Neutral Citation: [2023] UKFTT 00472 (TC)

Case Number: TC08832

FIRST-TIER TRIBUNAL
TAX CHAMBER

At Bristol Magistrates Court and Tribunals Hearing Centre

Appeal reference: TC/2021/05903

CUSTOMS DUTY – Commodity Codes for import of goods – Combined Nomenclature classification for import duty rates – static air pressure relieving products – approach in determination of duty rates – the General Rules for the Interpretation of the Combined Nomenclature ('GIRs') – Explanatory Notes (HSENs and CNENs) – errors by HMRC – legitimate expectation – appeal allowed in part

Heard on: 31 January 2023
Judgment date: 06 June 2023

Before

TRIBUNAL JUDGE ALEKSANDER

Between

INNOVATION REHAB LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Ashley Rogers, a director of the Appellant

For the Respondents: Simone Poon, solicitor, HM Revenue and Customs' Solicitor's Office

DECISION

INTRODUCTION

1. This appeal relates to HMRC's Advanced Tariff Ruling decision dated 11 June 2021 classifying the Appellant's Mattress Overlay to commodity code 3926 90 97 90 and HMRC's decision to issue a Post Clearance Demand Note dated 6 October 2021 for the misclassification of several imported products over the period 14 September 2018 to 21 December 2020 for £109,361.59 customs duty and £21,879.42 Import VAT. The relevant products were declared under commodity code 9021 10 10 00 attracting a customs duty of 0% however HMRC contend that the goods should be classified under commodity code 3926 90 97 90 attracting a customs duty of 6.5% (pre- Brexit) and 6.0% (post Brexit).

2. At the hearing of the appeal, the Appellant, Innovation Rehab Limited, was represented by its director, Ashley Rogers, and HMRC were represented by Simone Poon. I heard evidence from Mr Rogers and from Ben Key, an HMRC officer within their Classification Policy Team. An electronic bundle of 558 pages was admitted in evidence. In addition, Mr Rogers produced copies of two marketing leaflets which included photographs of the products under appeal.

3. Unfortunately, Mr Rogers did not bring a copy of the electronic bundle to the hearing. However, one of Ms Poon's colleagues kindly agreed to share the copy of the bundle on her laptop with Mr Rogers.

4. Following the conclusion of the hearing, two issues arose on which I sought the written representations of the parties. These issues are discussed below, and this decision takes account of those representations.

BACKGROUND FACTS

5. For the most part, the background facts are not in dispute, and I find them to be as follows.

6. There are ten products that Innovation Rehab imports:

   (a) Pre-inflated cushion

   (b) Bariatric cushion

   (c) Wheelchair cushion/multicare pad

   (d) Multipositional Wedge

   (e) Mattress Overlay

   (f) Bariatric Mattress Overlay

   (g) Trolly Topper

   (h) Foot Protectors

   (i) Riser Recliner Chair Cushion (Long)

   (j) Riser Recliner Chair Cushion (Short)

7. By way of background, in 2005 Mr Rogers was made redundant. He decided to start his own business and was approached by EHOB, a US company, to distribute their products into the UK.

8. The products are all manufactured from plastic and are inflatable or are pre-inflated. They are used in the hospital and care sectors by patients either after they have undergone a procedure, or whilst they are waiting for a procedure. According to the Innovation Rehab leaflet, the products provide effective pressure redistribution for patients at risk of developing

pressure ulcers. Mr Rogers described pressure injuries and ulcers as potentially deep tissue injuries that can go down to the bone.

9. The products provide a cushion of static air (of about 2cm depth) around the part of the body resting on the product. The product prevents the patient from putting their full weight on any particular part of their body.

10. Mr Rogers described the Mattress Overlay and the Bariatric Mattress Overlay as providing a cocoon around the patient, holding the patient effectively immobile as the overlay wraps around the patient. Mr Rogers said that this was particularly important in the case of patients with spinal injuries as these were static products. Alternative products involved a mechanical pump moving air around inside the overlay, so the patient was not held in a static position but was constantly moving.

11. Mr Rogers said that the same principles applied – to some extent – to the Trolly Topper, which was designed to be used by patients lying on hospital trollies.

12. Mr Rogers described the multipositional wedge as being strapped around the foot of a mattress. It prevented the patient's leg from dropping off the side of the bed.

13. The cushions (Pre-inflated cushion, Bariatric cushion, Wheelchair cushion/multicare pad, Riser Recliner Chair Cushion (Long), and Riser Recliner Chair Cushion (Short)) did not immobilise the patient in the same way as the overlays and the wedge.

14. Mr Rogers spoke on the telephone to someone at HMRC in 2005 to agree the classification of the products for import purposes. The HMRC officer had difficulty classifying the products as there was no specific category for them. However, the officer eventually decided that the products fell within Note 6 to Chapter 94 of the EU's Combined Nomenclature. This says:

> For the purpose of heading 9021 the expression "orthopaedic appliances" means appliances for:
>
> - preventing or correcting bodily deformities; or
>
> - supporting or holding parts of the body following an illness, operation or injury.
>
> Orthopaedic appliances include footware, and special insoles designed to correct orthopaedic conditions, providing they are either (1) made to measure or (2) mass-produced, presented singly and not in pairs and designed to fit either foot equally.

15. Accordingly, on the advice of the HMRC officer at the time, Innovation Rehab imported the products under commodity code 9021 10 10 – "orthopaedic appliances" on the basis that they supported parts of the body following an illness, operation or injury. In retrospect, it is unfortunate that Innovation Rehab did not obtain a Binding Tariff Information to confirm formally that this was the correct commodity code.

16. Ms Poon stressed in the course of her oral and written submissions that HMRC had no written or other record of this conversation. And Mr Rogers also had no such record. However, Mr Rogers' evidence was not challenged during the course of cross-examination and is plausible. I find that an HMRC officer advised him in 2005 that 9021 10 10 was the correct commodity code for the products.

17. In consequence of the COVID-19 pandemic, there was an increased demand for Innovation Rehab's products, and the quantity of products imported by the company substantially increased. This increase came to the attention of HMRC, who decided to audit the imports and their classification.

18. HMRC decided that only the Foot Protectors were correctly classified on import. In HMRC's view, the other products should have been classified under commodity code 3926 90 97 90 and a Post-clearance Demand Note was issued to assess unpaid duty on the other product lines that had been imported over the period from 14 September 2018 to 21 December 2020.

RELEVANT LAW

Customs Codes and Combined Nomenclature

19. Until the end of the Brexit transitional period on 31 January 2020 (references in this decision to "Brexit" are to the end of the transitional period), customs duty was governed by the Union Customs Code ("UCC") (EU Council Regulation 952/2013 as supplemented by Regulation 2446/2015). The applicable rate of customs duty is determined by reference to the Combined Nomenclature ("CN"): Art 20.3(a) of the UCC; the CN is produced at Annex 1 to Regulation 2658/87. Part 2 of the CN contains the commodity headings as a comprehensive goods nomenclature.

20. From 1 February 2021, the UK has adopted its own customs tariff under s8 Taxation (Cross-border Trade) Act 2018 and Regulation 2, Customs Tariff (Establishment) (EU Exit) Regulations 2020 (SI 2020/1430) – the Tariff of the United Kingdom ("the UK Tariff").

21. The Goods Classification Table in Annex I of Part Three of the UK Tariff is based on the CN of the European Union and, like the EU's tariff, the Harmonized Commodity Description and Coding System ("the Harmonized System") developed by the World Customs Organization which is used worldwide. Because the Goods Classification Table is identical to the CN, references in this decision to the CN are to be taken to include a reference to the corresponding provision in the Goods Classification Table of the UT Tariff.

22. Although not cited to me, a succinct summary of the legal framework relating to tariff classification by Lawrence Collins J in *Vtech Electronics (UK) plc* [2003] EWHC 59 (Ch), (as cited with approval by the Court of Appeal in *Invamed Group Limited v HMRC* [2020] EWCA Civ 243 per Patten LJ at [5]), is as follows:

> (1) The [Combined Nomenclature ("CN")] is established based on the World Customs Organisation's Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party: at [7].
>
> (2) The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are "00" and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000: at [10].
>
> (3) A BTI is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council reg 2913/92/EEC) on request from a trader, and is binding on the authorities in respect of the tariff classification of goods: at [12].

GIRs have legal force

23. Both the EU's tariff and the UK Tariff provide a systematic classification for all goods in international trade and are designed to ensure that, with the aid of interpretative rules, a product falls to be classified in only one place.

24. The CN is interpretated in accordance with the General Interpretative Rules which are contained as Section 1A of Part 1 of Annex 1 to Council Regulation 2658/87 and in Section 1 of Part Two of the UK Tariff (in both cases the "GIRs"), The GIRs have the force of law, and

were incorporated into UK law by Regulation 3(1)(a), Customs Tariff (Establishment) (EU Exit) Regulations 2020. The relevant GIRs are as follows:

> 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) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.
>
> (b) 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 heading 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.
>
> […]
>
> 6 For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings 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.'

Explanatory Notes (HSENs and CNENs)

25. As an aid to the interpretation of the scope of the various headings, the World Customs Organisation publishes Explanatory Notes to the Harmonised System ("HSENs") and the EU publishes Explanatory Notes to the Combined Nomenclature ("CNENs").

26. Although not legally binding, the HSENs and CNENs have been consistently held by the CJEU to be highly persuasive and in a *Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart - West* (Case C-35/93)) the CJEU stated that these notes

> constitute an important means of ensuring the uniform application of the common customs tariff by the Customs Authorities of the Member States and, as such, may be considered a valid aid to the interpretation of the tariff.

Case law principles on applying Tariff Headings

27. The CJEU has consistently held that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be found in their objective characteristics and properties, as defined in the wording of the relevant Headings or Subheadings, and of the notes to Sections and Chapters. It is then for the national court to determine the relevant "objective characteristics and properties".

28. The subjective wishes, beliefs or intentions of the importer or anyone else are not relevant to the classification process, nor is anything else that is not readily perceptible by the customs officer at the point of importation and based upon the objective characteristics of the goods being classified: *Farfalla Flemming v Hauptzollamy Muchen-West* (C-228/89) [1992] 1 CMLR 133.

Appeal procedure

29. The Tribunal has full appellate jurisdiction under section 16(4) and (5), Finance Act 1994. Regulation 3(1), Customs Reviews and Appeals (Tariff and Origins) Regulations 1997 (SA 1997/534) applies sections 13A to 16, Finance Act 1994 to any decision as to tariff classification of any goods.

30. Section 16(6), Finance Act 1994 provides that the burden of proof is on the appellant, Innovation Rehab.

HMRC'S CASE

31. The evidence of Mr Key is that the products in dispute ought to be classified under CN 3926 90 97 90

32. Mr Kay's evidence was that although Note 6 to CN Chapter 90 states that for the purposes of classification to heading 9021, “orthopaedic appliances” include appliances for:

> […] supporting or holding parts of the body following an illness, operation or injury.

Additional Note 2 limits the definition as follows:

> 2. For the purposes of subheading 9021 10 10, the expression “orthopaedic appliances” means appliances which are specially designed for a particular orthopaedic purpose, in distinction to products that might be used for various purposes (for example, products for overstrained joints, ligaments or tendons caused by sporting activities, type writing, and products which simply alleviate pain in the defective or disabled part of the body, for example, caused by inflammation).
>
> The “orthopaedic appliances” must completely prevent a specific movement of the defective or disabled part of the body (for example, joints, ligaments,

> tendons) in order to exclude further injuries or bodily deformities or an aggravation of such injuries or deformities, as distinct from other products that cannot prevent specific movements, yet prevent reflex movements (movements carried out subconsciously) through the relative inflexibility of those products due to, for example, flexible splints, pressure pads, non-elastic textile material, restrictions through "Velcro-type" straps.

33. Mr Kay's view is that with the exception of the Foot Protector, the products have not been specially designed for a particular orthopaedic purpose to aid with bodily deformities of bones or muscles. Further, the products in dispute do not completely prevent a specific movement of the defective or disabled part of the body. Mr Kay referred to the CNENs which included photographs of examples of products falling within 9021 10 10. These included rigid corsets and neck braces, and splints for thighs, knees and ankles. I note that the splits included hinges which allowed some degree of movement (although preventing other movements).

34. Mr Kay says that for these reasons, the products under appeal (other than the Foot Protector) cannot be classified under CN 9021.

35. Mr Kay also considers that the products cannot be classified under CN Chapter 94. This applies to:

> Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; luminaires and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name plates and the like; prefabricated buildings.

However, inflatable mattresses are specifically excluded from Chapter 94 by Note 1(a) which states:

> This chapter does not cover:
>
> (a) pneumatic or water mattresses, pillows or cushions, of Chapter 39, Chapter 40 or Chapter 63.

36. As the products are inflated with air and are therefore pneumatic, Mr Kay's view was that they do not come under this classification.

37. Mr Kay briefly referred to CN heading 9018 (medical instruments and appliances), but none of the sub-headings are appropriate for the products.

38. Where goods made of plastic, such as the products under appeal, are specifically excluded from other chapters, or do not meet the criteria of other headings in the Tariff, Mr Kay's evidence was that HMRC consider classification on the basis of their constituent materials. The products meet the terms of heading 3926, as they are made from plastic, and do not fall within any other heading within Chapter 39. CN heading 3926 is for

> Other articles of plastics and articles of other materials of headings 3901 to 3914.

39. The relevant classification code is:

> - Plastics and articles thereof - Other articles of plastics and articles of other materials of headings – Other (than specified elsewhere within Chapter 39).

40. For this reason, Mr Kay was of the view that the products (other than the Foot Protector) should be classified under CN 3926 90 97 90.

INNOVATION REHAB'S CASE

41. Mr Rogers submits that the mattress overlays and the wedge immobilise parts of the body. The overlays wrap around the body of the patient, effectively immobilising him or her –

which was particularly important in the case of spinal injuries. The wedge immobilised the patient's foot, as it prevented the foot from slipping off the bed. Mr Rogers acknowledged that not all of the products completely immobilised the body (or part of the body), but that was not what was required by Additional Note 2. Note 6 makes specific reference to insoles as being included, and these do not completely immobilise the foot.

42. Mr Rogers also referred to his telephone conversation with HMRC in 2005, when HMRC agreed that the correct classification for the product was 9021 10 10.

43. Mr Rogers referred to competitors' products being classified under Chapter 94, and submitted that there was no reason why his company's products should be classified differently.

WRITTEN SUBMISSIONS

44. Following the hearing, I invited the parties to give their written submissions on two issues.

45. The first related to the timing of the publication of Additional Note 2 in the EU Official Journal. The copy of the tariff included in the Hearing Bundle was taken from the UK Integrated Online Tariff last updated on 22 June 2022. It was only when I reviewed the EU Official Journal after the hearing to verify the source of Additional Note 2 that I ascertained that it was published in the EU Official Journal C119 dated 29 March 2019 at C119/389. This was after the first imports subject to the duty demand. I therefore invited the parties for their submissions on the extent to which Additional Note 2 applied to imports made before 29 March 2019.

46. The second related to the decision of the General Court of the European Union in the case of *Recombined Dairy System A/S v European Commission* ((2013) Case T-65/11) relating to the application of Article 220(2)(b) of the Community Customs Code (Council Regulation (EEC) No 2913/92) to errors by competent authorities. In the light of the telephone guidance given to Innovation Rehab in 2005, I invited the written submissions of the parties on the relevance of the decision of the General Court to this appeal.

Additional Note 2

47. HMRC's written response in relation to Additional Note 2 was that it does not apply retrospectively. As regards imports made prior to 29 March 2019, the term "orthopaedic" in commodity code 9021 10 10 would have to be given its ordinary and natural meaning. I was referred by HMRC to the "Oxford Dictionary" which defines orthopaedic as:

> Relating to the branch of medicine dealing with the correction of deformities of bones or muscles.

It was unclear from HMRC's submissions from which of the various dictionaries published by Oxford University Press this definition was taken. I was able to ascertain that the definition for "orthopaedic" given in the Oxford English Dictionary is:

> of, relating to, or involved in the surgical treatment of the musculoskeletal system.

Although this definition is possibly slightly wider than the definition cited by HMRC, I prefer it as I was able to verify its source.

48. HMRC submit that in the light of the definition they cited, the products in dispute would fail to meet the terms of heading 9021 as they are not orthopaedic appliances, rather they are designed to prevent skin injuries (and I note that the same argument would also apply if the OED definition was used). HMRC would not, they submit, have interpreted the meaning of orthopaedic appliances to include any appliance that could correct any bodily deformity, as it

is implicit in the definition that the appliance must relate only to orthopaedic appliances, and exclude appliances that can be utilised in other branches of medicine – for example, both seat belts and crash helmets both prevent bodily deformities, but are not orthopaedic in either design or use.

49. I reject this submission for two reasons. The first is that Note 6 provides a definition for the meaning of "orthopaedic appliances", and so the term is *not* to be given its ordinary or natural meaning. Whilst orthopaedic appliances are defined to include appliances for preventing or correcting bodily deformities (which would fall within both dictionary definitions), they are defined by Note 6 also to include appliances for supporting or holding parts of the body following an illness, operation, or injury. And I find that this latter part of the Note 6 definition is apt to describe all of the imported products.

50. Secondly, many (but not all) of the imported products relate to, or are involved in, the surgical treatment of the musculoskeletal system. Mr Roger's unchallenged evidence was that, for example, the Mattress Overlay immobilised a patient, which was particularly important in the case of spinal injuries – and although the Mattress Overlay would not be used in the course of the surgery itself, it would be "involved in" the treatment in order to prevent pressure ulcers whilst the patient was (for example) in bed either recovering from, or awaiting, surgery.

Errors by competent authorities

51. HMRC's written submission relating to *Recombined Dairy System A/S* was that although the EU principle of legitimate expectation exists, the FTT does not have the jurisdiction to deal with such claims as its jurisdiction is entirely statutory and that the correct remedy would be to seek judicial review. For this appeal, HMRC submit that the Tribunal's power is limited to the liability of the person and the amount of the assessment. I was referred to a number of decisions in support of this submission, including *HMRC v Hok Ltd [2012] UKUT 363* (TCC).

52. Further, HMRC submitted that, notwithstanding the decision of the Upper Tribunal in *KSM Henryk Zeman PP Z.o.o. v HMRC* [2021] UKUT 71 (TCC) as to the exercise of discretion, HMRC were obliged by virtue of Articles 101 to 114 of the UCC to recover any amounts of customs duty and VAT that are found to be legally due but were not collected at the time declarations were accepted and passed. Further, under Article 28 of the Treaty on the Functioning of the European Union, all Member States must apply the common external tariff to imports from third counties. HMRC submit that they therefore have no discretion as to whether or not to levy customs duty.

53. But these written submissions ignore the fact that the decision of the General Court of the European Union in the case of *Recombined Dairy System A/S v European Commission* ((2013) Case T-65/11) concerns the application of Article 220(2)(b) of the Community Customs Code to errors by competent authorities (such as HMRC prior to Brexit). This decision relates to the application of statutory provisions, and not to concepts of English administrative law.

54. As regards HMRC's submissions on the decision of the Upper Tribunal in *KSM Henryk*, they misunderstand that decision. The decision does not relate to the exercise of any discretion by HMRC, but rather whether public law defences (such as legitimate expectation) are available to the taxpayer. The Upper Tribunal held that held the starting point is that a taxpayer should be able to challenge the validity of a decision made by HMRC on public law grounds. It is only if the statutory scheme for the appeal expressly or by implication excludes this possibility that a public law defence will not be possible. As regards this appeal, I need only consider the availability of public law defences in relation to the post-Brexit importations, as Article 119 governs importations prior to Brexit.

55. Since the release of the General Court's decision in *Recombined Dairy System A/S*, the Community Customs Code was repealed and replaced by the UCC in October 2013. Article 220(2)(b) of the Community Customs Code was replaced by Article 119 of the UCC, which addresses error by the competent authorities. The relevant provisions of Article 119 are as follows:

> **Article 119 Error by the competent authorities**
>
> 1. […], an amount of import or export duty shall be repaid or remitted where, as a result of an error on the part of the competent authorities, the amount corresponding to the customs debt initially notified was lower than the amount payable, provided the following conditions are met:
>
> (a) the debtor could not reasonably have detected that error; and
>
> (b) the debtor was acting in good faith.

56. Article 116(5) provides that no repayment or remission shall be granted in cases of deception by the debtor.

57. Article 121 provides that applications for remission in the case of error by the competent authority must be made within 3 years of the date of notification of the customs debt, and where an appeal has been lodged against the notification of the customs debt (which would include an appeal to the FTT), the time limit is suspended for the duration of the appeal proceedings.

58. Although not cited to me, I am also aware of the decision of the CJEU in the case of *Covita* [1998] ECR I-7711 which considered the conditions that needed to be fulfilled for recovery of duty to be permitted in the context of the predecessor to Article 220(2)(b). The tests were summarised by the court in the case of *Ilumitronica* [2002] ECR I-10433 as follows:

> "38 First, non-collection of the duties must have been due to an error made by the competent authorities themselves. Second, the error they made must be such that the person competent, acting in good faith, could not reasonably have been able to detect it in spite of the professional experience and exercise of due care by him. Finally, he must have complied with all the provisions laid down by the legislation in force so far as his customs declaration is concerned (see, in particular, *Hewlett Packard France*, paragraph 13, *Faeroe Seafood* paragraph 83 and Case C-370/96 *Covita* [1998] ECR I-7711, paragraphs 25 to 28).
>
> 39. The fulfilment of those conditions must be assessed in the light of the purpose of Article 5(2) of Regulation 1697/79, which is to protect the legitimate expectation of the person liable that all the information and criteria on which the decision whether or not to proceed with recovery of customs duties is based are correct (see, in particular, Case C-348/89 *Mecanarte* [1991] ECR I-3277, paragraph 19 and *Faroe Seafood*, paragraph 87).

59. I draw out the following relevant points from these decisions and Article 119:

> (a) Post-clearance payment of import duties is limited to cases where the payment is justified and is compatible with a fundamental principle of EU law such as that of the protection of legitimate expectations.
>
> (b) The remission of import duties constitutes an exception to the normal procedure and, consequently, Article 119 must be interpreted strictly.
>
> (c) The protection of legitimate expectations arises only if it was the competent authority (in this case, HMRC) which created the basis for those expectations. Only errors attributable to acts of HMRC create an entitlement to the waiver of

subsequent recovery of customs duties. That protection does not arise if HMRC have been misled by, for example, incorrect declarations or descriptions.

(d) The error must not reasonably be capable of detection by the person liable for payment.

(e) The person liable for payment must act in good faith.

(f) The person liable for payment must have complied with all the provisions laid down by the legislation in force as regards the customs declaration (other than – obviously – as regards the error itself);

(g) The fact that the liable person did have a BTI for the products concerned does not mean that the customs authorities have not committed an error. Any other interpretation would undermine the application of Article 220(2)(b) of the Customs Code. Customs authorities can commit errors in situations in which the applicant was not the holder of or had not requested BTIs.

(h) A telephone interview can give rise to an error.

DISCUSSION

60. It is convenient to group the importations into three periods. The first period is from 14 September 2018 (the earliest date covered by the Post Clearance Demand Note) to 28 March 2019 (the day prior to the date on which Additional. Note 2 was published in the EU Official Journal). The second period is from 29 March 2019 to 31 January 2020 (Brexit). The final period is from 1 February 2020 to 21 December 2020 (the final date covered by the Post Clearance Demand Note).

First period – 14 September 2018 to 28 March 2019

61. Importations made in this period were made prior to the publication of Additional Note 2.

62. HMRC submit that Additional Note 2 does not have retrospective effect. But they submit that even so, none of the products in dispute fall within CN 9021 10 10 00 as they are not "orthopaedic appliances" within the ordinary and natural meaning of that term. For the reasons given above I have rejected this submission.

63. I find that all of the products fall within the definition of "orthopaedic appliances" within Note 6 to Chapter 94.

64. The fact that an HMRC officer told Mr Rogers in 2005 that the products are within the scope of CN 9021 10 10 00 reinforces my finding that, absent Additional Note 2, the products fall within the definition of "orthopaedic appliances" for the purposes of Note 6.

Second period – 29 March 2019 to 31 January 2020

65. Additional Note 2 was published in the EU Official Journal on 29 March 2019.

66. Under the terms of Article 119, Innovation Rehab can only rely upon an error made by HMRC providing that error was not reasonably capable of detection by them. Because of its publication in the Official Journal, Innovation Rehab would be deemed to have had notice of Additional Note 2 with effect from its publication. It therefore follows that from 29 March 2019 they were reasonably capable of detecting that Additional Note 2 might apply to the classification of their products.

67. I therefore find that Innovation Rehab could no longer rely on HMRC's 2005 guidance in respect of products imported after 29 March 2019.

68. The question then arises as to which (if any) of the products could continue to be treated as orthopaedic appliances within CN 9021 10 10 00 after 29 March 2019.

69. Mr Rogers did not provide any evidence that any of the various cushions (Pre-inflated cushion, Bariatric cushion, Wheelchair cushion/multicare pad, Riser Recliner Chair Cushion (Long), and Riser Recliner Chair Cushion (Short)) prevented specific movement of any part of the body. I find that these do not satisfy the requirements for orthopaedic appliances within Additional Note 2. I agree with Officer Kay that these cannot be classified under Chapter 94. I agree that they are properly classified under CN classification code 3926 90 97 90. I

70. However, Mr Rogers evidence was that the mattresses – the Mattress Overlay, the Bariatric Mattress Overlay, and the Trolly Topper - wrap around the patient, holding him or her immobile. I find that these satisfy the requirements of Additional Note 2 and are properly classified under CN 9021 10 10 00.

71. HMRC accept that the Foot Protector satisfies the requirements of Additional Note 2 and is properly classified under CN 9021 10 10 00.

72. The only other product imported by Innovation Rehab is the Multipositional Wedge, which prevents a patient's leg from dropping off the side of the bed. As this does not completely prevent a specific movement, I find that it falls outside Additional Note 2, and I agree with Officer Kay that this product is properly classified under CN code 3926 90 97 90.

Final period - 1 February 2020 to 21 December 2020

73. This period is after Brexit, and the provisions of EU law (and the UCC) no longer apply.

74. Customs duties for this period are governed by the UK Tariff and the Taxation (Cross-border Trade) Act 2018. The provisions of Article 119 of the UCC and general principles of EU law no longer apply.

75. Note 6 and Additional Note 2 have been published as part of the UK Tariff in the same terms as they applied to the Combined Nomenclature.

76. I find (for the same reasons given above in relation to the second period) that the Mattress Overlay, the Bariatric Mattress Overlay, the Trolly Topper, and the Foot Protector are properly classified under code 9021 1010 00. The other products, (Pre-inflated cushion, Bariatric cushion, Wheelchair cushion/multicare pad, Riser Recliner Chair Cushion (Long), the Riser Recliner Chair Cushion (Short), and the Multipositional Wedge) are properly classified under code 3926 9097 90.

77. Whilst a defence of legitimate expectation may apply to challenge the validity of a decision made by HMRC, I find that even if such a defence were available in relation to Advanced Tariff Rulings and Post Clearance Demand Notes, it is not available in the circumstances of this appeal. Additional Note 2 is clearly apparent on the face of the UK Tariff, and Mr Rogers is aware that only the mattresses, Trolly Topper and Foot Protector can completely prevent a specific movement. Innovation Rehab could therefore no longer have any legitimate expectation that the other products fell within the definition of "orthopaedic appliances".

CONCLUSIONS

78. I find that all of the products imported by Innovation Rehab in the period up to and including 28 March 2019 were properly classified under CN 9021 10 10 00.

79. I find that the Pre-inflated cushion, Bariatric cushion, Wheelchair cushion/multicare pad, Riser Recliner Chair Cushion (Long), and Riser Recliner Chair Cushion (Short) imported on or after 29 March 2019 ought to have been classified under CN 3926 90 97 90 (or the corresponding code in the UK Tariff).

80. I find that the Mattress Overlay, the Bariatric Mattress Overlay, and the Trolly Topper imported on or after 29 March 2019 were correctly classified under CN 9021 10 10 00 (or the corresponding code in the UK Tariff).

81. The Post Clearance Demand Note should be amended to reflect this "in principle" decision. If the parties are unable to reach agreement on the amended amount of duty within one month of the release of this decision, I give leave for them to apply for the Tribunal to determine the duty that is payable.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

82. 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.

NICHOLAS ALEKSANDER
TRIBUNAL JUDGE

Release date: