[2017] UKFTT 0447 (TC)

# TC05909

**Appeal number: TC/2016/01081**

*Tariff classification of items imported by vintage clothing business – meaning of 'worn clothing' – appeal against duties and penalty allowed*

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**ROKIT LTD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE THOMAS SCOTT**
**MS ELIZABETH BRIDGE**

**Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 30 January 2017**

**Charles Bradley of Counsel for the Appellant**

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

## DECISION

### *Introduction*

1. Rokit Ltd ("Rokit") appeals against a C18 post-clearance demand notice for £109,793 issued by HMRC in respect of customs duty on imports of second-hand clothing between 18 December 2012 and 7 September 2015.

2. Rokit also appeals against the related penalty of £2,000.

3. In respect of the customs duty notice, Rokit raises two arguments. The first is that HMRC have wrongly classified the relevant goods for tariff purposes. The second is that, in the alternative, Rokit has a defence of waiver under Article 220 of the Customs Code.

4. In respect of the related penalty, Rokit argues that if its appeal as regards classification succeeds, then the penalty must be dismissed. If that aspect of its appeal does not succeed, Rokit argues that in any event it had a "reasonable excuse" for penalty purposes.

### *Evidence*

5. We were presented with correspondence relevant to the appeal, and certain relevant documents. As discussed below, the evidence relating to several important factual matters was incomplete.

6. We heard evidence from a number of witnesses. For HMRC, we heard evidence from Nicola Pell, the HMRC officer who visited Rokit's premises in 2015 and issued the C18 notice. For Rokit, we heard evidence from Anthony Shackleton, Rokit's managing director; Alexandra Snelgrove, Rokit's Productions/Warehouse Manager; Emma Rice, an employee of Rokit, and Colin Reed, another employee of Rokit. All of these witnesses were examined and cross-examined, and we had the opportunity to question them. We set out below our findings as regards the evidence of these witnesses.

7. We also admitted as evidence witness statements from three witnesses who were not required to attend, namely, for HMRC Julie Lait, an officer who accompanied Ms Pell on the 2015 visit to Rokit's premises as part of her training programme, and, for Rokit, Loranique Pienaar and Lorna Connell, employees of Rokit who worked in its recycling department.

8. We received a witness statement from Gloria Wong, the Sales and Logistics Manager of a Canadian company, Trans-Continental Textile Recycling Ltd. This company was the main supplier to Rokit of the second-hand clothing imported by Rokit before, during and after the period covered by the C18 notice. Ms Wong's evidence related to her experience of the tariff classification of the second-hand clothing. The tribunal issued directions permitting Rokit to rely on Ms Wong's witness statement without the cost and inconvenience of her having to travel to London for the hearing from her home in Canada. Rokit accordingly

served a hearsay notice in respect of Ms Wong's witness statement. The weight which we attached to Ms Wong's statement took account of the fact that she was not available for examination and cross-examination.

9. We were also presented at the hearing with numerous items of clothing which Rokit submitted were representative of the clothing imported during the period covered by the C18 notice. HMRC disputed the relevance of these items. We discuss their relevance below.

***Legislative Background to Tariff Classification***

10. The EU is a contracting party to the International Convention on the Harmonized Commodity Description and Coding System, commonly referred to as the Harmonized System (the "**HS**"). The HS requires that the customs tariffs and nomenclatures of the contracting states conform to the HS. The HS is administered by the World Customs Organisation.

11. The decision of the First-tier Tribunal in *EP Barrus Ltd v HMRC* [2011] UKFTT 864 (TC) contains a useful summary of the relevant legislative background to tariff classification. On appeal, the Upper Tribunal referred with approval to this summary ([2013] UKUT 0449 (TCC), at [9]). The summary is as follows:

> **"The Legislation**
>
> **32.**
>
> The level of customs duties on goods imported from outside the European Community is based on the Customs Tariff of the European Communities. This includes the Combined Nomenclature of goods and the rates and other items of charge normally applicable to goods covered by the Combined Nomenclature as regards customs duties.
>
> **33.**
>
> The Combined Nomenclature uses an eight-digit numerical code to identify a product, the first six digits are those known as the harmonised system (the first four digits being the heading and the fifth and sixth being sub-headings); the seventh and eighth digits are further sub-headings.
>
> **34.**
>
> The Combined Nomenclature Regulation No 2658/87 provides the legal basis for the Community's Tariff. An annual amendment to this Regulation contains the Combined Nomenclature that is reproduced in the UK Tariff.
>
> **35.**
>
> The legal procedure for tariff classification is contained in Volume 2, Part 1, Section 3 of the UK Tariff. There are six General Interpretative Rules for tariff classification ("the GIRs"). These have legal force and are intended to be applied whenever seeking to classify goods within the Combined Nomenclature.
>
> **36.**
>
> Annex 1 of EC Council Regulation 2658/87 contains the General Rules for the Interpretation of the Combined Nomenclature ("the GRIs"). Insofar as relevant for present purposes, the GRIs state as follows:

"*Classification of goods in the combined nomenclature shall be governed by the following principles:*

*1. The title 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:*

*[….]*

*3. When … 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 …*

*(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 …*

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

*[….]*

*6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."*

**37.**

Products must be classified under the Combined Nomenclature by reference to their objective characteristics and properties, as defined in the headings of the Combined Nomenclature.

**38.**

A summary of the relevant principles to be applied in deciding whether a product falls within a particular code is found in recent Case C-486/06 *BVBA Van Landeghem* [2007] ECR 1-10661, at paragraphs 23-25:

> 23. First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 Kawasaki Motors Europe [2006] ECR 1-3657, paragraph 38, and Case C-310/06 FTS International [2007] ECR 1-0000 paragraph 27).
>
> Second, the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see C-400/05 BAS Trucks [2007] ECR 1-311, paragraph 29; Case C-183/06 RUMA [2007] ECR 1-559, paragraph 36; and Case C-142/06 Olicom [2007] ECR 1-0000, paragraph 18).
>
> 25. Lastly, according to the Court's case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (BAS Trucks, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariffs headings of the CN (see Kawasaki Motors Europe, paragraph 36).

**39.**

It is for the national court to determine the objective characteristics and properties of the product, having regard to their physical appearance, composition and presentation.

**40.**

There are three primary sources which are valid aids to the construction of the Combined Nomenclature:

(a) The Explanatory Notes to the Nomenclature of the Customs Co-operation Council (known as Explanatory Notes to the Harmonised System or HSENs), drawn up by the World Customs Organisation

(b) The Combined Nomenclature Explanatory Notes (known as CNENs), drawn up by the European Commission

(c) Opinions of the World Customs Organisation (known as WCO Opinions)

**41.**

HSENs can be used for persuasive, but non-legally binding guidance. It has been held that the explanatory notes in the CNENs and the HSENs are an important aid to construction of the scope of the headings of the Combined Nomenclature, albeit that neither is legally binding. The content of HSEN and CNEN notes will be ignored if they are incompatible with the provisions of the Combined Nomenclature.

**42.**

A WCO Opinion is also a valid aid to the construction of the Combined Nomenclature but must be set aside if the interpretation is incompatible with the wording of the Combined Nomenclature or manifestly goes beyond the discretion conferred on the WCO."

***Customs debt***

12. Article 201 of Regulation 2913/92 establishing the Community Customs Code (the "Customs Code") provides, so far as relevant, as follows:

"1. A customs debt on importation shall be incurred through:

(a) The release for free circulation of goods liable to import duties, or

(b) The placing of such goods under the temporary importation procedure with partial relief from import duties.

2. A customs debt shall be incurred at the time of acceptance of the customs declaration in question.

3. The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor…"

***Waiver***

13. In relation to the limited defence of waiver on import duty, Article 220 of the Customs Code provides, so far as relevant, as follows:

"1. Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts)…

2. Except in the cases referred to in the second and third subparagraphs of Article 217(1), subsequent entry in the accounts shall not occur where:

…

(b) 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…"

***Classification Codes***

14. The headings of the Combined Nomenclature which are relevant for the purposes of the appeal are Chapters 61, 62 and 63.

15. Chapter 61 is headed "Articles of apparel and clothing accessories, knitted or crocheted". The Chapter Notes begin as follows:

"1. This chapter applies only to made up knitted or crocheted articles.

2. This chapter does not cover:

(a) goods of headings 6212;

(b) worn clothing or other worn articles of heading 6309; or

(c) orthopaedic appliances, surgical belts, trusses or the like (heading 9021)."

16. The Notes to Chapter 61 go on to define those garments which comprise a "suit" or an "ensemble". The table to Chapter 61 prescribes a broad category of garments which are either cotton or man-made fibres, together with their commodity code entries. The rate of duty chargeable under Chapter 61 is 12%.

17. Chapter 62 is headed "Articles of apparel and clothing accessories, not knitted or crocheted". The Chapter Notes begin as follows:

"1. This chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 6212).

2. This chapter does not cover:

(a) worn clothing or other worn articles of heading 6309; or

(b) orthopaedic appliances, surgical belts, trusses or the like (heading 9021).

18. The table to Chapter 62 prescribes those products which are either made of wool or fine animal hair or of cotton, together with their commodity code entries. The rate of duty chargeable under Chapter 62 is again 12%.

19. Chapter 63 is headed "Other made up textile articles; sets; worn clothing and worn textile articles; rags". The heart of the dispute in this case relates to the scope and applicability of heading 6309 of Chapter 63, titled "Worn clothing and other worn articles". The introductory Notes to Chapter 63 state as follows:

"1. Sub-chapter 1 [other made up textile articles] applies only to made up articles, of any textile fabric.

2. Sub-chapter 1 does not cover:

(a) goods of Chapters 56 to 62; or

(b) worn clothing or other worn articles of heading 6309.

3. Heading 6309 applies only to the following goods:

(a) articles of textile materials:

- clothing and clothing accessories, and parts thereof;

- blankets and travelling rugs;

- bedlinen, table linen, toilet linen and kitchen linen;

- furnishing articles, other than carpets of headings 5701 to 5705 and tapestries of heading 5805;

(b) footwear and headgear of any material other than asbestos.

In order to be classified in this heading, the articles mentioned above must comply with both the following requirements:

- they must show signs of appreciable wear; and

- they must be presented in bulk or in bales, sacks or similar packings."

20. The rate of duty for items within heading 6309 (worn clothing) is 5.3%. The rate of duty for items within heading 6310 (rags) is zero.

***Jurisdiction***

21. The decision by HMRC to charge duty in this appeal was a "relevant decision" within section 13A of the Finance Act 1994 ("FA 1994"), as being a decision by HMRC on the rate and amount of customs duty to be charged on the relevant imports.

22. That decision was then the subject of an HMRC statutory review pursuant to section 15C FA 1994.

23. The decision to charge duty was not a decision as to an "ancillary matter" as defined by section 16 FA 1994. The powers of this tribunal on the appeal are therefore the extensive powers set out in section 16(5), with the burden of proof lying on Rokit by virtue of subsection (6) of section 16. The relevant provisions are as follows:

> "(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 decisions; 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.
>
> (6) On an appeal under this section the burden of proof as to-
>
> [(a) – (c): not in point]…
>
> shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established."

***Penalty***

24. Under Section 26 of the Finance Act 2003 ("FA 2003"), a penalty arises when certain rules are contravened, as follows:

> "(1) If, in the case of any relevant tax or duty, a person of a prescribed description engages in any conduct by which he contravenes-
>
> (a) a prescribed relevant rule, or
>
> (b) a relevant rule of a prescribed description,
>
> he is liable to a penalty under this section of a prescribed amount."

25. Pursuant to regulations under section 26 (the Customs (Contravention of a Relevant Rule) Regulations 2003, S1 2003/3113), the contravention consists, according to HMRC, in the making by Rokit of incorrect import entries in the period in dispute.

26. Under section 27 FA 2003, a person is not liable to a penalty under section 26 if he satisfies the tribunal on appeal that there is a reasonable excuse for his conduct.

27. An appeal against the penalty lies to the tribunal under section 33 FA 2003. The tribunal has full jurisdiction under section 33 and section 29 to consider whether the penalty has been properly imposed, and to reduce or cancel it, with certain circumstances to be disregarded.

***Issues***

28. There was some discussion in the papers filed with the tribunal of whether Rokit sought to appeal against the decision by HMRC to issue the C18 notice or against the HMRC review decision which upheld that issue. The distinction was considered in *Atom Supplies Ltd (t/a Masters of Malt) v HMRC* [2015] UKFTT 388 (TC), at [50] to [53]. In the event, the parties agreed that the issue was not material in this case, and we took into account the review decision, which confirmed the original decision, in reaching our conclusions.

29. There were therefore three issues to be determined on the appeal. First, were the imported goods correctly classified by HMRC? (the "Classification Issue") Secondly, did Rokit have a defence of waiver against HMRC in respect of the duty assessed? This raised a preliminary issue of whether or not the tribunal had jurisdiction to consider the question, as well as the substantive question (the "Waiver Issue"). The final issue was whether or not the related penalty should be upheld (the "Penalty Issue").

***Findings of Fact***

30. We make the following findings of fact, set out in chronological order.

31. On 2 September 2015 HMRC wrote to Rokit stating that they would be visiting their premises on 30 September 2015 to ensure that the company's records and systems were adequate for duty and VAT compliance purposes, and that duty and VAT were being properly declared.

32. On 30 September 2015 that visit took place. HMRC decided that duty was not being properly declared, and indicated that it intended to issue a C18 Post Clearance Demand Note for £91,495 customs duty and £18,299 of import VAT.

33. Following correspondence, that C18 Demand Note was issued by HMRC on 12 November 2015. On 27 November 2015 HMRC gave notice to Rokit of the intention to charge a related penalty.

34. Rokit sought an HMRC review of the decision to issue the C18. The letter of 8 December 2015 from Rokit's solicitors argued that HMRC's interpretation of tariff code 6309 was wrong in law and also that a proportion of the clothing imported by Rokit fell within the heading

"rags" in code 6310. In arguing additionally that Rokit was entitled to the defence of waiver, the letter referred to a prior agreement with HMRC as follows:

"Rokit initially imported all of its clothing under heading 6309. Around 15-20 years ago, however, Mr Shackleton, Rokit's managing director, attended a meeting with two Customs & Excise inspectors at a container port (he believes it was Felixstowe). The inspectors opened the container and discussed the contents with Mr Shackleton. The inspectors considered that some of the clothes, although second hand, appeared to be in very good condition and were in their view outside of heading 6309. Equally, they acknowledged that a proportion of the clothing was also in such a state to qualify under heading 6310 as rags. They agreed that the clothing imported by Rokit should be allocated to the three relevant headings in the following percentages:

- 70% Worn clothing 63090000
- 17% Rags 63109000
- 13% 'as new' 61142000

They further agreed that the only practical way of carrying out the apportionment was to apply these percentages to the total invoice value.

Rokit does not have a written record of this ruling as it only keeps records going back seven years. Rokit has also been informed that HMRC does not keep records going back more than three years. Given the length of time that has passed, it is hardly surprising that there is no written record available. Plainly, however, this is not a reason to dispute Mr Shackleton's account in the absence of any countervailing evidence from HMRC. Furthermore, it is barely plausible to suggest that Rokit could have determined these specific percentages 'off the top of its head' without direction from Customs & Excise/ HMRC.

From the time of that meeting onwards, Rokit has imported its goods under the apportionment procedure agreed with Customs & Excise. The average composition of the consignments has not materially changed during that time. During those years Customs & Excise/HMRC have periodically checked the containers imported by Rokit (usually by X-ray, occasionally by direct inspection of the contents). On none of those occasions have the inspecting officers questioned the apportionment. In particular, Mrs Pell herself carried out an audit around three years ago and visited Rokit's sorting depot. She did not at that time, or at any time prior to her recent visit, question the percentages allocated to the relevant classifications."

35. On 22 January 2016 HMRC wrote to Rokit upholding the decision to issue the C18 on review. On 25 January 2016 HMRC issued a penalty notice for £2,000.

36. On 18 February 2016 Rokit lodged appeals against the C18 and the penalty.

***The Classification Issue***

37. The issue relates to the correct customs code for the garments imported by Rokit during the relevant period. Are those garments entirely dutiable at 12% under Chapter 61 or Chapter 62, as HMRC contends and as the C18 asserts? Or are these garments properly categorized, in whole or in part, as "worn clothing" under heading 6309 (dutiable at 5.3%) and/or "rags" under heading 6310 (dutiable at 0%)?

38. In our judgment, this must logically entail consideration of two questions, namely:

(a) what do the relevant definitions in headings 6309 and 6310 mean?, and

(b) having determined that, how should the correct application of these headings be determined in practice in respect of Rokit's imports?

39. Rokit's submissions in relation to both of these questions were clear and remained consistent throughout the proceedings. However, HMRC's position on both questions was less than clear, and was not consistent. In particular, HMRC and Mr Bradley seemed unclear as to HMRC's position on question (b), and whether or not they needed to succeed on question (a) question for the purposes of the appeal.

40. Dealing firstly with heading 6309, it is Rokit's position that the majority of its imports – Rokit says 70% – falls within this heading. So, the first question is to determine the scope and meaning of the term "worn clothing and other worn articles" in the title to heading 6309.

41. The Notes to Chapter 63 are set out at [19] above. The HSENs are also a highly persuasive and important aid to interpretation, although they are not legally binding. The HSEN for heading 6309, so far as relevant, is as follows:

> "In order to be classified in this heading the articles … must comply with both of the following requirements. If they do not meet these requirements they are classified in their appropriate headings.
>
> (A) They must show signs of appreciable wear, whether or not they require cleaning or repair before use.
>
> New articles with faults in weaving, dyeing, etc., and shop-soiled articles are excluded from this heading.
>
> (B) They must be presented in bulk (e.g. in railway goods wagons) or in bales, sacks or similar bulk packings, or in bundles tied together without external wrapping or packed roughly in crates.
>
> These articles are normally traded in large consignments, usually for resale, and are less carefully packed than is generally the case with new articles.

42. There is no disagreement between the parties as to the meaning of the second requirement applying to heading 6309, namely that the articles are "presented in bulk … or in bales, sacks or similar bulk packings".

43. Where the parties differ is in the meaning of clothing being "worn", and showing "signs of appreciable wear".

44. Mr Bradley set out Rokit's submissions in his Skeleton Argument as follows:

> "(i) **All of the imports apart from the 'rags' are 'worn clothing'**

> Rokit's first submission is that all of the relevant imports apart from the 'rags' are 'worn clothing' within the meaning of CN heading 6309, regardless of their state of wear on importation.
>
> The expression 'worn clothing' in English is ambiguous, in that it might mean (i) 'worn' in the sense of 'used' or 'second-hand' or (ii) 'worn' in the sense of 'worn down' or worn out'. This ambiguity disappears, however, when one looks at other language versions of the CN, e.g. the French '**Articles de friperie'** or German '**Altwaren**', which simply refers to second-hand clothes.
>
> Once it is established that it is the first sense of 'worn clothing' that is intended, that is the end of the matter, because it is common ground that all of Rokit's imported clothing is used or second-hand. To the extent that the HSEN introduces a further limitation that the clothing has to show signs of 'appreciable wear', that is an alteration of the meaning of the CN heading and may be disregarded: cf **Rose Electrotechnik** (Case C-280/97) at paragraphs 23-34.
>
> (ii) **Around 70% of the imports show signs of appreciable wear**
>
> If that is wrong, and the expression 'worn clothing' does have to be read down by reference to the HSEN, the question is whether the relevant samples of clothing show 'signs of appreciable wear' …
>
> The expression 'appreciable wear' does not require a gloss: it simply means wear that one can appreciate. The words 'whether or not they require cleaning or repair before use' make it clear that the clothing does not have to be dirty or damaged. Ms Snelgrove gives examples of what she considers to be appreciable wear at paragraph 18 of her witness statement:
>
> > "sweat marks, rough edges on collars, fading (in whole or patches), frayed ends, [frayed] seams, dog-eared collars, rusty zips, shrinkage, permanent creases or crinkles, button moulds, loose threads".

45. HMRC's interpretation of "worn" and "signs of appreciable wear" was somewhat harder to establish, but it appears to rest on two propositions.

46. The first is that in order to fall within heading 6309, and to show signs of "appreciable wear", the items must be "items that most people would throw out as not being worthy of being worn any more, eg badly frayed collars, hole in elbow etc." This is the phrase used in a letter from Ms Pell to Shackleton of 8 October 2015 following Ms Pell's visit to Rokit's premises. The same wording appears in Ms Pell's notes of her site visit, which we were shown in evidence. It is also recorded in Ms Pell's witness statement as the advice she received internally from HMRC's Tariff Classification Team. It is not repeated in HMRC's review decision of 22 January 2016, though curiously the decision refers to various letters to Rokit from Ms Pell which do repeat this wording.

47. The second proposition which HMRC appears to assert is that items cannot fall within heading 6309 if they have been – or perhaps if they are capable of being – cleaned and/or repaired for resale.

48. There are various references throughout correspondence between HMRC and Rokit in which HMRC refers to the fact that during her 2015 site visit Ms Pell saw Rokit cleaning and preparing for sale imported items of clothing. The proposition that this debars the items from falling

within heading 6309 is on occasions implicit in the HMRC explanations and on occasions more explicit.

49. In her letter to Mr Shackleton of 28 October 2015, for instance, having asserted the HMRC view that the items must be "not worthy of being worn any more", Ms Pell continues:

> "If [the items] are capable of being made into a garment, they will still be classed as clothing".

50. In an internal email of 2 October 2015 from Mr Dore of HMRC's Tariff Classification Team to Ms Pell, Mr Dore states:

> "On the whole if you have usable old clothing, it should be classified in either Chapter 61 or 62".

51. The HMRC review letter of 22 January 2016 does not set out this second proposition explicitly, but in describing Ms Pell's visit to Rokit's premises in 2015, it states (presumably as material to the review conclusion) as follows:

> "On 30 September 2015 Officer Pell visited your premises. During this visit she inspected some of the clothing on the premises; the items examined had been cleaned and hung up with the intent to sell. Some of the items were being altered with the intent to sell. Officer Pell noted a number of errors on the classification of the goods".

52. In considering the meaning of "worn clothing" and "signs of appreciable wear", we took into account the meaning of those words under normal principles of statutory interpretation, including a purposive construction taking into account the context of the relevant Code headings. We were guided by the established body of case law on tariff classification. Finally, we gave material weight to the HSENs, but bearing in mind the need for consistency with the headings themselves.

53. As explained above, the European Commission also produces explanatory notes for some of the codes of the Combined Nomenclature ("CNENs"), but there are no CNENs for headings 6309 or 6310.

54. We were not referred to any domestic or CJEU decision relating to the meaning of the language in issue. We note, however, that there is one decision of the Court of Justice of the European Communities where the facts refer to the relevant wording in handling 6309. That is the decision in **Euro Tex Textilverwertung Gmbh v Hauptzollamt Duisburg** (Case C-56/06).

55. *Euro Tex* concerns the processes necessary to establish "originating product" status for customs tariff purposes. The interesting aspect of the case for the purposes of this appeal lies in the factual background described in the Opinion of Advocate General Sharpston for the purposes of the reference. The Opinion states (at paragraphs 29 and 30):

> "29. At the relevant time – namely when they were exported by the applicant, and hence after they had been sorted and matched by Euro Tex – the used goods at issue in the present case fell under heading 6309 of the HS Nomenclature: worn clothing and other

> worn articles which show signs of appreciable wear and which are presented in bales, sacks or similar packings. Community origin will therefore be conferred for the purposes of Article 2(1)(b) of Protocol 4 only if all the materials used in the applicant's operations are classified in a heading other than 6309.
>
> 30. The referring court states, and it appears to be common ground between the parties, that that is the case: although those materials are themselves worn clothing, they are not packaged in bales, sacks or similar containers before being subjected to Euro Tex's operations, and hence do not fall under heading 6309".

56. The aspect of *Euro Tex* which is of interest is not the CJEU decision itself, but the fact that Germany, and the referring court, would have treated the used clothing, before it was sorted and separated by Euro Tex, as falling within heading 6309 but for the fact it was not "packaged in bales" etc. The articles in question were placed in public waste/recycling banks before being subjected to various detailed sorting processes. This implies a practice which did not appear to categorize the items by reference to HMRC's two suggested criteria. However, in the absence of any specific discussion of this issue, this is only of persuasive interest in indicating the approach of another Member State.

57. We turn now to the meaning of "worn" in heading 6309. Mr Bradley's first submission was that it simply means "used" or "second-hand", citing in support some of the non-English language translations of the Code. In our view, this is not the correct interpretation of the term. First, the natural meaning of "worn" is "showing signs of wear" not "having been previously worn by someone". In our opinion, the word is insufficiently ambiguous to warrant reliance on other language versions. Secondly, the requirement in the Chapter 63 notes that the articles "must show signs of applicable wear" clearly points against Mr Bradley's interpretation. Thirdly, while not legally binding, the same requirement in the HSEN for heading 6309 is highly persuasive. Fourthly, taking account of the settled principle that the correct tariff clarification of an item should be evident to a customs officer at the point of importation, given that there may be no ready means of establishing whether or not an item has previously been worn by someone, this points on balance against Mr Bradley's interpretation.

58. Given our decision that "worn" does require "signs of appreciable wear", what does this wording mean? Mr Bradley submitted that it simply means any sign of wear which is evident or apparent or "which can be appreciated" by viewing it. HMRC submit that it must be interpreted much more narrowly, so that any item which is "worthy of wearing", or can be repaired for resale, falls outside of the wording.

59. In our judgment, the HMRC interpretation is unduly restrictive. If the intention of the Combined Nomenclature was so to restrict heading 6309, that could easily have been stated or referred to in the headings, the heading Notes, the HSENs or the CNENs. It is not, either expressly or by implication.

60. In support of our conclusion, we also note the following points. First, in terms of the coherence of the Code, HMRC's interpretation would mean

that there would be no separate tariff heading for items showing signs of appreciable wear but being capable of being repaired or reworn. Such items would be liable to duty at 12%, the same rate as brand new clothing, and the same rate as the "new articles with faults ..." referred to in the HSEN for heading 6309. HMRC's interpretation would also result in a relatively narrow distinction between "worn clothing" and "rags". These results would produce a less coherent tier of tariffs than is likely to have been intended.

61. Secondly, while in no way determinative, the hearsay evidence from Ms Wong was that in her experience loads such as those which her company regularly exported to Rokit were in practice treated for tariff purposes as being "worn clothing". HMRC did not challenge Ms Wong's experience or testimony on this point.

62. Thirdly, in our judgment HMRC's assertion that heading 6309 cannot apply to clothing which is capable of being repaired and resold is entirely unwarranted. The HSEN for heading 6309 states that the articles "…must show signs of appreciable wear, **whether or not they require cleaning or repair before use**" (emphasis added). The HSEN later states that such articles are "usually for resale". This quite clearly shows that HMRC's reading is not justified given the highly persuasive weight of an HSEN.

63. Finally, the use to which items are or may be put subsequent to their import is inherently unlikely to determine their classification at the point of import. HMRC's approach, and its reliance on Rokit's practice of cleaning and preparing the items for resale, betrays a fundamental confusion between the objective characteristics of the items when imported and their subsequent actual or intended use. The settled jurisprudence on classification shows that the latter is relevant only in so far as it affects the former.

64. We conclude that HMRC's interpretation of heading 6309 is unjustified. However, we consider that "appreciable" wear probably implies something more than wear which is visible, or "can be appreciated". The secondary definition of the term in the Oxford English Dictionary refers to something being estimated or assessed to "a significant extent or degree", and in our judgment, while not necessarily intending that the wear must be "significant", we conclude that "appreciable" connotes wear which is readily noticeable.

65. So much for the meaning of heading 6309. We turn now to the second question we identified at [38], namely how the application of the heading should be correctly applied in practice to the imports in this appeal.

66. One might have expected that the answer to this question would be plain, namely that in order to determine the correct classification of the imports HMRC would inspect them, and where they were in bulk containers, would agree an apportionment based on sampling, to be corroborated and if necessary adjusted by further inspections.

67. However, it is at this point that the central conundrum in this appeal arises. Rokit submits that such an apportionment was agreed with HMRC around 15 to 20 years ago, and applied since that date. It submits that Ms Pell had ample opportunity to inspect the goods to verify the apportionment in her audit visit in 2013. Finally, it submits that Ms Pell did not inspect the clothing at all during her 2015 visit, or make any request or attempt to do so.

68. In relation to the alleged apportionment agreement, HMRC appeared not to deny that this existed, but rather to argue that they have no record of it, and Rokit has failed to provide adequate proof of it. We heard evidence from Mr Shackleton as to the terms of the agreement and its genesis. We found Mr Shackleton to be an entirely credible and reliable witness, and, in the absence of any contradictory evidence from HMRC, we find as a fact on the balance of probabilities that an agreement was reached with HMRC of the sort submitted by Mr Shackleton.

69. In relation to the 2013 visit by Ms Pell to Rokit, HMRC devoted considerable resources, including an 18 page submission to the Tribunal, seeking to avoid disclosure of HMRC results of that visit and its audit report. In the event, they stated subsequently that the report had been lost, and that they would accept that Mr Shackleton's recollections of the events of the 2013 audit were correct. In particular, they accepted the following passages from Mr Shackleton's first witness statement:

> "Officer Pell was given full access to the books and records that she requested. She was able to see the bales/bags of imported clothing but chose not to inspect them. She did not at the time nor subsequently question the agreed ratios. She did not suggest that the audit had been prompted by HMRC thinking that, for whatever reason, the agreed ratios were no longer appropriate or required reappraisal. We did not receive any correspondence from HMRC which challenged the agreed ratios.
>
> As a result of the 2013 audit and the lack of any questioning of the ratios and the absence of any subsequent communications challenging the declared percentages in the relevant classifications or seeking information about the average compositions of the imported bundles, we understood that the long standing allocations continued to be agreed and accepted by HMRC."

70. In relation to the 2015 visit by Ms Pell which precipitated the issue of the C18 Notice in this appeal, we received witness statements from Ms Pell stating that she had observed some of the clothing being cleaned and prepared for sale, and being hung on rails. We heard evidence from Ms Pell and had the opportunity to ask her questions. We did not find Ms Pell's recollections to be wholly reliable. For instance, having given evidence that she had observed two female employees hanging up the clothing, when shown a contemporaneous photograph of the two impressively large gentlemen who were performing this task, Ms Pell thought that she may have misremembered. She also claimed to have little or no recollection of her 2013 audit visit, which we find surprising.

71. We find as a fact that neither during her 2013 audit visit nor during her 2015 visit did Ms Pell make any meaningful attempt to inspect any of

the goods, with a view to determining their correct tariff classification or otherwise.

72. The conundrum is that HMRC appeared during the proceedings to argue that this is irrelevant, and that inspection of the imports could never matter in determining their correct tariff classification.

73. HMRC stated that this is because classification can never properly be determined by a formula or apportionment. It can only ever be based on written evidence of the classification of each item or items at the point of import.

74. In examination, Ms Pell eventually stated that this was her understanding, as communicated to her by HMRC's Tariff Classification Team. She also accepted on questioning from us that a consequence of this was that it was wholly irrelevant whether she (or anyone from HMRC) had inspected any of Rokit's imports, in 2013, or in 2015, or indeed at any time.

75. This approach is, of course, hugely convenient for HMRC. It means that any apportionment of the sort which Rokit say was agreed in the past would be unenforceable. There would be no need to keep it under review because it should never have been agreed in the first place. It also means that HMRC have no duty, either on an audit visit or otherwise, to inspect the imported goods.

76. In our judgment, HMRC are not justified in taking this view, and are not exercising their powers reasonably in simply assuming all the items should be charged at 12% through the issue of the C18 Notice in this appeal. HMRC cites no authority or precedent for their position, but simply asserts it.

77. We accept that in certain situations, such as where items are inextricably commingled, a sampling or apportionment for tariff classification purposes may not be feasible or appropriate. But here, the items are not commingled. Unless some practical steps are taken to agree a representative apportionment of the imports between the various potential headings, HMRC will apply duty at the maximum rate of 12% for 100% of the imported items. Where HMRC know, or should reasonably know, or could easily establish, that this is too high a charge to duty, in our judgment they cannot simply ignore that and choose to levy duty on all the items at the highest rate. The result would be that the taxpayer would be paying the wrong tariff and we do not consider that that can be the intention of the legislation.

78. While the focus of the evidence and proceedings was on the proportion of the imports which fell within heading 6309, the perversity of HMRC's argument is highlighted when one considers what proportion of the imports fell within heading 6310 as "rags". We heard evidence from Mr Shackleton, and from the warehouse manager Ms Snelgrove, that in their judgments approximately 20% of the imported goods were "rags" within heading 6310. There was no disagreement between the

parties as to the meaning of heading 6310. Nor did HMRC seek to challenge the evidence from Rokit on this point. Rather, HMRC seek to argue that it is irrelevant what percentage of the imports are in fact rags, because all that matters is whether Rokit has evidence at the point of importation that a particular item is in fact a "rag". So, even if 20% of the imported items are in fact rags, properly dutiable at zero, in the absence of such proof, they must bear duty at 12%. That seems to us plainly wrong.

79. The practical impact of refusing to agree any apportionment or sampling would be that any importer of vintage clothing would be forced to pay duty of 12% on items imported in bulk such as those in this appeal. In Rokit's case, the imports in the period covered by the C18 Notice were typically imported, it was agreed, in 9-ton containers containing bundles of between 100 and 150 items of used clothing. In practice, it would not be feasible for each individual item of clothing to be accompanied by an invoice showing its tariff classification.

80. HMRC did not indicate how their approach should be enforced in practice, though they suggested that the exporter might pre-sort and document each item before it was packaged. We do not regard that approach as consistent with commercial reality. Rokit's business expertise rests in its ability to vet items, select those which might be salvageable and marketable as vintage clothing, and then execute that process. If, as HMRC suggested, it is the exporter who must carry out a parallel but prior vetting and sorting process if the importer is to be able to bear duty at the correct rate, then a business model such as Rokit's (or perhaps that in *Euro Tex*) would simply be unworkable.

81. We do not consider that that can be the intended purpose of the reduced rate afforded by heading 6309. The HSEN for heading 6309 deals with the requirement that the worn clothing must be presented in bulk as follows:

> "… They must be presented in bulk (eg in railway goods wagons) or in bales, sacks or similar bulk packings, or in bundles tied together without external wrapping or packed roughly in crates.
>
> These articles are normally traded in large consignments, usually for resale, and are less carefully packed than is generally the case with new articles."

82. This seems to us to fit neatly with the method used to export worn clothing to a business such as Rokit. A requirement that articles should have been sorted and classified in advance by the exporter cannot coherently be applied to require more of the exporter than Trans-Continental did in practice ie properly classifying the bulk containers as 'worn clothing".

83. We turn to HMRC's decision to issue the C18, treating 100% of Rokit's imports as new clothing, and the related review decision letter of 22 January 2016. The only analysis of the legal basis for the decision which we find in the review letter states as follows:

" It was noted during Officer Pell's visit to your premises that the garments that were viewed looked like they has been cleaned or prepared for sale. Officer Pell was not shown garments which show signs of appreciable wear.

I consider that this HSEN is very clear and confirms that the product in question cannot be classified under heading 6309.

Classification of this product is in accordance with GIRs 1 and 6. HSEN to Chapter heading 6309 also provides support for my approach.

By the application of the tariff and by the operation of GIR 1 have legal effect [sic]. I am therefore satisfied that your imported product, as described, was correctly classified within Chapters 61 or 62.

I have given due consideration to the facts of the case and I conclude that 1 must uphold the original decision".

84. For the reasons we have given, we conclude that the C18 Notice should be quashed. The review letter refers to viewing of garments which in fact did not occur in any meaningful sense; is wrongly based on the premise that cleaning and preparation for resale exclude the application of heading 6309; does not explain the HMRC interpretation of "appreciable wear", and omits entirely to refer to the basis for classification which HMRC now appear to rely on, being the impermissibility of agreeing a formula or apportionment for goods imported in bulk.

85. Under section 16(5) FA 1994, the powers of this Tribunal include the power to substitute our own decision for any decision quashed on appeal.

86. We heard evidence from Mr Shackleton, Ms Snelgrove, and two other employees of Rokit, as to the average competition for tariff classification purposes of the containers imported by Rokit. That evidence was based on the considerable knowledge and experience of those witnesses. Unlike HMRC, they had taken the trouble to inspect the items in order to reach a view. Their evidence was consistent in corroborating an apportionment of 70% "worn clothing" within heading 6309, 17% "rags" within heading 6310, and 13% "new clothing" within chapters 61 or 62.

87. In our judgment, these employees of Rokit were correctly applying the various headings to the items in question. We therefore substitute for the decision in the C18 the decision that duty should be charged for the period covered by the C18 based on the apportionment described at [84].

88. We were shown during the proceedings a number of items of clothing which Rokit submitted were representative of the items, which they imported. While interesting, we did not take this into account in reaching our decision on classification, because we had no way of verifying to what extent these items were representative of the items imported during the period covered by the C18.

***The Waiver Issue***

89. In view of our decision that HMRC's decision should be quashed and substituted, it is strictly unnecessary to consider Rokit's defence waiver, but we shall do so in case our decision on classification is overturned on appeal.

90. We must first determine whether we have jurisdiction to consider this issue. Several months in advance of the hearing, Rokit asked HMRC to confirm that it would not take this issue, and HMRC did not reply. Very shortly before the hearing, HMRC did take the issue.

91. HMRC's review decision specifically excluded consideration of the waiver issue which had been raised by Rokit.

92. HMRC's argued that we had no jurisdiction to consider the waiver argument as part of an appeal against the C18 because an appellant cannot raise the defence of waiver before the Tribunal without first making a "formal" application to HMRC for remission of the duty and receiving a refusal which gives to an appealable decision.

93. One week before the hearing HMRC filed a further skeleton argument which described HMRC's position as follows:

> "It is apparent that where the defence of waiver is relied on, a formal application must be made for remission of the duty owed. In this case the Appellant has not made such an application.
>
> Once the application is received, the Respondent would make a decision which, if adverse to the Appellants, could be subject to appeal.
>
> Before such a decision is made, there is no appealable decision. The Tribunal, therefore, do not have jurisdiction to consider the defence of waiver.
>
> The Appellant is, therefore, invited to make the application so that it can be considered before the hearing takes place.
>
> If the decision is adverse to them it can then be added to this appeal."

94. For reasons unknown, HMRC's further skeleton argument did not refer to the decision of the First-Tier Tribunal in *Citipost Mail Limited v HMRC* [2016] UKFTT 283 (TC). In that case, Judge Redston firmly rejected HMRC's argument that a separate appeal was required in relation to waiver: see [284] to [290]. Mr Evans argued that *Citipost* need not be followed, and in any event was distinguishable as relating to "completely different statutory provisions".

95. HMRC's submission in *Citipost* was based on a proposition not put forward by Mr Evans, namely that the structure of section 13A(2) FA 1994 required separate appeals against the assessment and the refusal to waive it. In this case, Mr Evans appears to argue that there has not been a refusal to waive which can be appealed.

96. HMRC's argument is without merit. *Citipost* is to be followed in so far as HMRC challenges it. As to whether or not HMRC have refused to waive the duty, that is abundantly clear from the many documents filed

with the Tribunal. There is no magic form which must be completed in order to seek waiver. Rokit have said they have a defence of waiver, and HMRC have said why they do not accept that, several times and in considerable detail. As Judge Redston stated in *Citipost* (at [295]):

"The fact that HMRC has a separate procedure for dealing with applications for waiver is simply not relevant. The Tribunal has to give effect to Article 220(2)(b) and FA94, 13A(2)".

97. We therefore have jurisdiction to consider the waiver issue in this appeal.

98. Article 220 of the Custom Code is, so far as relevant, set out at [13] above. Rokit submits that Article 220(2)(b) is applicable, based on the prior agreement between Rokit and HMRC described at [34] above, which, say Rokit, was not questioned or challenged by HMRC until the present case.

99. The elements which must be satisfied in order to sustain the defence of waiver are set out by Judge Berner in *Beko plc v HMRC* [2014] UKFTT 060 (TC) as follows (at [43]):

"There are a number of elements of Article 220(2)(b) that fall to be considered:

(1) Was there an error?

(2) Was the error made by the "customs authorities"?

(3) Was the failure to enter in the accounts the amount of duty legally owed a result of the error?

(4) If (1), (2) and (3) are established,

(a) Is it the case that the error could not reasonably have been detected by the person liable for the payment?

(b) Did that person act in good faith?

(c) Did that person comply with all the provisions laid down by the legislation in force as regards the customs declaration?"

100. As to whether or not an "error" was made on the part of the customs authorities, we have found on the balance of probabilities and in the absence of contrary evidence from HMRC that a prior apportionment agreement of the sort submitted by Mr Shackleton was reached with HMRC: see [68] above. In our judgment, it follows from this that (on HMRC's formulation of the law), there was an "error", and it was made by the customs authorities.

101. However, while sympathetic to Rokit's arguments, we are not persuaded that Rokit could not reasonably have detected the error. As explained in *Beko*, this requirement looks to the knowledge and experience of the particular taxpayer. Rokit gave evidence that, prior to the apportionment

agreement it had imported all of its clothing under heading 6309. We agree with HMRC that this suggests that Rokit had the experience and knowledge to independently assess tariff classification. As an experienced importer over a considerable period, Rokit could have taken positive steps to confirm the apportionment by reference to the Official Journal, or by asking HMRC specifically to reconfirm the apportionment in writing.

102. With some reluctance, we therefore conclude that the defence of waiver under Article 220 is not established.

***Penalty***

103. The £2,000 penalty is based on the incorrect classification of the imported goods. In view of our finding that the C18 should be quashed, we find that the penalty should be cancelled.

104. 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 Rules. The application must be received by the Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Evidence to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**THOMAS SCOTT**
**TRIBUNAL JUDGE**

**RELEASE DATE: 25 MAY 2017**