[2012] UKFTT 622 (TC)

TC02298

Appeal number: TC/2010/04771, TC/2010/07917, TC/2012/01341

CUSTOMS DUTY – relief for military end use – council regulation 150/2003 – whether certificate of MoD pursuant to that regulation is conclusive as to the availability of relief – classification of goods imported for military end use – Combined Nomenclature – objective characteristics of clothing with infra red reflectance properties – entitlement to repayment and/or remission of duties – articles 236, 237 and 239 of the customs' code

FIRST-TIER TRIBUNAL
TAX CHAMBER

COONEEN WATTS & STONE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MR ALAN SPIER

Sitting in public at Manchester on 18 and 19 June 2012

Mr Kieron Beal QC instructed by Carson McDowell, Solicitors for the Appellant

Mr Owain Thomas of Counsel instructed by the General Counsel and Solicitor for HM Revenue & Customs for the Respondents

DECISION

Introduction

1. The appellant is the "Industrial Prime Vendor" to the Ministry of Defence ("MoD") for the supply of cut and sew products. It supplies over 150 different types of military clothing and clothing related products. It has held this contract with the MoD since 2004 and most recently the contract was renewed in 2010.

2. There are three connected appeals before us. The issues between the parties on these appeals relate to the classification for customs duty purposes of certain ranges of specialised military clothing, in particular clothing which is made of fabric having infra red reflectance ("IRR") properties. We will set out the issues and the circumstances in which they have arisen in more detail below. For present purposes we simply note the issues in the following broad terms:

(1) Does a certificate issued by the MoD pursuant to *Council Regulation 150/2003* determine the proper customs classification of the goods?

(2) If not, what is the proper customs classification of IRR clothing imported by the appellant?

(3) Does the appellant have a valid claim to repayment and/or remission of customs duty in respect of IRR clothing which it has imported?

3. *Council Regulation 150/2003* provides for suspension of import duties on certain weapons and military equipment imported by or on behalf of Member States. The weapons and equipment must be for military end use ("MEU") to qualify for relief and must also fall within the classification headings at Annex I of the regulation. In this decision we refer to this as "the MEU regulation".

4. The issues arise in the context of a repayment claim by the appellant in the sum of £827,437 covering imports in the period February 2008 to May 2009. In addition HMRC have issued a post clearance demand in the sum of £743,059 covering imports in the period May 2009 to February 2010 where duty was treated as having been suspended pursuant to the MEU regulation. The appeals also have implications for imports in the period after February 2010 where duty has been accounted for and in relation to future imports.

5. Before setting out the law and the competing classifications we shall deal with the evidence as to the nature of the goods. There is no real dispute as to that evidence. It will also be relevant for us to make findings of fact as to the circumstances in which the appellant came to account for customs duty in the various periods with which we are concerned.

6. By way of background, the procedure to be followed when importing goods with MEU relief requires:

(1) a certificate from a competent authority, in this case the MoD, and

(2) authorisation from HMRC to import goods using MEU relief.

7. There was no issue as to the scope of our jurisdiction on this appeal. In relation to each appeal we have a full appellate jurisdiction pursuant to *section 16(5) Finance Act 1994*. Hence we can substitute our own decision for that of HMRC but only to the extent that HMRC could itself have reached that decision.

Findings of Fact

8. For the sake of clarity we deal with our findings of fact under the following headings:

(1) The nature of the goods.

(2) The appellant's dealings with the MoD.

(3) The appellant's dealings with HMRC.

(4) Dealings within HMRC.

(5) Dealings between HMRC and the MoD

9. The reason we set out the various dealings of the appellant, the MoD and HMRC separately is because the appellant relies on its dealings with the MoD and/or indirectly with HMRC as the basis for a "special situation" giving rise to a right to repayment and remission of customs duty. It also relies on those dealings to rebut any suggestion that it did not act with due care. We find it easier to consider the circumstances from the viewpoint of the appellant when the facts are analysed on this basis.

10. We heard evidence from Mr Kevin McMahon, the finance director of the appellant. He joined the appellant as company secretary in February 2005 and later became finance director.

11. HMRC produced two witnesses and we understand that this was at the request of the appellant. Mr James McChesney is a Higher Officer of HMRC who works in a unit of expertise which amongst other matters has responsibility for MEU relief. Ms Carmel Crawford is an assurance officer of HMRC who made two visits to the appellant as such and issued the post clearance demand referred to above.

The Nature of the Goods

12. As we have said, the appellant supplies over 150 different types of military clothing and clothing related products to the MOD. This range of products includes a small number of items of clothing which are made of IRR fabric.

13. Most of the relevant clothing is disruptively patterned for camouflage purposes but importantly it all has specific IRR properties. It is these properties which protect the wearer from detection by weapons fitted with infra red assisted vision sights,

commonly referred to as night vision goggles. The effect of wearing IRR protective clothing is to significantly reduce the visibility of the wearer to an enemy using night vision goggles. It does this by suppressing the infra red radiation generated by the human body. IRR fabric employs different intensities in the material to suppress the various colours contained in the garment and mimics the radiation emitted by surrounding vegetation.

14. IRR properties are incorporated into the fabric during a manufacturing process which is highly technical and specialised. We understand that the manufacturing process involves secret technology. The IRR clothing in the present appeals is manufactured in China and imported by the appellant into the UK. Unlike ordinary military camouflage clothing, IRR clothing cannot be purchased by members of the public.

15. There are 8 items of IRR clothing which are relevant to the present appeals. Each item also comes in a non-IRR version and no customs duty relief is sought in relation to those items. We were shown the following examples of IRR clothing:

(1) A combat jacket and combat trousers which come in both woodland camouflage and desert camouflage. The jacket and trousers must be worn together otherwise the benefit of IRR properties in one will be defeated by the absence of IRR properties in the other.

(2) A coverall, which is an all-in-one item of clothing

(3) A smock, which is similar to an anorak.

(4) A shirt, which is designed to be worn under body armour.

(5) A cap, which is designed to be worn over a helmet.

16. There is no difference to the naked eye between IRR camouflage clothing and ordinary camouflage clothing. HMRC accept that imports of the coveralls are entitled to MEU relief but deny entitlement to relief in relation to all the other items of clothing.

17. The IRR clothing imported by the appellant is crucially important to combat troops deployed by the MoD. It helps to protect them in the battlefield and helps to save soldiers' lives.

The Appellant's Dealings with the MoD

18. The appellant was first awarded a contract with the MoD for the provision of clothing in or about June 2004. On 2 June 2005 Mr McMahon wrote to the MoD Tax and Duty Team asking them to clarify whether a list of 12 products fell within the classification headings in Annex I of the MEU regulation. The list provided by Mr McMahon only included 3 items which were made using IRR fabric. Mr McMahon was prompted to make this enquiry by the appellant's sales director.

19. Ms Moira McCollum of the MoD replied on 7 June 2005. She stated that she would need to seek advice from HMRC. On 16 June 2005 a letter was sent on behalf of Ms McCollum stating that the MoD had contacted HMRC and that a full description of the goods and the commodity code would be required before they could ascertain whether the goods qualified under the MEU regulation. The letter also stated as follows:

> "*The importer is legally responsible for the correct Tariff classification of the goods. If you are unclear what the commodity codes for these goods are then the Tariff Classification Service at the address and phone number below is able to help …*"

20. Finally the letter re-iterated that full details of the goods and the commodity code would be required in order to progress the appellant's request.

21. On 27 June 2005 Mr McMahon replied enclosing a full description of the goods and their commodity codes. The three items which had IRR properties were given commodity code 6203. This had been on the advice of the appellant's customs agent, Puma Cargo Limited. Two coveralls which did not have IRR properties were given commodity code 6211. As shown below, CN code 6203 does not appear in annex I of the MEU regulation. Code 6211 does appear in annex I.

22. Ms McCollum replied on 30 June 2005. Items which did not fall under code 6211 did not qualify for relief. She went on to say:

> "*Some items which fall under the code 6211 do qualify for the waiver of import duty. It is the MoD's and HM Revenue and Customs understanding that only special purpose military clothing qualify and this is regarded as clothing adapted for military combat purposes and/or specialist protective items such as body armour.*"

23. The letter also indicated that the appellant would need to check with the relevant team within the MoD to confirm eligibility for a certificate under the MEU regulation for the two items in code 6211. This was because it was they who would need to be satisfied that the relevant items qualified.

24. The matter was not pursued further by the appellant because only a small volume of coveralls were imported at that stage and Mr McMahon did not understand the significance of IRR properties.

25. In late 2008 the issue of relief under the MEU regulation arose again. This was in anticipation of a re-tendering process for the MoD contract. The chairman of the appellant, Mr John Trimble, wrote to Ms McCollum on 15 January 2009. He referred to the 2005 correspondence described above and stated that garments imported fell into headings 6210 and 6211. He continued:

> "*Camouflage Clothing items or Disruptively Patterned Material (DPM) items are manufactured from fabric which has specific Infra Red Reflectance properties to protect the wearer from detection by enemy weapons fitted with infra red assisted vision sights. The production of this*

fabric is very technical and requires great expertise and knowledge. The garment production is monitored through factory batch testing and then further independent testing by ourselves in the UK to verify its continued effectiveness. It is our contention therefore that such items are just as important to protect the infantryman as a piece of Body Armour, which qualifies unequivocally for Import Duty Relief …

We therefore hope that you will grant us a "Certificate from a Competent Authority" for waiver of import duty …

Obviously you will need us to furnish you with details of the specific products for which we seek duty relief and we will be happy to do so at the appropriate time."

26. On 26 and 27 January 2009 there were telephone discussions between Mr Trimble and Ms McCollum. Mr Trimble made a contemporaneous note of those conversations. On 26 January 2009 he recorded:

> "She *[Ms McCollum] is going to discuss it with Customs focal point in light of our clothing being protective IRR etc and used only for war … she will also contact IPT to see if they are willing to issue the certificate*"

27. On 27 January 2009 Mr Trimble recorded:

> "*Customs agree that we qualify for military end use. [Ms McCollum] will go to Gerry Harvey who hopefully will agree to issue a waiver certificate*"

28. Mr Harvey was part of the MoD project team who would be responsible for issuing the certificate from a competent authority.

29. On 28 January 2009, Ms McCollum wrote to the Appellant stating:

> "*… I am writing in reply to your letter … which enquired about the possibility of the MoD issuing an import duty waiver certificate for camouflage clothing made from Infra Red reflective material.*
>
> *Agreement has been reached with our focal point at HM Revenue & Customs that, as the clothing has specialised protective properties, importing to Military End Use with an import waiver certificate is allowable in this case…*
>
> *I also informed Mr. Harvey that it is possible to raise a retrospective certificate for this clothing. The certificate can be backdated to cover imports up to one year from the date the certificate is signed. This may enable the duty on some imports made during 2008 to be reclaimed. The retrospective certificate can also cover the remaining life of the existing contract if required.*"

30. The appellant was not at that time privy to the discussions between the MoD and HMRC in relation to military end use of the appellant's goods. The appellant, including its finance director Mr McMahon, appears to have taken this letter as

confirmation that MEU relief would be available. The original enquiry from Mr Trimble was seeking a certificate from the MoD. However the response does appear to go further and at least suggests that not only will a certificate be granted, but that MEU relief will be available. However we do not accept that the appellant could reasonably take this letter as confirmation that it would be entitled to MEU relief. Mr Trimble had not furnished either Ms McCollum or HMRC with details of the specific products which he realised it would be necessary to do at the time of his request for a certificate in January 2009. More importantly, the appellant was also aware that both the MoD and HMRC (see below) in 2005 had emphasised that it was for the importer to identify the correct tariff classification of goods and in case of uncertainty the importer should contact the HMRC tariff classification service.

31. On 17 February 2009 the MoD as the competent authority issued a certificate to the Appellant as importer ("the Certificate"), in the form required by Annex III to the MEU regulation. The certificate covered various specific items of military clothing which the appellant supplied to the MoD pursuant to the procurement contract. Each of the different items of clothing was described on the face of the Certificate. The Certificate identified the CN code applying to each item as 6211. The operative words in the Certificate as provided for by Annex III were as follows:

> "*This is to certify that the goods described above are for the use of the military forces of the United Kingdom.*"

32. The Certificate was stated to be valid until 30 September 2009. On 24 September 2009 it was re-issued in the same form save that its validity was extended to 30 March 2010. It appears to have been re-issued again on 23 December 2009 in the same form but so as to include further items of clothing.

33. In January 2010 Mr McMahon had further contact with Ms McCollum in relation to issues which had by that stage arisen between the appellant and HMRC. Ms McCollum telephoned Mr McMahon to say that HMRC had been in touch with the MoD and told her that classification to CN 6211 was incorrect. On 29 January 2010 the certificate was re-issued yet again by the MoD. On this occasion it was limited to coveralls under CN heading 6211.

The Appellant's Dealings with HMRC

34. On 4 May 2005 Puma Cargo contacted the HMRC contact centre with an enquiry on behalf of the appellant. Construing the notes of that enquiry, Puma asked whether uniform imported for the MoD could benefit from MEU relief. They stated that they normally use code 6203 but asked whether code 6211 could be used instead as this gave the benefit of relief. The HMRC officer told Puma that they were responsible for classifying the goods correctly. He advised them to speak to the HMRC tariff classification service to establish the correct code. Mr McMahon had no recollection of this enquiry but we find that the appellant would have been aware of that enquiry at the time and would have known the results of the enquiry.

35. The enquiry by Puma Cargo was made shortly before Mr McMahon's first contact with the MoD in relation to MEU relief referred to above. There was no

further contact between the appellant or Puma Cargo and HMRC in connection with MEU relief until 2009.

36. In or about February 2009, once the appellant had received the MoD Certificate dated 17 February 2009, Mr McMahon made an application to HMRC for authorisation for MEU relief. The application was to cover the period 16 February 2008 to 17 February 2009. The application noted that the appellant had asked the MoD to issue a back dated certificate which would also cover the remaining life of the contract. The description of the goods was simply "military clothing" and the commodity code was 6211.

37. The application was received on 30 March 2009 and was dealt with by Ms Crawford. She visited the appellant's premises on 29 April 2009 in order to confirm the details of the application and met with Mr McMahon and Mr Richard Condell, a management accountant with the appellant. Amendments were made to the application form and signed by Mr McMahon. During the course of that visit Ms Crawford discussed Public Notice 770 (Imported Goods: end use relief) with Mr McMahon. She also discussed the request for retrospective authorisation and indicated that further details justifying it would be required.

38. Mr McMahon stated in evidence that he and Ms Crawford had discussed the flowchart at section 7 of Notice 770 and that she had confirmed that the appellant met the requirements of the flowchart. We accept that a conversation in relation to the flowchart took place, but we are not satisfied on the balance of probabilities that Ms Crawford was confirming in terms that MEU was available for the specific goods being imported by the appellant. Ms Crawford was not a classification officer and having heard her evidence we do not think it likely that she would have confirmed that the goods intended to be imported were properly classified under code 6211. We accept Ms Crawford's evidence that she discussed with Mr McMahon the appellant's responsibility to ensure the correct classification of the goods.

39. Immediately following the visit Mr McMahon sent a letter to Ms Crawford setting out the reasons the appellant was seeking authorisation retrospectively from 16 February 2008. He indicated that the amount involved in relation to retrospective authorisation could be in excess of £650,000. He also spoke to Mr Stanners of the HMRC unit of expertise generally about the circumstances. On 1 May 2009 Mr Stanners told Mr Condell of the appellant that retrospective authorisation would be granted and also indicated that a repayment claim could be submitted.

40. By letter dated 5 May 2009 Ms Crawford informed Mr. McMahon that the application for end-use relief had been approved. Authorisation was granted from 7 February 2008 to 30 September 2009 ("the Authorisation"). It extended to the goods referred to in box 5 of the application, namely military clothing under CN heading 6211.

41. On 6 May 2009 Mr McMahon had discussions with Puma Cargo and as a result instructed them to import the IRR garments under commodity code 6211 with end-use relief.

42. On 3 July 2009 the appellant sent to HMRC a claim for repayment and/or remission of customs duty on Form C285. The claim was in respect of duty paid for shipments of military clothing from 28 February 2008 to 28 April 2009. The total amount of the reclaim was £827,437. The claim was made in respect of clothing with IRR protective properties.

43. Mr Ian Wakeling, an officer of HMRC was tasked with processing the claim for repayment or remission. By letter dated 12 August 2009 Mr Wakeling expressed concerns about the tariff classification of certain items of clothing. In particular he noted that most of the imports for which relief had been claimed were not imported under commodity code 6211. He expressed doubts as to the credibility of the claim and invited the appellant to re-examine it.

44. Mr McMahon replied by letter dated 18 August 2009. He stated that in 2005 the contact centre had advised them to use code 6203. Mr McMahon was referring to the contact centre enquiry by Puma Cargo mentioned above. We find that when Mr McMahon was writing this letter in 2009 he was incorrect in his recollection. The contact centre had not advised use of code 6203. He went on to say that the MoD and their focal point at HMRC had agreed that importing to military end use with an import waiver certificate is allowed. Mr McMahon also noted that repayment was only sought in respect of those items confirmed by MoD and HMRC to fall within CN Code 6211.

45. We do not accept that either HMRC or the MoD had agreed that any of the items imported were proper to code 6211. In fact, following the results of the enquiries in 2005 and Ms Crawford's visit in April 2009 we find that Mr McMahon at least ought to have been aware that it was the appellant's responsibility to import using a correct code and if the appellant was in doubt then it should contact the tariff classification service. We can accept that there may have been some confusion on his part as to the relationship between the MoD Certificate, the Authorisation for military end use and actual entitlement to obtain relief for specific items imported. Mr McMahon appears to have assumed that the existence of the certificate and the authorisation gave rise to an entitlement to relief irrespective of the true classification of the goods. Whether in law it does so is one of the issues on this appeal. Apart from that issue, which we consider below, as a matter of fact neither HMRC nor the MoD had agreed to MEU relief for the specific imports of the appellant.

46. Mr Wakeling replied to Mr McMahon by letter dated 21 August 2009. He stated that Ms Crawford had "no in depth knowledge regarding your trade or your liaison with the MoD or any dialogue with HMRC." We find that this letter probably understated Ms Crawford's knowledge and the nature of her visit. We do not find that this was in any way deliberate, and in any event it does not affect our findings above in relation to the visit. Mr Wakeling expressed concerns in relation to the classification of the goods but the claim itself was passed to HMRC "headquarters". Mr Wakeling again questioned the credibility of the claim. In so far as he was suggesting anything dishonest or disingenuous about the claim we do not accept that to be the case. Mr Thomas on behalf of HMRC also did not suggest any improper conduct on the part of the appellant.

47. Mr McMahon replied to Mr Wakeling on 26 August 2009 again stating that the MoD had agreed with HMRC that the military products fell under CN code 6211. He did not accept that the credibility of the claim was compromised.

48. Processing the claim was then passed to Ms Lisa Cureton-Burgess. She wrote on 14 October 2009 saying that she had been in contact with Ms McCollum and asked Mr McMahon for further information including a swatch of the fabric and a copy of any brochure detailing the garments being imported. On 4 November 2009 Mr McMahon replied this time stating that the 6211 classification "*was directed to us by the MOD*". For the reasons given above we do not accept that was the case. He enclosed a copy of a brochure including the garments. The same or a similar brochure was before us in evidence. Swatches of fabric were subsequently provided.

49. By letter dated 5 January 2010 Ms Cureton-Burgess wrote to the appellant reducing the repayment claim to £8,390.25 which related to the duty paid on coveralls. The claim for repayment of duty on all other items was refused on the basis that classification to CN 6211 was incorrect.

50. The appellant then requested a formal departmental review on the basis that all the garments in question were correctly classified under heading CN 6211. Repayment was requested pursuant to *Article 236* and/or *Article 220(2)(b)*. On 22 February 2010, following contact with the MoD described below, the appellant instructed Puma Cargo to cease claiming MEU relief.

51. The decision on review was given by letter dated 20 April 2010 from Ms Sharon Barbouti. It was expressed to be in relation to the repayment claim, and it was expressly not an opinion in relation to the correct classification of the garments. However in upholding the original decision the review officer must have decided that the garments were not properly classified under heading 6211. Having said that, she went on to suggest that the appellant should obtain a definitive ruling as to the correct classification by obtaining a binding tariff information ("BTI"). It is this review decision which is the subject of the first appeal.

52. Matters then progressed on two fronts.

53. Firstly, on 26 April 2010 the appellant made two applications for BTIs. The first was in relation to a camouflage anorak, described by the appellant as a smock. The second was in relation to an under body armour combat shirt. Both garments had IRR properties. BTIs were issued on 13 May 2010 classifying the garments under CN headings 6201 ("anorak") and 6206 ("shirt/blouse") respectively. These decisions are the subject matter of what became the third appeal.

54. The reason these requests were submitted was because the appellant was at that time involved in tendering for the next cut and sew contract with the MOD. It was concerned as to the possibility that a competitor may obtain a BTI to CN 6211 giving entitlement to MEU relief and enabling it to put in a lower tender offer.

55. Secondly, on 27 April 2010 Ms Crawford made a second visit to the appellant. She had been waiting until after the result of the review was known before making

this visit. The purpose of her visit was to consider the potential misclassification of goods imported after the repayment claim had been lodged covering the period May 2009 to February 2010. She uplifted records and quantified the sums involved. She then issued a C18 post clearance demand for the period in the sum of £743,059 comprising customs duty of £574,217 and VAT of £168,842.

56. Ms Crawford did not give any consideration herself as to the correct classification of the goods. She is not a classification officer. She based her decision to issue the C18 on the result of the review decision on the repayment claim, and also on certain "non-live liability rulings" referred to below.

57. The post clearance demand was confirmed in a review decision dated 1 September 2010 from Mr Stuart Peacock. It is this review in relation to the post clearance demand which is the subject matter of the second appeal.

Dealings within HMRC

58. The appellant was not privy to the internal dealings of HMRC, although he was to some extent aware that officers liaised with other HMRC officers in relation to the appellant. Save where otherwise appears the internal dealings of HMRC were not known to the appellant.

59. Following her first visit on 30 April 2009, Ms Crawford sent a fax to Ian Stanners of the HMRC end use unit of expertise, together with a copy of the MoD Certificate and the application form for HMRC end use authorisation. In an email to Mr Stanners of the same date she refers to her visit on 29 April 2009 and notes:

> "*Trader advised that 'they were advised by MoD initially that the import of military clothing (Ch.6211?) was not covered by the End-Use regulations initially, but produced correspondence per my visit from the MoD confirming that this scenario was now covered by HMRC.*"

60. Ms Crawford was seeking Mr Stanners' "thoughts" in relation to the retrospective date of the authorisation and the date of expiry of the authorisation. It was put to Ms Crawford in cross-examination that her reference to "Ch.6211?" was a query on her part to Mr Stanners as to the correct classification of the goods. It is difficult to say 3 ½ years after the event what the significance is of the reference to "Ch.6211?" in this email. On balance we do not accept that this was intended to be taken as a query as to the correct classification of the goods. We find that Ms Crawford was simply signalling to Mr Stanners that the appellant was classifying the clothing as CN 6211 but that she had not confirmed with the tariff classification service that this was the appropriate code. She was not inviting Mr Stanners to make any observation on the question of classification.

61. By an email dated 1 May 2009 Mr Stanners confirmed to Ms Crawford that she could grant retrospective authorisation.

62. In considering the appellant's repayment claim in August 2009, Mr Wakeling contacted Ms Crawford by telephone. As we have found above, Mr Wakeling was left

with an incorrect impression of Ms Crawford's knowledge and the nature of her visit to the appellant on 29 April 2009.

63. In September 2009 the appellant's claim to repayment was passed from Mr Wakeling to Ms Cureton-Burgess. She was part of the "Duty Liability" team at HMRC in Southend on Sea and worked within the tariff classification area. On 13 October 2009 she contacted Mr McChesney by email in connection with the repayment claim. Ms Cureton-Burgess expressed the view that hats, trousers and jackets should not be classified under heading 6211 and that "*only clothing like overalls and waistcoats would fall in this heading*". She also said that if it was a coated fabric then it may fall under heading 6210. She asked whether he had at any time visited the company, seen a sample of the clothing or got a classification of the goods.

64. Mr McChesney replied on 19 October 2009. He states (sic):

> "*The U of E received an enquiry from Belfast asking whether the goods could be covered by Military End Use (MEU) the Commodity code indicated suggested that it should not we then received a call from the MoD giving us more detail about the material being used in the products at that point we felt that if the goods could be covered by a code from the approved list the goods could be allowed under MEU Moira mentioned code 6211, which according to her list covered uniform, and as this was covered by EC Reg 150/2003 I agreed to them being approved. I did not check that the commodity code covered the goods being imported it was the fact that the goods were being supplied with an infra red dispersal coating to protect military staff rather than just a normal uniform that I had agreed to the goods being included under an MEU authorisation.*"

65. On 3 December 2009, as part of her enquiries in relation to the repayment claim, Ms Cureton-Burgess sent certain "Liability Enquiries" to the Tariff Classification Service of HMRC also based at Southend on Sea. She received back what are known as "Non-Live Liability Rulings" which we infer were based on the enquiries she had submitted. We understand that these are generally internal rulings which do not bind a trader and may or may not be notified to a trader. They were briefly as follows:

(1) Combat helmet to CN 6506.

(2) A Lightweight jacket to CN 6203.

(3) An All in One garment (we take this to be a coverall) designed to be worn by the military to CN 6211.

(4) Trousers to CN 6203.

(5) A military style coat to code 6201 which also included a note "*please advise the trader of this decision*". In fact the appellant was not notified of the ruling.

66. There was no reference to IRR properties in any of the rulings. Further, the appellant does not import combat helmets. The justification for the rulings included a reference to "*EC REG 317/81*". In fact that regulation deals with refunds on milk and milk products. We find that the reference was intended to be to a case before the ECJ called *Howe & Bainbridge BV Case C-317/81* which concerns the test for determining whether coatings on material are visible to the naked eye. That would be relevant to CN code 6210 but it has never been suggested that the garments in question in the present case have any coating whatsoever or that they fall within CN 6210.

67. We have not heard evidence from Ms Cureton-Burgess. However it appears to us that these rulings were based on a fundamental misunderstanding as to the goods being imported and the arguments in support of the goods being classified under heading 6211. It appears that Ms Cureton-Burgess relied at least in part on these rulings in making her decision to restrict the repayment notified to the appellant on 5 January 2010.

Dealings between HMRC and the MoD

68. The appellant was not privy to the dealings between the MoD and HMRC, although as appears above it was aware that the MoD and HMRC were discussing matters relevant to the appellant's claim to MEU relief.

69. In 2005 Mr McMahon was in discussion with the MoD as to whether some goods being imported fell within the MEU regulation. He was aware that Ms McCollum of the MoD was seeking advice from HMRC.

70. Lynn Emery of the MoD contacted Colin Davis by email on 22 June 2005. It appears likely that this contact at least in part was prompted by Mr McMahon's enquiries with the MoD in early June 2005. Mr Davis headed up the relevant HMRC unit of expertise and was Mr McChesney's predecessor. Ms Emery posed the following question (emphasis added):

> "*The MoD is now getting queries from contractors regarding clothing … I am finding it difficult to interpret [the MEU regulation] regarding clothing. To date the MoD are interpreting the commodity code 6211 to include* ***any*** *special purpose military clothing. This does not include basic uniforms … what was the HMRC understanding of the interpretation of the clothing commodity codes?*"

71. She gave as an example protective thermal cold weather underwear made from specialist material such as polartec power dry used in Afghanistan and for which she identified a commodity code of 6001. Mr Davis replied as follows:

> "*…we don't have any information about why certain CN codes were included in the Annex & others weren't. However I can confirm that your general approach accords with our understanding of the scope of the [MEU regulation]…*

> *As you say the subject of clothing is a difficult one … If there is any special purpose military clothing that is classified within CN code 6211 then in our view, they would fall within the scope of the Regulation….*
>
> *In the specific example, you advise the goods are classified under CN code 6001… As 6001 is not included in the CN codes listed in the Annex, I'm afraid the goods are not entitled to relief under the Regulation even if they are being used for military purposes.*"

72. There is no evidence of any general or specific discussions between HMRC and the MoD in relation to MEU relief after this email exchange. Indeed there was no reason for there to be any specific discussions concerning the appellant until January 2009. It was at this stage that Ms McCollum indicated to the appellant that she would discuss Mr Trimble' enquiries with "*Customs' focal point*". On 27 January 2009 she sent an email to Mr McChesney referring to Mr Trimble's letter and continued:

> "*This contractor [meaning the appellant] is importing camouflage … items from outside the EU for operational requirements, at present in Iraq/Afghanistan. The camouflage material used has specific Infra Red Reflectance properties … we do feel that this particular form of camouflage clothing is of a protective/specialist nature and contributes to the protection of service personnel, in a similar way to body armour on which import duty is waived.*
>
> *Would HMRC be content with our interpretation that this clothing could be imported to Military End Use and the use of a waiver certificate is allowable??*"

73. Mr McChesney replied on 27 January 2009 as follows:

> "*As the garments have specialised properties for protecting staff I would agree that they can be covered by waiver certificates.*"

74. It was on the strength of this exchange that Ms McCollum wrote to Mr Trimble on 28 January 2009. It appears to us that it was the way in which this exchange was relayed to Mr Trimble that has been the source of confusion on the part of the appellant. In particular neither Mr McChesney nor Ms McCollum made clear that it was only items which were classified under CN 6211 which would have the benefit of MEU relief. Having said that, Mr McChesney answered the question he was asked and in our view cannot be criticised. He was not given any details of the goods in question beyond their specialist properties. His response was limited to the question of whether the items in question were sufficiently specialist in nature. We are satisfied that if he had been asked about the appropriate CN code for specific items he would have referred the request to the tariff classification service.

75. It appears to us that Ms McCollum thought that the goods could be properly classified to CN 6211. In making this finding we have also had regard to Ms McCollum's exchange with Ms Cureton-Burgess referred to below. Whilst the terms of Ms McCollum's letter to Mr Trimble dated 28 January 2009 may have contributed to some

extent to the appellant's misunderstanding it is not fair to say that she caused that misunderstanding. In the context of the appellant's dealings with the MoD and, through Puma Cargo with HMRC in 2005, it was a failure on the part of the appellant to take up the issue with HMRC directly which was the real cause of the appellant's misunderstanding. The appellant and their customs agent ought to have known that the importer was responsible for identifying the correct commodity code and to contact the tariff classification service directly in case of doubt.

76. In May 2009 Ms Crawford was considering the question of retrospective authorisation for MEU. Before approving the application she had contacted the unit of expertise. Mr Stanners of that unit records in his email dated 1 May 2009 that;

> *"Jim McChesney was speaking to Moira McCollum at the MoD this morning & raised the subject with her. She confirmed the details & stated that an amended retrospective military end-use Certificate will be issued to [the appellant] to cover the infra-red disruptive fabric only.*"

77. Mr McChesney had no recollection as to the detail of that conversation. It seems unlikely in the light of Mr McChesney's involvement generally that he was asked to give any view on whether the goods were properly classified to CN 6211. We find as a fact that the extent of his involvement in his dealings with other HMRC officers and with the MoD was to confirm whether or not the clothing was sufficiently specialist to fall within the scope of the MEU regulation. It was not his responsibility to say whether or not imports of particular goods were entitled to relief because that would depend on whether they were classified to a heading in Annex I of the MEU regulation.

78. There was further contact between HMRC and the MoD when Ms Cureton-Burgess was considering the repayment claim. Indeed the first step she took was to contact Ms McCollum by letter dated 15 September 2009. She asked Ms McCollum to identify the HMRC "focal point", to explain why the goods qualified for duty relief when they were not in Annex I and why the Certificate issued by the MoD identified jackets and trousers with CN code 6211.

79. Ms McCollum replied by letter dated 7 October 2009. She stated that Mr McChesney had agreed that the clothing could be covered by waiver of import duty. She enclosed the email correspondence she had had with Mr McChesney. She continued:

> *The 4 digit CN Code list held by the MoD, and agreed by HMRC, which comes from the list within the [MEU regulation], contains very few codes relating to clothing. 6210 states 'Protective Suits such as Explosive Ordnance Disposal' and 6211 'Suits(if woven) such as Immersion suits, combat body armour jacket, [nuclear, biological and chemical] suit. Note that the examples given are for guidance only. Given these descriptions we felt this clothing fell within 6211. "*

80. Ms McCollum also referred to the 2005 email exchange between Lynn Emery and Colin Davis.

81. None of the witnesses who gave evidence was aware of the existence of any "list" as described by Ms McCollum. Ms McCollum herself did not give evidence. We were told that she had refused to give evidence but we are not aware of the circumstances in which she was asked to do so, nor does it appear that any witness summons was issued by the appellant. We are left in the position that we do not have all the evidence surrounding the basis upon which Ms McCollum wrote her letter dated 28 January 2009. However it does appear to us from her letter dated 7 October 2009 and we find as a fact that she was under the impression that the items of clothing being imported by the appellant could properly be classified to heading 6211.

82. The MoD re-issued the Certificate to the appellant on 27 January 2010, limiting MEU to coveralls. Whilst we were not taken to any evidence in this regard it appears that there was further contact between HMRC and the MoD leading to the re-issue of the certificate.

The Law

Generally

83. The legal framework against which goods are classified for customs duty purposes is well established. For the sake of convenience we take the description in *HMRC v Flir Systems AB [2009] EWHC 82 (Ch)* where Henderson J summarised the legal framework in the following terms:

> *"6. A full account of the legal background to the EU customs tariffs, and the principles to be followed in their interpretation, was given by Lawrence Collins J (as he then was) in Vtech Electronics (UK) Plc v Customs & Excise Commissioners [2003] EWHC 59 (Ch) ("Vtech"). What follows is intended to be a relatively brief summary.*
>
> *7. The EU is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System, generally known as "the Harmonised System". The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System, and all contracting states therefore use the headings and sub-headings of the Harmonised System. The system is administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as "HSENs".*
>
> *8. At Community level, the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature ("CN") established by Article 1 of Council Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:*
>
> > *(a) the nomenclature of the Harmonised System;*
> > *(b) Community sub-divisions to that nomenclature; and*
> > *(c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.*

9. The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are "00". There may also be ninth and tenth digits which identify further Community (TARIC) sub-headings, of which there about eighteen thousand.

10. Apart from the HSENs to which I have already referred, the European Commission also issues Explanatory Notes of its own to the CN which are known as "CNENs".

11. The Court of Justice of the European Communities ("the ECJ") has repeatedly stated 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. The two categories of Explanatory Notes, that is to say the HSENs and the CNENs, are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 Intermodal Transports BV v Staatssecretaris van Financien, [2005] ECR I-8151, at paragraphs 47 and 48.

12. Part 1 of the CN contains at Section 1A the General Rules for the Interpretation of the CN. These General Rules are known as "GIRs". Unlike the Explanatory Notes, they have the force of law (see Vtech at paragraph 16).

13. So far as material, the GIRs provide as follows:

> *"Classification of goods in the Combined Nomenclature shall be governed by the following principles:*
>
> *1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.*
>
> *2 (a) …*
> *(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.*

3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. 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 which occurs last in numerical order among those which equally merit consideration.

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. …

6. For legal purposes, the classification of goods in the sub-headings 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."

14. It can be seen that the General Rules quoted above provide a hierarchical set of principles, and if the correct classification can be ascertained at a given stage it is unnecessary to proceed any further."

84. Also relevant for present purposes is *Article 12 Regulation 2913/92* ("the Code") which provides as follows:

"1. The customs authorities shall issue binding tariff information… on written request, acting in accordance with the committee procedure.

2. Binding tariff information …. shall be binding on other customs authorities as against the holder of the information..."

Military End User Relief

85. MEU relief is granted by reference to the procedure set out in the Code for end use reliefs generally. Article 21 of the Code provides for favourable treatment of certain goods by reason of the nature of their end-use. It states as follows:

> *"1. The favourable tariff treatment from which certain goods may benefit by reason of their nature or end-use shall be subject to conditions laid down in accordance with the Committee procedure. Where an authorization is required Articles 86 and 87 shall apply.*
>
> *2. For the purposes of paragraph 1, the expression 'favourable tariff treatment' means a reduction in or suspension of an import duty as referred to in Article 4 (10), even within the framework of a tariff quota".*

86. The detailed provisions are set out in *Regulation EEC No 2454/93* ("the Implementing Regulation") at Articles 291-300. They provide that an authorisation is required and hence Articles 86 and 87 of the Code are also applicable. They state:

> ***"****Article 86*
>
> *Without prejudice to the additional special conditions governing the procedure in question, the authorization referred to in Article 85 and that referred to in Article 100 (1) shall be granted only:*
>
> *- to persons who offer every guarantee necessary for the proper conduct of the operations;*
>
> *- where the customs authorities can supervise and monitor the procedure without having to introduce administrative arrangements disproportionate to the economic needs involved.*
>
> *Article 87*
>
> *1. The conditions under which the procedure in question is used shall be set out in the authorization.*
>
> *2. The holder of the authorization shall notify the customs authorities of all factors arising after the authorization was granted which may influence its continuation or content".*

87. Article 292 of the Implementing Regulation provides that:

> *"The granting of favourable tariff treatment in accordance with Article 21 of the Code shall, where it is provided that goods are subject to end-use customs supervisions, be subject to written authorisation.*

Where goods are released for free circulation at a reduced or zero-rate of duty on account of their end-use and the provisions in force require that the goods remain under customs supervision in accordance with Article 82 of the Code, a written authorisation for the purposes of end-use customs supervisions shall be necessary"

88. Article 237 of the Code referred to below deals with repayment of customs duties where a customs declaration is invalidated. In this context Article 66 of the Code provides as follows:

"*The customs authorities shall, at the request of the declarant, invalidate a declaration already accepted where the declarant furnishes proof that goods were declared in error for the customs procedure covered by that declaration or that, as a result of special circumstances, the placing of the goods under the customs procedure for which they were declared is no longer justified.*"

89. Article 294 of the Implementing Regulation provides that the customs authorities may issue retroactive authorisations. It states that retroactive authorisations shall take effect on the date the application is submitted but that in exceptional circumstances the retroactive effect may be extended further but not more than a year before the application was submitted provided a proven economic need exists and:

"(a) the application is not related to attempted deception or to obvious negligence;
(b) the applicant's accounts confirm that all requirements of the arrangements can be regarded as having been met and, where appropriate, in order to avoid substitution the goods can be identified for the period involved, and such accounts allow the arrangements to be verified;
(c) all the formalities necessary to regularise the situation of the goods can be carried out, including where necessary, the invalidation of the declaration"

90. Article 251 of the Implementing Regulation provides that a customs declaration may be invalidated after the release of the goods where certain conditions are satisfied. These include at Article 251(1c):

"*Where a retroactive authorisation is granted in accordance with:*

- *Article 294 for release for free circulation with a favourable tariff treatment or at a reduced or zero rate of duty on account of the end-use of the goods … "*

91. MEU relief is granted by the MEU regulation which suspends import duties on certain weapons and military equipment. It states in recital (2) that it is in the interests of the Community as a whole that certain military weapons and equipment should be imported free of duties. Recital (3) envisages the establishment of a common list of

weapons and equipment eligible for suspension of duty so as to ensure consistent application. Recital (5) states as follows:

> " *In order to take account of the protection of the military confidentiality of the Member States it is necessary to lay down specific administrative procedures for the granting of the benefit of the suspension of duties. A declaration by the competent authority of the Member State for whose forces the weapons or military equipment are destined, which could also be used as customs declaration as required by the Customs Code, would constitute an appropriate guarantee that these conditions are fulfilled. The declaration should be given in the form of a certificate. It is appropriate to specify the form, which such certificates must take and to allow also the use of means of data processing techniques for the declaration.*"

92. Article 1 of the MEU regulation states that it lays down the conditions "*for the autonomous suspension of import duties on certain weapons and military equipment imported by or on behalf of the military defence of the Member States from third countries.*"

93. Pursuant to Article 2 of the MEU regulation, duties on goods listed in Annex 1 shall be totally suspended where they are used by, or on behalf of, the military forces of a Member State. Annex I sets out a list of CN headings which are used to identify the equipment in question. This includes CN headings 6210 and 6211.

94. Article 3 to the MEU regulation in conjunction with Annex III prescribes a form of end use certificate to be issued by the competent authority of a Member State which entitles the goods in question to be entered for free circulation with the benefit of duty suspension. The MEU regulation permits the end use certificate to be presented to national customs authorities in lieu of the customs declaration otherwise required by Articles 59 to 76 of the Code. The certificates issued by the MoD in this case conformed to those requirements.

95. In addition, pursuant to Article 5, the Certificate of Competent Authority may be presented to the customs authorities in another Member State other than that of issue and used as a basis for the importation of goods in that Member State with customs duty being suspended.

96. MEU relief is available for goods properly classified in one of the headings contained in Annex I of the MEU regulation. It is apparent that the regulation applies to provide relief from import duties only on "certain" weapons and equipment for the armed forces of the Member States. Goods which do not fall within any of the headings of Annex I to the regulation do not qualify for the relief. The headings in Chapter 62 which are listed in Annex I are 6210, 6211 and 6217.

97. Not all goods which fall within those CN headings will qualify for MEU relief. Only those in respect of which a certificate has been granted by the authorities in charge of military defence will qualify.

98. The MEU regulation does not provide a complete suspension of import duties for weapons and military equipment but only for certain weapons and military equipment. It follows that some weapons and military equipment do not qualify relief regardless of how specialised they are or how integral they may be to the operation of the military. Those that do not fall within any of the headings contained in Annex I do not qualify and neither do those goods which do fall within those headings but which do not comply with the conditions in Article 2.1. Mr Thomas submitted and we accept that it is not possible to derive from the regulation any general policy to exempt all specialist military equipment (including clothing).

99. It was common ground between the parties that only technologically specialised military equipment falling within the headings in Annex 1 will qualify for relief. This is how both the MoD and HMRC have interpreted the MEU regulation, and appears to be based on Recital (2) which refers to "*technologically advanced*" weapons and equipment and the need to procure such items from third countries outside the EU.

100. In order to obtain MEU relief the parties before us agreed that the following procedure was to be followed:

(1) The MoD must provide the appellant with a Certificate of Competent Authority in the form of Annex III to the MEU regulation.

(2) HMRC must give the appellant an end use relief Authorisation.

(3) The goods imported by the appellant must satisfy the description in the Certificate and the Authorisation and the appellant must satisfy the other conditions set out in the Authorisation.

Principles of Classification

101. The general principles of classification are set out in the passage from *HMRC v Flir Systems AB* quoted above.

102. The intended use of a product may be determinative of the appropriate CN heading, if it is ascertainable from the objective characteristics of the product itself and is not dependent on subjective intention.

103. In *Case C-467/03 Ikegami Electronics (Europe) GmbH* the Court of Justice was concerned with the classification of a machine which could be used as a personal computer but which incorporated special equipment for use as a video recorder for up to 8 television cameras. The issue for the Court was whether it was properly classified as an automatic data processing machine or as a video recording or reproducing apparatus. The Court stated as follows:

"*19. It is clear from Note 5(E) to Chapter 84 of the CN that machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be*

classified in the headings appropriate to their respective functions or, failing that, in residual headings.

…

21. Whilst it is equipped to process data, the machine is different, by virtue not only of its specific function of storage of video signals, but also the manner in which it is marketed and presented to the public (see, in that regard, Case T-'243/01 Sony Computer Entertainment Europe v Commission [2003] ECR II-'4189, paragraph 112) from an automatic machine which undertakes only data processing.

…

23. It is important also to make clear that, according to the Court's case-law, the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (Case C-201/99 Deutsche Nichimen [2001] ECR I-2701, paragraph 20, and Krings, cited above, paragraph 30)."

104. However, care is need in relying upon one particular function as conferring the essential character of a product. In *Ikegami*, Note 5(E) to Chapter 84 specifically required machines performing a specific function other than data processing to be classified to headings appropriate to that function. That is because Chapter 84 classifies machines and apparatus with electronic functions by reference to their functions.

105. In *Wiener SI GmbH v Hauptzollamt Emmerich Case C-338/95* the Court of Justice was concerned with garments declared as "nightdresses" which was a sub-heading of CN 6004 ("Under garments …"). The German customs authorities sought to classify them as "dresses" which was a sub-heading of CN 6005 ("Outer garments …"). The cut and presentation of the garment suggested that it could be worn either as a nightdress or as a dress.

106. The Court referred to its previous decision in *Neckerman Versand v Hauptzollamt Frankfurt am Main-Ost [1994] ECR I-4027* where in a similar context it held that garments used mainly in bed were classified as pyjamas. Since the goods were intended to be worn essentially in bed they must be regarded as nightdresses even though they may be used for other purposes.

Correcting Errors – Repayment or Remission of Import Duties

107. Article 236 of the Code requires duties to be repaid or remitted in circumstances where:

(1) when they were paid they were not legally due, or

(2) where the amount has been entered in the accounts contrary to Article 220(2) of the Code.

108. Article 220(2) provides as follows:

> *"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:*
>
> *(a) . . . ;*
>
> *(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.*
>
> *…"*

109. Article 237 of the Code provides that:

> "*Import duties or export duties shall be repaid where a customs declaration is invalidated and the duties have been paid. Repayment shall be granted upon submission of an application by the person concerned within the periods laid down for submission of the application for invalidation of the customs declaration*."

110. Article 239(1) of the Code provides as follows:

> *"1. Import 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.*"

111. The terms of the Implementing Regulation governing repayment or remission of customs duties lawfully due were amended by Commission Regulation (EC) No 1335/2003 of 25 July. Recital (2) to that Regulation provided as follows:

> *"Given that under Article 8 of Council Decision 2000/597/EC, Euratom of 29 September 2000 on the system of the European Communities' own resources the Member States are primarily responsible for collecting traditional own resources, it should therefore primarily be up to the authorities of the Member States to decide whether or not import duties or export duties should be entered subsequently in the accounts under Article*

220(2)(b) of Regulation (EEC) No 2913/92 or repaid or remitted under Article 239 of that Regulation."

112. Recital (3) also identified circumstances in which the matter should continue to be transmitted to the Commission:

> *"However, in order to ensure uniform treatment of traders and protect the financial interests of the Communities, the obligation to transmit dossiers to the Commission for a decision should remain where Member States consider that the decision should be favourable and either (a) an active error or failing on the part of the Commission is cited, or (b) the circumstances of the case are connected to Community investigations carried out under Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters (4), or (c) the amount of duties involved is EUR 500 000 or more."*

113. Article 871 of the Implementing Regulation provides as follows:

> *"1. The customs authority shall transmit the case to the Commission to be settled under the procedure laid down in Articles 872 to 876 where it considers that the conditions laid down in Article 220(2)(b) of the Code are fulfilled and:*
>
> *…*
>
> *the amount not collected from the operator concerned in respect of one or more import or export operations but in consequence of a single error is EUR 500 000 or more.*"

114. Title IV of the Implementing Regulation lays down specific provisions governing the repayment or remission of import duties. Article 899 (as amended) governs the specific case of applications under Article 239 of the Code and provides as follows:

> *"1. …*
>
> *2. In other cases, except those in which the dossier must be submitted to the Commission pursuant to Article 905, the decision-making customs authority shall itself decide to grant repayment or remission of the import or export duties where there is a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned.*
>
> *Where Article 905(2), second indent, is applicable, the customs authorities may not decide to authorise repayment or remission of the*

duties in question until the end of a procedure initiated in accordance with Articles 906 to 909."

115. In the present case, it is for HMRC to rule on the applicability of Article 899(2) to the facts, unless the terms of Article 905 are engaged. Article 905 effectively provides for a reference procedure to the Commission of the European Communities in certain defined circumstances. Article 905 now provides as follows:

> "*1. Where the application for repayment or remission submitted under Article 239(2) of the Code is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which the decision-making customs authority belongs shall transmit the case to the Commission to be settled under the procedure laid down in Articles 906 to 909 where:*
> …
> - *the amount for which the person concerned may be liable in respect of one or more import or export operations but in consequence of a single special situation is EUR 500 000 or more …*"

116. The importer has an obligation to ensure that it enters the correct customs classification on any customs declaration at the time of importing a consignment of goods (see *Article 199 of the Implementing Regulation*). From the time of publication in the Official Journal, no person is deemed to be unaware of the nature and extent of charges to customs duty (see *Binder v. Hauptzollamt Bad Reichenhall [1989] E.C.R. 2415*, at [19]). The importer is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities (See *Case T-239/00 SCI UK Ltd v. Commission* [2002] E.C.R. II-2957 at [55]). It is the responsibility of traders to make the necessary arrangements in their contractual relationships to guard against the risks of an action for post-clearance payments.

117. By virtue of the provisions of the Code and the Implementing Regulation set out above, HMRC are obliged as a matter of EU law to enter the correct CN classification for goods imported into the United Kingdom (See *Case C-413/96 Skatteministeriet v Sportsgoods A/S [1998] E.C.R. I-5285* at [23-25] and [36-37]). In principle, when the customs authorities discover an error in the tariff classification of goods indicated in a declaration of release for free circulation, they must recalculate, in the light of the new information at their disposal, the amount of customs duties legally due at the date when that declaration was accepted.

118. The recovery of post-clearance payment of import duties complies with the principle of legitimate expectations recognised as a general principle of EU law by virtue of the mechanism for waiver and/or remission of the duty if certain conditions are met.

119. The ECJ in *Case C-250/00 Ilumitrónica v. Chefe da Dvisião de Procedimentos Aduaneiros e Fiscais* [2002] ECR I-10433, at paragraph 33, noted that:

> *" The circumstance that the declarant [on importation] acted in good faith and with care, unaware of an irregularity which prevented the collection of duties which he should have paid if that irregularity had not been committed, has no bearing on his capacity as the person liable, which results exclusively from the legal effects associated with the formality of declaration."*

120. The ECJ has identified two exceptions to this principle:

(1) Waiver of post-clearance recovery by the national authorities, subject to three cumulative conditions under Article 220(2)(b) of the Code (formerly Article 5(2) of Regulation No. 1697/97);

(2) Repayment and remission of duties under Article 239 of the Code (formerly Article 13(1) of Regulation No. 1430/79).

121. Waiver of post-clearance recovery by the national authorities is permitted where the three cumulative conditions under Article 220(2)(b) of the Code are met. Each has to be met before waiver of a customs debt will be permitted. Many of the cases which provide assistance as to the correct approach to this question are concerned with the statutory predecessor of Article 220(2) found in Article 5(2) of Regulation 1697/79.

122. In *Case C-370/96 Covita* [1998] ECR I-7711, at [24-28] the ECJ set out the conditions to be fulfilled in relation to the statutory predecessor to Article 220(2)(b). In summary:

(1) Non-collection of the duties must have been as a result of an error made by the competent authorities themselves. The legitimate expectations of the person liable do not attract the protection provided for in Article 220(2)(b) unless it was the competent authorities themselves which created the basis for the expectations of the person liable.

(2) The error made by the competent authorities must be such that it could not reasonably be detected by the person liable acting in good faith, despite his professional experience and the diligence shown by him. It is mandatory for Community provisions relating to customs duties to be published in the Official Journal of the European Communities. Traders are deemed to know the law as published in the OJ from the date of publication.

(3) The person liable must have complied with all of the provisions laid down by the rules in force as far as his customs declaration is concerned.

123. The ECJ in *Covita* also gave guidance as to what is now Article 239 of the Code at [29 to 32]:

> "*29. So far as concerns the interpretation of Article 13 of Regulation No 1430/79, it follows from the wording of that provision that repayment or remission of import duties is subject to two cumulative conditions, namely the existence of a special situation and the absence of deception or obvious negligence on the part of the trader.*

30. Furthermore, Article 13 of Regulation No 1430/79 and Article 5(2) of Regulation No 1697/79 pursue the same aim, namely to limit the post-clearance payment of import and export duties to cases where such payment is justified and is compatible with a fundamental principle such as that of the protection of legitimate expectations (Hewlett Packard France, cited above, paragraph 46).

31. From that point of view, the fact that a trader places his trust in erroneous information provided by the competent authorities could, in certain circumstances, be regarded as a special situation within the meaning of Article 13 of Regulation No 1430/79, despite the fact that that situation is not provided for in Regulation No 3799/86. The list of special situations within the meaning of Article 13 of Regulation No 1430/79 which Article 4 of Regulation No 3799/86 provides is not exhaustive (see to that effect Hewlett Packard France, cited above, paragraphs 39 and 43).

32. None the less, so far as concerns the second condition laid down by Article 13 of Regulation No 1430/79, it should be borne in mind that the question whether the error was detectable, within the meaning of Article 5(2) of Regulation No 1697/79, is linked to the existence of obvious negligence or deception within the meaning of Article 13 of Regulation No 1430/79 (Hewlett Packard France, cited above, paragraph 46).”

124. The Court of First Instance in *Case T-330/99 Spedition Wilhelm Rotermund GmbH v Commission of the European Communities [2001] ECR II-1619, GCEU* held that Article 905 is an equitable provision intended to deal with exceptional situations faced by traders. It is intended to apply where the circumstances of the relationship between a trader and administrator are such that it would be inequitable to require the trader to bear a loss which, in normal circumstances, it would not have incurred. Provided that the conditions for applying the general equitable provision are satisfied, the person liable is entitled to remission of the import duties. To hold otherwise would deprive that provision of its effectiveness: see [53]. In deciding whether a ‘special situation’ exists, the Commission must balance the Community interest against the interests of a trader who has acted in good faith (*See also Case T-239/00 SCI UK Ltd v. Commission [2002] ECR II-2957, GCEU at [44 to 51]*). In order to assess whether a trader is in a “special situation”, it is necessary to consider whether he is in an exceptional situation as compared with other operators engaged in the same business (See *Case C-61/98 De Haan Beheer BV* at [52] and [53]).

125. In *Case T-104/02 Société française de Transports Gondrand Frères v. Commission [2004] ECR II-3211, GCEU* at [58], the Court of First Instance held that factors which might constitute a special situation for the purposes of Article 905 exist where, in view of the objective underlying the fairness clause, factors liable to place the applicant in an exceptional situation as compared with other operators engaged in the same business are found to exist. Furthermore, in *Case T-385/05 Transnáutica – Transportes e Navegação, SA v. Commission [2009] ECR II-163, GCEU* at [58] to [60], the Court noted that a lack of diligence on the part of the national customs

authorities may place a trader in a special situation going beyond the normal commercial risk inherent in its business and which justifies remission of the customs duty.

Competing Classifications

126. We set out below the competing classification headings which we must consider in this appeal. Chapter 62 of the CN is concerned with articles of apparel and clothing accessories.

127. The BTIs issued by HMRC and against which the appellant appeals are *6201 93* and *6206 30*. The garments were described as a combat smock similar to an anorak and an under body armour combat shirt without reference to their IRR properties. The relevant headings and sub-headings of the CN are as follows:

6201	*Men's or boys' overcoats, car-coats, capes, cloaks, anoraks (including ski-jackets), wind-cheaters, wind-jackets and similar articles, other than those for heading 6203:*
	- Overcoats, raincoats, car coats, capes, cloaks and similar articles:
	…
	- Other:
6201 93	*-- Of man-made fibres*
6206	*Women's or girls' blouses, shirts and shirt-blouses:*
	…
6206 30	*- Of cotton*

128. In addition HMRC have also issued various liability rulings classifying articles imported by the appellants under the following headings – 6203, 6206 and 6506. The relevant headings and sub-headings are as follows:

6203	*Men's or boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear):*
	- Jackets and blazers:

…

6203 39 -- Of other textile materials:

--- Of artificial fibres:

6203 39 11 ---- Industrial and occupational

6506 Other headgear, whether or not lined or trimmed

129. The appellant for its part seeks to classify the goods for which it claims relief under the headings 6211 33 10. The relevant headings and sub-headings are as follows:

6211 Tracksuits, ski suits and swimwear; other garments:

- swimwear:

…

- ski suits

…

- Other garments, men's or boys':

…

6211 33 -- Of man-made fibres:

6211 33 10 --- Industrial and occupational clothing

130. The CNENs for Chapter 62 include the following general notes:

> "*4. This chapter includes items of industrial and occupational clothing which because of their general aspect … and the nature of their fabric … make it clear that they are designed to be worn solely or mainly in order to provide protection (physical or health) for other clothing and/or persons during industrial professional or domestic activities.*
>
> *…Uniform and other similar official garments (judge's gowns, church vestments, for example) are not considered to be industrial and occupational garments.*"

Summary of the Parties' Submissions

131. Mr Beal QC relied upon the following broad grounds of appeal which deal with the issues arising under each appeal:

(1) The Certificate issued by the MoD is conclusive as to the availability of MEU relief and it is not necessary to go beyond the Certificate in order to classify the goods being imported.

(2) In any event, the goods being imported were properly classified to CN 6211 and were prima facie entitled to MEU relief.

(3) The Appellant is entitled to remission and/or repayment of duties pursuant to Article 220(2)(b) (via Article 236) and Article 239 of the Code. In this regard he relied upon due care having been exercised by the appellant and submitted that the circumstances gave rise to a legitimate expectation of MEU relief on the part of the appellant. In particular he submitted that a "change of mind" by HMRC had contributed to that legitimate expectation.

132. We deal with Mr Beal's detailed submissions in the course of our decision below.

133. Mr Thomas submitted that the appellant's case confused three separate elements of the customs duty regime, namely:

(1) Duty suspension under the MEU regulation and the MoD certification process required by the regulation.

(2) Classification of goods by traders on entry of those goods to the EU.

(3) Authorisation by HMRC for a trader to enter those goods to end use relief.

134. He submitted that the appellant was reading documentation including correspondence relevant to one of those regimes as if it applied to another regime. Against that background, Mr Thomas's broad submissions were as follows:

(1) The MoD Certificate, given pursuant to the MEU regulation, does not displace the fundamental requirement for a trader to classify the goods on entry to the EU.

(2) The goods are not properly classified to heading CN 6211

(3) There has been no error by a "customs authority" for the purposes of Article 220, nor any change of mind as to classification by HMRC. In any event there was a lack of due care by the appellant.

(4) Even on the appellant's case, no special situation arises pursuant to Article 239. The appellant is in no better or worse position than any other trader. There has been no unfairness to the appellant.

Decision

135. We have reached our decision considering each of the three grounds of appeal separately, and on the basis of the findings of fact and legal principles set out above.

The First Ground of Appeal – The MoD Certificate

136. Mr Beal argued that under the terms of the MEU regulation the Certificate could be used as a customs declaration. He relied upon this as supporting the conclusive nature of the certificate as far as entitlement to relief is concerned. He submitted that the whole purpose of the Certificate is to avoid the possibility of customs supervision of import entries by other Member States. For example goods for MEU by the UK could be imported to Rotterdam. The Dutch customs authorities would not have power to question entitlement to MEU relief of goods satisfying the description in the Certificate. He did not suggest that the Dutch customs authorities in those circumstances could not inspect the goods to ensure that they satisfied the description given in the Certificate.

137. We accept that the Certificate is conclusive as to the military end use of goods being imported into the EU and described in the certificate. However we do not accept that it is also conclusive as to the proper classification of those goods. The fact that the Certificate identifies the CN Code of goods referred to in the Certificate does not support Mr Beal's submission. It merely reflects the possibility of a Certificate being used as a customs declaration. The evidence before us from Mr McChesney was that the UK has not chosen to accept such certificates as customs declarations.

138. The appellant's submissions on this ground of appeal reflect the confusion identified by Mr Thomas in his submissions. It is important to bear in mind the three regimes identified by Mr Thomas. The MoD Certificate is directed towards the end use of goods imported. Unless it is used as an import declaration it has nothing to do with the classification of the goods actually imported. It is clear from Article 3 of the MEU regulation that the Certificate "*may*" replace the customs declaration. In the present case, and in the UK generally, such certificates are not used or accepted as customs declarations. It is therefore necessary for traders such as the appellant importing goods to military end use to make a customs declaration in the ordinary way, including a declaration as to the classification of the goods.

139. Mr Beal described the Certificate as the "*lynch pin*" document which guarantees relief from duty. Clearly one of the conditions for MEU relief requires a certificate to be in place. However it is not correct to describe this as a lynch pin. It is an essential element to the relief, but so too is the classification of the goods and authorisation from HMRC for a trader to enter goods to end use relief.

140. The MEU regulation itself gives relief for military end use by adopting the general provisions for end use reliefs found in the Code. Hence the necessity for authorisation by HMRC. The requirement for a MoD Certificate reflects the particular requirements and sensitivities which would otherwise be involved in a trader establishing military end use and in customs authorities verifying such end use. If the

MEU regulation was intended to displace the requirement for a trader to classify goods separately on importation we consider that express provision would have been made in the regulation itself.

141. Mr Thomas submitted that the certificate could not be conclusive of entitlement to relief because there is also a requirement to have an end use Authorisation from HMRC. The Authorisation itself was in terms that the appellant was authorised to import goods of heading CN 6211 and no other heading. The Authorisation makes no reference to the Certificate. We agree. HMRC are entitled to grant an authorisation subject to conditions and one of the conditions in the present case was that the goods should be classified to heading CN 6211. We take that to mean properly classified to heading 6211. The Certificate itself cannot be read in isolation from the general scheme of end use relief, and in particular the terms of the Authorisation.

142. Mr Beal also referred us to the purpose of the MEU regulation. He submitted that it was intended to help Member States finance the war effort in Iraq and Afghanistan. Prior to 2003 there was no relief for weapons and equipment imported for military end use (See *Case C-239/06 Commission v Italy,* and *C-38/06 Commission v Portugal*). We accept that submission but it does not assist in relation to the status of the Certificate.

143. If the Certificate is conclusive as to the appellant's entitlement to relief, Mr Beal argued that to deprive the appellant of relief infringed principles of EU law. In particular the principles of legal certainty (non-retrospection), legitimate expectation and good or sound administration. We did not understand Mr Thomas to argue against this proposition. However, given our decision as to the effect of the Certificate these issues do not arise.

144. Mr Beal also relied upon Section 7 of Notice 770 and argued that section 7.4 confirms that the appellant could rely upon the CN Code in the Certificate and it would be unfair to permit HMRC to depart from the Notice. Section 7.4 reads as follows:

> "***7.4 Application and Authorisation***
>
> *You should apply for end-use authorisation using Form C1317 (see paragraph 2.4). If you are importing military equipment under this scheme there is no need to enter the full 10 digit commodity codes in Box 5 of the form. You may use the four digit HS heading code(s) entered on the certificate.*"

145. On any reading the Notice does not confirm that the appellant or any other importer can rely on the CN code in the certificate as being the correct classification. It simply removes the need to quote the full 10 digit code in an application for authorisation. We do not accept that HMRC have failed to apply their published policy.

The Second Ground of Appeal – Classification

146. In support of this ground of appeal Mr Beal argued that the IRR clothing must be categorised under CN Code 6211. Otherwise, there would be a huge lacuna in the MEU regulation. Relief would not be available for the vast majority of protective clothing worn by servicemen. For example he suggested that there was no real difference between the IRR clothing and body armour which did have the benefit of MEU relief. It was illogical that coveralls with IRR fell within CN 6211 and qualified for MEU Relief, but a jacket and trousers performing the same function fell outside the relief.

147. It is only certain weapons and equipment which can benefit from the relief. It is not possible to identify, certainly on the basis of the evidence before us, any policy behind the types of weapons and equipment which are entitled to relief. The most that can be said by reference to Recital (2) is that relief is intended to apply to certain specialised and technologically advanced goods. Certainly that is the way it has been interpreted by the MoD and HMRC and by the appellant in presenting this appeal.

148. We heard no evidence in relation to body armour or other items of protective clothing worn by servicemen. The only evidence we have before us relates to the particular items which are the subject matter of this appeal. There was reference in the correspondence to a "list" agreed between the MoD and HMRC referring to items which qualify for relief. It was said to include body armour. None of the witnesses was aware of any such list and we have not seen a copy. Further, HMRC do not accept for the purposes of this appeal that body armour does qualify for relief. In those circumstances we can draw no useful analogy between the two, nor can we say that there is any lacuna in the provisions for MEU relief.

149. In any event, we note in passing that it is not at all clear to us that one can use the terms of a regulation providing for relief from customs duty as a tool for construing the Combined Nomenclature. That issue, if indeed it is an issue, was not canvassed before us.

150. Mr Beal argued that the IRR clothing was exactly like other "industrial and occupational" clothing that falls within CN 6211. We note the reference to industrial and occupational clothing in sub-heading CN 6211 33. However the same reference appears in several other sub-headings of Chapter 62, for example 6203 itself for industrial and occupational jackets made of cotton. Whether or not the clothing is industrial or occupational does not assist in the classification issue in these appeals.

151. Similarly, the reference to industrial and occupational clothing in paragraph 4 of the CNEN for chapter 62 does not assist us in classifying the garments in the present case. It simply states that the chapter includes industrial and occupational clothing and then goes on to describe what should and should not be treated as falling within that description. It excludes from the description "uniform and other similar official garments". Whilst we accept the garments in the present case are not uniforms within the meaning of that term in the CNEN, describing the garments as industrial or occupational does not assist in the classification issue.

152. As part of his submissions on this ground of appeal Mr Beal criticised the approach of HMRC to classification, in particular the approach of Ms Cureton-Burgess who refused the repayment claim. He submitted that HMRC had omitted to take into account the specialist protective properties of the clothing and its function. We accept that criticism. The analysis of Ms Cureton-Burgess, the non live liability rulings and the BTIs do not appear to take those factors into account.

153. The omission is particularly important, Mr Beal submitted, because to describe a combat jacket with IRR properties simply as a jacket does not capture the full functionality of the garment. He submitted that functionality is best captured by the description "industrial or occupational". We do not accept the latter part of that submission. Industrial or occupational is a sub-heading and consideration of sub-headings only arises once the product has been classified to a particular heading.

154. *Flir v HMRC*, referred to above, was a classification case. Mr Beal submitted that it illustrates the sort of case where one of two competing headings does not capture the entire functionality of the goods resulting in the court applying GIR 3(c) as a "tie-breaker".

155. In *Flir* the High Court was concerned with the classification of thermal imagers. HMRC contended heading 9025 (electronic thermometers) was appropriate. The importer argued for heading 9027 as instruments using optical radiations for measuring or checking quantities of heat. The case was thus concerned with technical equipment to be categorised by reference to its function. Henderson J held that the items in question fell within both headings. At [33] he stated:

> "*Once the conclusion has been reached that the products fall within both headings, the rest in my judgment follows without difficulty. Neither heading can be regarded as providing the more specific description, because the two functions identified by the Tribunal are of equal importance, and it would in my view be a travesty of the facts to say that the products operate mainly, or predominantly, as thermometers. As the Tribunal say in paragraph 13 of the Decision, "neither is the more specific description: they are in part thermometers and in part instruments for checking quantities of heat, and neither is more specific". It is common ground that, if GIR 3(a) does not apply, rule 3(b) cannot be used to resolve differences in function. Accordingly, recourse must be had to rule 3(c), which is admittedly arbitrary in its operation, but does at least provide an answer to the question.*"

156. Mr Thomas accepted that the specialist nature of the goods was not in dispute. However he submitted that factor is relevant only to the issue of the Certificate and not to the question of classification. We do not accept that submission, in so far as the specialist nature of the goods is reflected in their functionality. He pointed out that until 2009 experienced Customs agents had been content to declare the goods to headings other than 6211. We do not consider that this is relevant, or should in any way colour our decision on classification.

157. Mr Thomas' principal submission was that the headings themselves in Chapter 62 provide the answer to the question of classification. According to GIR 1 it is not necessary to look at the other GIRs. He also stressed that it is important to consider the terms of the headings themselves in Chapter 62. He suggested that the appellant's case only arises at the level of sub-headings. However it is not necessary to go beyond the headings themselves.

158. Mr Thomas argued that if the goods were properly classified to CN 6211 then CN 6210 otiose. We do not accept that argument. The CN, for whatever reason, has been drafted so as to distinguish for example garments made of certain rubberised or coated fabrics which fall within CN 6210 and those other garments which fall within CN 6211.

159. It appears to us that heading 6211 is in the nature of a residual heading for garments which the draftsmen did not wish to classify elsewhere in chapter 62. We say this for a number of reasons:

(1) Heading 6211 refers to ski suits. We note that heading 6201 expressly includes ski jackets. By implication one piece ski suits are not classified elsewhere.

(2) Heading 6211 refers to swimwear. We note that heading 6203 expressly excludes swimwear. Hence swimwear, which might otherwise look like a pair of shorts but performs a different function, has no other heading;

(3) Tracksuits, which in our experience are generally two piece garments designed to be worn together, are not classified elsewhere.

(4) The heading includes other garments and is clearly intended to be a catch all for other types of garments which the draftsmen did not classify separately.

160. There is no suggestion that the term "other garments" in CN 6211 takes any meaning from the reference to tracksuits, ski suits and swimwear in the same heading.

161. The HSEN provides that waistcoats are covered by heading 6211. It is also common ground that "coveralls", that is all in one garments, are properly classified as other garments in heading 6211.

162. Mr Thomas submitted that even if the goods could prima facie be classified to headings 6203 and 6211 then GIR 3(a) would resolve the issue in favour of HMRC. The heading with the most specific description is, for example CN 6203 which refers to "jackets" and "trousers". That heading is more specific than "other garments" in CN 6211.

163. These submissions of Mr Thomas are undoubtedly correct if one ignores the functionality of the garments and their IRR properties. However in our view the functionality of the garments must be taken into account in determining their classification..

164. Mr Thomas also referred to the cases of *Ikegami* and *Case C-142/06 Olicom*. In relation to function he sought to derive a general rule that if the function of goods is

relevant to the proposed heading, then the goods will be classified in the heading which refers to that function. In the present case the relevant headings did not refer to function. For example there was no reference in 6211 to any protective element or function in the clothing. He distinguished the cases of *Neckerman* and *Weiner* on this basis. The competing headings were dresses and nightdresses. There was a functional distinction between the two and the characteristics relevant for the purpose of classification were in part the function or intended use of the goods.

165. Mr Beal accepted that there is no explicit reference to the function of garments at the heading level. There is however what he described as a "free standing entitlement to look at function". We are not entirely sure what Mr Beal meant by that description, but we do accept that in some headings, particularly in the context of electronic items, there will be an express reference to function. In other headings there may be an implicit reference to function. For example in *Wiener*, nightdresses are recognised by their intended function, which is essentially to be worn in bed. There is an implicit reference to function or intended use in the competing headings.

166. It seems to us that heading 6211 does refer to the function of the garments contained within it. Whether something is a tracksuit, ski suit or swimwear will depend on the function it is intended to perform.

167. In our view a camouflage jacket, intended for military use but which is available to the public generally, is still a jacket. Elements of style or fashion do not characterise it as anything other than a jacket. However when IRR properties are incorporated within the garment, which is not available to the public generally, the garment has a function which is not related to style or fashion. Such a garment fulfils two functions – firstly it is an item of clothing intended on one level in common with jackets generally, to protect the wearer from the elements. Equally important at least is the function it performs in protecting the wearer from detection by enemy forces.

168. The point that arises in the present case is that the garments fulfil their function as a jacket, whilst also fulfilling a specialist protective function by reference to their IRR properties. In other words, making the wearer less detectible to an enemy using night vision goggles. Put simply, the question is whether in those circumstances the garments fall to be classified as for example jackets/trousers or as other garments.

169. Mr Thomas submitted that the description "jacket" may be considered more specific than the description "other garments". It is in that context that the decision in *Flir* is helpful. The Court held that neither heading was more specific than the other because neither of the functions was more specific than the other. Hence GIR 3(a) did not apply.

170. In our view GIR 3(a) does not operate to classify the goods in question as jackets. It would only apply if the function of a jacket as an item of apparel is considered more specific than its function in protecting the wearer from detection. Similarly in relation to the other items of clothing we are concerned with in this appeal.

171. In our view the objective characteristics of the IRR clothing imported by the appellants includes their function in helping to prevent detection by enemy forces. The IRR properties are such a specialist feature of the jackets that describing them simply as jackets does not adequately reflect the product. Given its specific and specialised function, we consider that all clothing with IRR properties is best described as an "other garment" and properly classified to heading 6211 33 10. It is not necessary to resort to GIR 3(c), although if it had been necessary the classification would have been the same. Consequently the appellant succeeds on its second ground of appeal.

The Third Ground of Appeal – Repayment / Remission

172. We must first deal with an issue between the parties as to which provision of the Code for repayment and/or remission is in point.

173. The application for repayment covers the period February 2008 to May 2009. Imports during this period were declared without the benefit of MEU relief and import duties were paid. In relation to the period May 2009 to February 2010 duty was treated as having been suspended but is the subject of a post clearance demand.

174. The appellant claims to be entitled to repayment of duty paid and disputes liability for goods imported without payment of duty on a number of grounds. These include:

(1) A retrospective certificate came into force conclusively giving entitlement to relief, alternatively

(2) The goods should have been properly classified to CN 6211 which, together with the retrospective certificate gives entitlement to relief.

175. Those grounds are the first two grounds of appeal dealt with above. For the reasons given above we do not consider that the retrospective certificate is conclusive as to classification. As to the proper classification of the goods we have found that they do fall within heading CN 6211 and the appellant succeeds on its second ground of appeal.

176. In the event that either of the first two grounds of appeal is made out Mr Thomas accepted that there is no further dispute and the appellant would be entitled to repayment pursuant to Article 237 of the Code. Mr Thomas also accepted in those circumstances that the appellant would not be liable pursuant to the post clearance demand. The customs debt does not arise in the first place.

177. If we are wrong on the second ground of appeal we set out below what our decision would have been on the third ground of appeal.

Repayment

178. The claim for repayment is advanced on the basis of either Article 236 or Article 239.

179. Under Article 236 the appellant must show either:

(1) When they were paid, the amount of the duties was not legally owed, or

(2) The amount was entered in the accounts contrary to Article 220(2).

180. At the time the duties were paid in the period February 2008 to May 2009 there was no Certificate or end use Authorisation in place. The amounts were therefore legally owed and the first limb of Article 236 is not satisfied.

181. In the same period, the amounts of duties legally owed were entered in the accounts. There is no suggestion of any error on the part of HMRC in failing to enter the duty in the accounts and Mr Beal did not rely on the second limb of Article 236.

182. Article 239 is engaged in situations other than those described in Articles 236 and 237. Customs duties may be repaid in situations resulting from circumstances in which there is no deception or obvious negligence on the part of the appellant. However the situation must be a "special situation" (Articles 899(2) and 905 of the Implementing Regulation). There will be a special situation where the person liable is in an exceptional situation as compared with other operators engaged in the same business.

183. Mr Beal did not set out any basis upon which there could be a special situation in respect of the duties paid for the period February 2008 to May 2009. They were paid because the appellant had not sought to obtain military end use. Ultimately the appellant raised the matter in early 2009 and obtained a retrospective Certificate and Authorisation to import to MEU. We cannot see how Article 239 could be engaged in those circumstances.

184. Mr Thomas submitted that any claim for repayment for this period should be pursuant to Article 237. Article 237 requires a customs declaration to be invalidated after the duties have been paid. Mr Beal argued that the customs duty declarations made by the appellant from February 2008 to May 2009 have not been invalidated. They were valid declarations at the time because there was no certificate or end use authorisation in place.

185. Article 66 of the Code deals with the invalidation of declarations already accepted where goods are declared in error. It is clear from Article 294(3)(c) and Article 251(1c) of the Implementing Regulation that where a retroactive authorisation is issued it can have the effect of invalidating the original declaration. We accept Mr Thomas' submission that Article 237 of the Code is the relevant provision for the purposes of repayment in the present case. However, it is only if the goods were classified to CN 6211 and properly entitled to MEU Relief that the declaration will be invalidated.

186. We are not satisfied therefore that there is any entitlement to repayment of duties paid if the goods were not properly classified to CN 6211.

Remission

187. The claim for remission of duties subject to the post clearance demand in period May 2009 to February 2010 is again based on Article 236 and Article 239.

188. In these circumstances Article 236 will apply where:

(1) When they were entered in the accounts the amounts of duties were not legally due, or

(2) The amount was entered in the accounts contrary to Article 220(2).

189. If we are wrong as to the correct classification of the goods, the duties were legally due at the time they were entered into the accounts and the first limb does not apply.

190. In order to engage Article 220(2)(b) and therefore Article 236, the appellant must establish an "*error on the part of the customs authorities*" in failing to enter the duty legally owed in the accounts. The appellant relies on the following errors:

(1) An error on the part of the MoD, endorsed by HMRC, in granting the Certificate identifying that the goods to be imported were classified under CN 6211

(2) An error on the part of HMRC in granting the Authorisation to import goods pursuant to the certificate.

191. The first issue which arises is whether the MoD is a "customs authority" for these purposes? Article 220 replaced Article 5(2) Regulation 1697/79 which used the term "competent authority". There was no definition of competent authority for these purposes. However Article 4(3) of the Code does define customs authorities as "*authorities responsible inter alia for applying customs rules*". Mr Thomas submits, on the basis of that definition, that the MoD is not a customs authority.

192. In *Case C-250/91 Hewlett Packard* the error was by customs authorities in another Member State. As to whether they were a competent authority for the purposes of Article 5(2) the Court of Justice stated at [15]:

> "*As regards the error committed by customs authorities other than those responsible for effecting recovery, it follows from the judgment in Mecanarte-Metalúrgica de Lagoa, cited above, paragraphs 22 and 23, that, in principle, notice may be taken of such an error in proceedings concerning non-recovery initiated by the competent authorities in another Member State, provided that the error is one which is relevant to the recovery of the customs duties and may thus cause the person liable to entertain legitimate expectations.*"

193. Customs authorities of a non-Member State were also held to be competent authorities for these purposes in *Case C-153/94 Faroe Seafood* (see [89] and [90])

194. Mr Beal submitted that the key to whether a body was a competent authority was whether they were in a position such that they were capable of engendering a legitimate expectation on the part of a trader.

195. We can see that the customs authorities of another Member State could be a competent authority and would also naturally fall within the definition of customs authorities in the Code. As Mr Beal observed, the MoD was designated by HMRC as a competent authority for the purpose of issuing the Certificate. In that sense it is an authority responsible for applying customs rules and we find that it is a customs authority for the purposes of Article 220(2)(b).

196. We accept that there was an error by the MoD if Ms McCollum considered, wrongly, that the IRR clothing could properly be the subject of MEU relief. However it was not this error which resulted in customs duty legally owed not being entered in the accounts. The real cause of the duty not being entered in the accounts was a failure by the appellant to obtain advice from HMRC tariff classification service as to the proper classification of the goods. They had been advised to do so in 2005 by both the MoD and HMRC. Notwithstanding Ms McCollum wrongly thought that the goods were entitled to MEU relief she did not cause the appellant's misunderstanding. Nor was she responsible for any legitimate expectation on the part of the appellant that it would be entitled to relief.

197. Further, we find that the error could have been reasonably detected by the appellant if it had sought to confirm the correct tariff classification with HMRC. The appellant failed to make the enquiries with HMRC that Puma Cargo had made on its behalf in 2005. The appellant was an experienced importer employing an experienced customs agent.

198. We do not accept that HMRC made any error in granting the Authorisation. It was on terms that the goods imported to MEU relief should be properly classified to CN 6211.

199. Mr McMahon's evidence was that the appellant had relied on the Certificate and the end use Authorisation to justify classifying the goods to CN 6211. We accept that he did so rely, and also that he acted in good faith. For the reasons we have given we are not satisfied that it was reasonable for the appellant to rely on those documents for the purposes of tariff classification. Even if there was an error on the part of the customs authorities, it was reasonably detectable by the appellant in the sense that the appellant could and should have referred the question to the tariff classification service of HMRC.

200. In the circumstances the second condition for the application of Article 220(2)(b) is not satisfied. The appellant would not be entitled to remission pursuant to Article 236.

201. Article 237 has no application in relation to the post clearance demands which are in dispute. The appellant's alternative basis of claim is therefore pursuant to Article 239. The circumstances relied upon as giving rise to a special situation arise from the appellant's dealings with the MoD and/or indirectly with HMRC. Mr Beal submitted as follows:

(1) The imports from May 2009 to February 2010 were declared to MEU relief on the strength of the MoD Certificate and the HMRC end use Authorisation.

(2) HMRC had approved the use of CN 6211 for the appellant's imports.

(3) Even if HMRC had not approved the use of CN 6211, the appellant was led to believe by the MoD that it had been approved by HMRC.

(4) In the circumstances the appellant had a legitimate expectation that MEU relief would be available on these imports.

202. As appears above we have had some difficulty in getting to the bottom of the various dealings of HMRC and the MoD because of the absence of evidence from the individuals involved. We accept a point made by Mr Thomas that classification issues depend on the CN and the objective characteristics of the goods in question. Hence evidence as to the circumstances in which rulings have been made and certificates and authorisations granted is not relevant to the classification issue. However evidence from, for example Ms McCollum or Mr Stanners would have helped us to understand the circumstances in which the alleged special situation arose. Mr Beal invited us to take a pragmatic approach and to do the best we can do with the evidence we have. That is the approach we have taken.

203. We have found that HMRC did not approve the use of CN 6211 for the appellant's imports. Nor for the reasons given above did the MoD lead the appellant to believe that CN 6211 had been approved by HMRC. In the circumstances we do not accept that the appellant had any legitimate expectation from its dealings with the MoD or HMRC that MEU relief would be available.

204. In all the circumstances we are not satisfied that there is any special situation for the purposes of Article 239. We are also not satisfied that the appellant has been placed in any exceptional situation compared with other operators engaged in the same business. If it were necessary for us to do so we would find obvious negligence on the part of the appellant in failing to follow the advice given to it by the MoD in 2005, and to Puma Cargo by HMRC, also in 2005.

The Binding Tariff Informations

205. The goods which were the subject of BTIs were classified to headings 6201 93 and 6206 30. The appellant argues that they ought to be classified to CN 6211. We have found that such clothing with IRR properties is properly classified to CN 6211. More specifically they should be classified to CN 6211 33 10. In the circumstances the third appeal is allowed.

Conclusion

206. In all the circumstances and for the reasons given above the three appeals are allowed.

207. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 October 2012