceptional situation *as compared with other operators engaged in the same business*.
>
> 22. It follows that the answer to the questions submitted must be that factors 'which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be

> attributed to the person concerned' exist, necessitating examination of the file by the Commission, where, having regard to the objective of fairness underlying Article 239 of the Code, factors liable to place the applicant in an exceptional *situation as compared with other operators engaged in the same business* are found to exist and the conditions laid down in Article 900(1)(a) of the Regulation, for remission of customs duties in favour of an applicant, are not fulfilled." (Emphasis added)

Jurisdiction of the Tribunal

101. Section 13A Finance Act 1994, so far as material, describes a "relevant decision" as follows:

> "(2) A reference to a relevant decision is a reference to any of the following decisions—
>
> (a) any decision by HMRC, in relation to any customs duty …of the [European Union], as to—
>
> (i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
>
> (ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
>
> … or
>
> (iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled…."

102. It was common ground that a relevant decision referred to in section 13A was not an "ancillary matter" and that, therefore, the jurisdiction of the Tribunal was governed by section 16(5) Finance Act 1994. Section 16(4) and (5) which provide:

> "(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
>
> (a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
>
> (b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and
>
> (c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.
>
> (5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary

any decision and power to substitute their own decision for any decision quashed on appeal."

103. It was, therefore, clear that we have jurisdiction over the remission issue as a matter of domestic law. We should also note that the use of the word "also" suggests that the powers contained in section 16(5) are additional to those contained in section 16(4). In other words, in relation to an appeal which is not an "ancillary matter", we have the powers specified in both section 16(4) and (5).

104. Article 871 Commission Regulation 254/93/EEC ("the Regulations") requires the customs authority of the Member State to transmit a remission claim under Article 220 (2) (b) of the Code where the customs duty (in consequence of a single error) is €500,000 or more.

105. Article 905 of the regulations requires the customs authority of a Member State to transmit an application for remission submitted under Article 239 (2) where the liability to customs duty is €500,000 or more.

106. The relationship between the jurisdiction of a national court and the Commission as regards remission claims was considered by the CJEU in *Staatssecretaris van Fianancien v Heuschen Schrouff Oriental Foods Trading BV* C-375/07 ("*Oriental Foods*"). In that case there were parallel proceedings before the national court and before the Commission. After referring to Articles 871 and 905 of the Regulation, the Court noted that where the customs authorities consider that the conditions laid down respectively in Article 220(2)(b) and the second indent of Article 239(1) of the Customs Code may be satisfied the customs authorities of the Member State must submit the case to the Commission for it to determine whether those conditions have in fact been satisfied.

107. The Court continued:

> "61. In that regard, it appears that, with the exception of the specific cases provided for by the legislation, the Community legislature intended to entrust to the assessment of the Commission those cases in which budgetary revenue payable as a matter of course ought to be waived, on the basis that customs duties levied on the importation of goods into Community territory constitute own resources of the budget of the European Communities. Such a finding is borne out by the powers conferred on the Commission by Articles 875 and 908(3) of the Implementing Regulation, pursuant to which the Commission may, under conditions which it is to determine, authorise one or more Member States to refrain from post-clearance entry of duties in the accounts and repay or remit duties in cases involving issues of fact and law comparable to those which the Commission has already examined in previous decisions.
>
> 62. As the Court has already stated, the objective of conferring on the Commission a power of decision in regard to the post-clearance recovery of customs duties is to ensure the uniform application of Community law. That is likely to be jeopardised in cases where an application to waive post-clearance recovery is allowed, since the assessment which a Member State may make in taking a favourable decision is likely, in actual fact, owing to the probable absence of any

> appeal, to escape any review by means of which the uniform application of the conditions laid down in the Community legislation may be ensured. *On the other hand, that is not the case where the national authorities proceed to effect recovery, whatever the amount in issue, because, in those circumstances, it is still open to the person concerned to challenge such a decision before the national courts* (Case C-419/04 *Conseil général de la Vienne* [2006] ECR I-5645, paragraph 42 and the case-law cited).
>
> 63. *In such cases, it is thus for the national court to assess whether, having regard to the circumstances of the case, those conditions have been satisfied* and, as a result, it will then be possible for the uniformity of Community law to be ensured by the Court of Justice through the preliminary ruling procedure (see, to that effect, Case C-64/89 *Deutsche Fernsprecher* [1990] ECR I-2535, paragraph 13, and *Conseil général de la Vienne*, paragraph 42 and the case-law cited)."(emphasis added)

108. Pausing there, it seems clear from the above passage that this Tribunal has jurisdiction to determine both the Article 220(2)(b) and Article 239 remission claims.

109. There is, however, an alternative open to the Tribunal. This was highlighted in Advocate General Trestenjak's Opinion in *Oriental Foods* at [73] as follows:

> "That raises a further possible way for the national court to ensure a uniform interpretation of Article 220(2) and the second indent of Article 239 (1) of the [code], namely, by annulling the national customs authority's decision without thereby taking a decision in the matter itself. It should be noted in that regard that, insofar as national procedural law contains such a possibility of annulling the national authority's decision and referring the matter back to it on certain conditions, that also may be a manner of proceeding which is consistent with community law, so long as the Commission's decision-making competence is respected."

110. In our view, it is open for us to decide whether the duty disputed in this appeal should be remitted. Accordingly, we now address the two different grounds for remission. First, we shall consider the claim for remission under Article 220(2)(b)

Claim for remission under Article 220 (2) (b)

111. As already noted, Article 220(2)(b) lays down four conditions, all of which must be satisfied:

(1) HMRC must have made an error;

(2) the error could not have been reasonably detected;

(3) the appellant acted in good faith; and

(4) the appellant complied with all the provisions laid down by the legislation in force as regards the customs declaration.

112. It was common ground that the burden of proof to establish that the conditions of Article 220(2)(b) were satisfied lay upon the appellant.

(a) Error by HMRC

113. First, the appellant contended that, on or around 4 October 2006, Mr Shaikh telephoned HMRC's Tariff Classification Service and spoke to Officer Jane Martin. Mr Shaikh described the product to the Officer and said he was informed that it should be declared to CN code 4202 9290890. Mr Shaikh said that he was given a reference code KLO 62283. Mr Hitchens says he made a similar telephone call, using the same reference number, and received the same advice.

114. Ms Bowden's evidence was that the reference code KLO 62283 was not in the form used by the Tariff Classification Service. Nonetheless, Mr Shaikh and Mr Hitchens both testified that they had used at number and spoken to HMRC and received confirmatory advice.

115. It seems to us unnecessary to resolve this issue because we have come to the conclusion that the appellant cannot rely on telephone advice in these circumstances. Plainly, whatever advice was received by the appellant in those telephone conversations must have depended on the information provided by Mr Shaikh and Mr Hitchens. Unsurprisingly, after more than 10 years, neither Mr Shaikh nor Mr Hitchens could recall the details of the product description given to HMRC. Therefore, the appellant cannot show that incorrect advice was given by HMRC on the basis of a correct description of the goods.

116. Furthermore there are two competing CN codes: 4202 9298 90 and 4202 921900. The latter code depends on a visual examination of the goods. HMRC could not, therefore, confirm that the goods fell outside this code in a telephone conversation in absence of a visual examination.

117. Also, Mr Hitchens acknowledged that the Tariff Classification Helpline contained a message stating that advice given was for guidance only.

118. We further note that in an Information Paper produced by the European Commission on the application of Articles 220(2)(b) and 239 of the it is stated that erroneous information communicated by word of mouth, including telephone, was not binding on a member state.

119. Accordingly, we consider that the telephone conversations between HMRC and the appellant in October 2006 did not constitute an error by HMRC.

120. Secondly, the appellant argued that the repayment of customs duties in 2007, pursuant to an application for repayment made in 2006, was an error. The appellant contended that the application for repayment had been supported by a sample of the product. We have already found that the correspondence clearly indicates that samples and technical literature were sent to HMRC by the appellant (via WM International Ltd) to support the change of the CN code 4202 929890.

121. Ms Bowden, of HMRC, considered that this was not an error because HMRC's internal checks confirmed that no papers, or samples provided, had been retained by HMRC regarding this refund application. It was, therefore, impossible to verify the specification of the goods on which the refund was based.

122. It seemed to us, however, that sample goods were provided and a refund paid on the basis that the goods fell within code 4202 929890. However, it was not possible for the appellant to recollect exactly which goods were supplied. Accordingly, we consider that the appellant has not discharged the burden of proof that HMRC had made an error. Furthermore, we do not consider that the appellant has shifted the evidential burden to HMRC. That would only happen, in our view, if there was prima facie evidence that the appellant had provided the relevant bags.

123. Thirdly, HMRC accepted that there had been a "passive" error because the bags had been imported in large numbers over a long period of time. The bags have been subject to both Route 1 and Route 2 checks, the latter of which involved an examination the goods.

124. Fourthly, HMRC conceded that the visit by Officer McKenna on 29 March 2011 was an active error. We accept the evidence of Mr Weaver to the effect that Officer McKenna had been provided with samples of the goods including the bag in question. Whether Officer McKenna examined the goods or relied on a catalogue description seems to us beside the point. He was, in our view, given the opportunity to examine samples which he himself had indicated he may wish to do.

125. We consider that HMRC were correct to concede that the inspection by Officer McKenna was an active error.

(b) Could the errors have been reasonably detected by the appellant?

126. The case-law of the CJEU establishes that this question is to be determined by reference to three factors ("the three factor test"): (i) the nature of the error, (ii) the professional experience of the trader concerned, and (iii) the degree of care exercised by the trader. See *Hewlett Packard France* C-250/91 at [22] citing *Societe Cooperative Belovo* C-187/91, *Beirafrio* C-371/90 and *Deutsche Fernsprecher* C-64/89.

127. As regards the first element of the three factor test, the CJEU said in Case C-64/89 *Deutsche Fernsprecher* at [20]:

> **"**As regards the precise nature of the error, the question to be determined each time is whether the rules concerned are complex or simple enough for an examination of the facts to make an error easily detectable. It should be stated that, in a case such as this, where the trader twice received confirmation that the erroneous view upon which the customs treatment was based was correct, the repetition of the error by the customs authority is evidence that the problem to be resolved was a complex one"

128. HMRC argued that the relevant test was simple. The applicable CN codes and tariffs were contained in the Official Journal of the European Communities. The appellant was deemed to be aware of the contents of the Official Journal. *In Friedrich Binder GmbH & Co. KG v Hauptzollamt Bad Reichenhall* C-161/88 at paragraph [19] the Court held:

> "It must first be pointed out in that regard that the applicable Community provisions relating to the customs tariff must be published in the Official Journal of the European Communities. From the date of that publication, they constitute the sole relevant positive law, of which all are deemed to be aware."

129. Ms Vicary also contended that the appellant had failed to apply for a BTI and thus failed to seek a proper and definitive application of the rules. This failure did not make the case complex. The error had occurred simply by virtue of the appellant's failure to apply the applicable rules.

130. Ms Sloane, for the appellant, countered by noting that HMRC had made an active error during an audit by Officer McKenna in 2011 (for which the appellant had supplied samples). Secondly, HMRC had repeatedly carried out Route 1 and Route 2 inspections over several years where the relevant classification was applicable by a speedy visual check. In those circumstances, the conduct of HMRC itself was evidence that the appellant could not reasonably have detected the alleged "error" because it had reasonable grounds to believe that HMRC considered that it had classified the goods correctly.

131. Ms Sloane referred to the second sentence of the passage at [20] from the decision of the CJEU in *Deutsche Fernsprecher* noting that the length of time over which the authorities persisted in their error was relevant to an assessment of whether the importer should reasonably have detected the error.

132. Ms Sloane also referred to Case C-153 & 204/94 *Faroe Seafood* and Case C-38/95 *Foods Import*, where the CJEU considered the repetition of an active error on the part of the customs authorities to be evidence that the error was not reasonably detectable by the importer. In this case, said Ms Sloane, HMRC positively considered the tariff classification of the bags and repeatedly allowed the trader to carry out the allegedly erroneous procedure. That was, in Ms Sloane's submission, evidence that the error of HMRC was not reasonably detectable by the appellant.

133. Finally, under this heading, Ms Sloane argued that HMRC could not deny remission of duty simply because the appellant did not exercise a right to apply for a BTI. She referred to a decision of the Commission (REC09/03) where the Commission recognised that "though traders have a right to request a BTI, they are under no obligation to do so."

134. As regards the second factor of the three factor test, Ms Sloane did not dispute that the appellant was an experienced trader.

135. In relation to the third factor of the three factor test (i.e. the degree of care exercised by the trader), Ms Vicary argued that the only way that a trader could protect itself against the classification error was for applying for a BTI. The appellant had failed to do this until they received a C18 demand notice.

136. In addition, HMRC referred to a number of decisions by the commission where it was clear that the degree of care exercised by the appellant in this case was significantly below the standard set in those decisions. Those decisions involved what Mr Vickery described as "difficult products" involving multi-component items.

137. Ms Sloane also referred to a number of the Commission decisions and noted that the Commission did not indicate that a trader failed to exercise diligence by failing to apply for a BTI.

138. If we are wrong in our conclusion that the appellant had correctly classified the bags, then we consider that the one passive error and one active error made by HMRC could reasonably have been detected by the appellant. In our view, the naked eye test required to be performed was a simple test. Both HMRC and the appellant accepted that it was a simple test designed for speedy customs clearance. Accordingly, if we had needed to decide this point we would have held that the appellant did not satisfy this requirement of Article 220(2)(b).

(c) Good faith and (d) legislative compliance

139. In the light of our conclusion that the error was reasonably detectable, we do not need to consider this issue save to note: (a) that Ms Vicary made it clear that it was no part of HMRC's case that the appellant had acted in bad faith and (b) there was no evidence of a failure to comply with procedural requirements.

Claim for remission under Article 239

140. Ms Vicary argued that the appellant had not advanced any positive case to establish that it was in an exceptional situation as compared with other operators engaged in the same business.

141. Ms Sloane, however, argued that the appellant's 2006/2007 claim for a refund of duty, the Route 1 and Route 2 checks and Officer McKenna's inspection were circumstances which constituted a special (i.e. exceptional) situation.

142. It is clear that Article 239 has a wider scope than Article 220(2)(b). Furthermore, the appellant must establish the absence of deception and obvious negligence on its part.

143. As regards the absence of deception, Ms Vicary expressly stated that HMRC were not contending that the appellant had acted in bad faith. In our view, she was correct to make that concession. The evidence, in our judgment, establishes that the appellant acted in good faith throughout.

144. Secondly, as regards the absence of obvious negligence on the appellant's part, we do not consider that our conclusion in relation to Article 220(2)(b) that HMRC's error was reasonably detectable equates to obvious negligence. The "obvious negligence" test seems to us to be a significantly higher standard. Moreover, we reject HMRC's contention that the appellant's failure to apply for a BTI was obvious negligence. As the Commission in its decisions has observed, it is open to a trader to apply for a BTI but it is under no obligation to do so.

145. In our view, the appellant was not obviously negligent.

146. Next, we must consider whether the appellant was in an exceptional situation compared with other traders. We have concluded that it was.

147. The appellant had repeatedly imported goods under heading 4202 929890 and the goods were cleared under Route 1 and Route 2 – the latter involving an inspection of the goods. No queries were raised about the alleged mis-classification of the bags. Secondly, Officer McKenna had carried out an audit of the bags in 2011. The evidence establishes that the bags were made available for Officer McKenna's inspection. There was no reason for the appellant to believe, after that inspection, that HMRC were anything other than satisfied with the classification of the goods under CN heading 4202 929890. We consider that those two factors place the appellant in an exceptional situation compared with other traders.

148. Accordingly, had it been necessary for us to do so, we would have decided that the appellant would have been entitled to remission of duty under Article 239 of the Code.

Decision

149. For the reasons given above, we allow this appeal.

150. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 9 FEBRUARY 2017