[2013] UKUT 0394 (TCC)

Appeal number FTC/23/2012

Customs duty – classification - whether mastectomy bra a brassière under CN 6212 or an orthopaedic device etc under CN 9021 – mastectomy bra an orthopaedic device under CN 9021 10 10 by virtue of Note 6 to Chapter 90 - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

AMOENA (UK) LIMITED

Appellant

- and –

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Tribunal: Judge Greg Sinfield
Judge Nicholas Aleksander

Sitting in public in London on 25 April 2013

Tim Eicke QC, instructed by Bell Davies, for the Appellant

Sarabjit Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant ("Amoena") imports and sells the Carmen mastectomy bra. The bra is designed to hold silicone breast forms worn by women following removal of all or part of a breast or breasts. In 2009, Amoena applied to the Respondents ("HMRC") for a binding tariff information ("BTI") to determine the proper classification of the Carmen mastectomy bra in the Combined Nomenclature ("CN") of the European Union ("EU") common customs tariff and thus the customs duty payable on importation of the bra into the EU. HMRC issued a BTI decision classifying the bra as a brassière in CN heading 6212 subject to 6.5% customs duty. Amoena believed that the bra should have been classified as an orthopaedic appliance in CN heading 9021 which is free from duty.

2. Amoena appealed to the First-tier Tribunal ("the FTT"). In an amended decision released on 28 November 2011, [2011] UKFTT 675 (TC), the FTT held that the Carmen mastectomy bra was not an orthopaedic appliance but was a brassière and dismissed Amoena's appeal.

3. Amoena now appeals to the Upper Tribunal on the ground that the FTT failed to apply the correct principles and erred in law when it classified the Carmen mastectomy bra as a brassière for customs duty purposes. The only issue in this appeal is whether the Carmen mastectomy bra should be classified as an orthopaedic appliance, artificial part of the body or other appliance worn or carried to compensate for a defect or disability in CN heading 9021. If it is not so classifiable, there is no dispute that it should be classified as a brassière in CN heading 6212.

4. For the reasons given below, we have decided that, on the basis of the facts found by the FTT, the Carmen mastectomy bra should be classified as an orthopaedic appliance under CN 9021 10 10 and we allow Amoena's appeal.

Combined Nomenclature

5. Customs duty on goods imported into the EU is charged by reference to a common customs tariff. Until 31 March 2010, Article 20 of the Community Customs Code in Council Regulation (EEC) No 2913/92 provided that the tariff classification of goods is determined by reference to the CN. Council Regulation (EEC) No 2658/87 of 23 July 1987, as amended, contained the CN which set out descriptions of goods and the rates of duty applicable to those goods.

6. Chapter 62 of the CN is entitled "Articles of apparel and clothing accessories, not knitted or crocheted". CN heading 6212 applies to "Brassières, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted". Note 2(b) to Chapter 62 provides:

> "2. This chapter does not cover:
>
> …

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

7. It is clear from Note 2(b) to Chapter 62 that articles of apparel and clothing accessories (including brassières) are capable of being orthopaedic appliances, surgical belts, trusses or the like in CN heading 9021. If the Carmen mastectomy bra is an orthopaedic appliance or the like then it cannot be classified as a brassière in CN Heading 6212.

8. Chapter 90 of the CN is entitled "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof". CN heading 9021 applies to: "Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability". The relevant subheadings in this case are as follows:

9021 10 – Orthopaedic or fracture appliances

9021 10 10 – – Orthopaedic appliances

9021 31 – Other artificial parts of the body

9021 31 00 – – Artificial joints

9021 39 – – Other:

9021 39 90 – – – Other

9021 90 – Other

9021 90 90 – – Other

9. There are some notes to Chapter 90 that must be taken into account in determining whether goods should be classified in heading 9021. The relevant notes are as follows:

"1. This chapter does not cover:

…

(b) supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derives solely from their elasticity …

2. Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:

…

(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus … are to be classified with machines, instruments or apparatus of that kind.

…

6. 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."

10. Note 1(b) to Chapter 90 only applies to items (supporting belts or other support articles of textile material) that would otherwise fall within Chapter 90.

11. Note 6 to Chapter 90 provides a complete definition of orthopaedic appliances for the purposes of CN heading 9021 but the heading covers more than just orthopaedic appliances. In particular, it includes other artificial parts of the body, other appliances which are worn or carried to compensate for a defect or disability and, by note 2(b) to the Chapter, parts and accessories suitable for use solely or principally with a particular kind of machine, instrument or apparatus in heading 9021.

12. The headings and sub-headings of the CN are to be interpreted in accordance with the General Rules for the Interpretation of the Nomenclature ("GIRs") set out in Section 1 of Part 1 of the CN. The GIRs have the force of law. The GIRs relevant to this appeal 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.

…

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.

…

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis,

> to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

Facts

13. On 12 October 2009, Amoena applied to HMRC for a BTI for the Carmen mastectomy bra describing it as:

> "… a mastectomy bra which is worn by post operated women following amputation of a breast or breasts. The bra is especially designed to hold silicone breast forms and has left and right pockets to hold the breast forms firmly in place. The other design features which differentiate the mastectomy bra from an ordinary bra are the wide padded straps which help support the weight of the breast form and help to avoid undue stress associated with neck/shoulder problems for the post operated women. The bra is also designed to ensure the breast form itself does not show and therefore has a specific cut and shape dissimilar to a conventional bra."

14. Amoena contended that the Carmen mastectomy bra was an orthopaedic appliance within heading 9021 of the CN because it is worn to compensate for a disability ie following amputation. Amoena stated that the bra was excluded from the normal brassière heading (CN 6212) by Note 2(b) to Chapter 62 which states that Chapter 62 does not cover orthopaedic appliances, surgical belts, trusses or the like.

15. In a letter dated 16 October 2009, HMRC informed Amoena that they did not consider that the Carmen mastectomy bra was an orthopaedic appliance and it did not fall within CN heading 9021. After further correspondence between the parties, HMRC classified the Carmen mastectomy bra as a brassière within CN sub-heading 6212 10 90 in a letter dated 29 January 2010. Amoena appealed HMRC's decision.

16. The FTT stated in [14] of the decision that the issue which it had to decide was whether the Carmen mastectomy bra should be classified as a brassière in CN subheading 6212 10 90 or as an orthopaedic appliance in subheading 9021 10 10.

17. The FTT carefully examined the Carmen Mastectomy bra and a normal bra provided for comparison. The FTT's findings based on the physical appearance of the bra are set out at [17] – [19]. In case it is not obvious to the reader, we point out that the FTT panel in this case was entirely female and thus the tribunal was not only expert in matters of customs classification but also experienced in assessing the characteristics of women's undergarments. In [17], the FTT described the differences between the Carmen mastectomy bra and a normal bra. The FTT stated that:

> "The most noticeable differences between the two garments was that the mastectomy bra had two side supports on the outside of each breast, which were absent in the normal brassière which we saw, and the straps in the mastectomy bra were positioned centrally over the breasts whereas in the normal bra the straps were marginally over to the sides. It was Mrs Seehaus's evidence that the area under the bust

> was not elasticated, however, we do not accept this evidence, it appearing to us that there was some give in that area. She also referred to the fact that there was more fabric used to cover what might be called the cleavage, i.e. the middle part of the bra, than would be found in a normal brassière."

18. In [18], the FTT set out the key features of the Carmen Mastectomy bra as described by Mrs Seehaus, the product manager for Amoena's German parent company, before finding, at [19], that it did not have any features that would not be found in an ordinary brassière

> "although the positioning of the pockets to hold the breast form in conjunction with the higher cup to cover it is not such as would usually be found in an ordinary brassière where the opening is more normally used in conjunction with a low cut bra, and where it is found, it is in order to insert padding to create an appearance of a larger bust; the central positioning of the straps is a feature which we accept it would be unusual to find in a normal brassière."

19. The FTT's findings based on the purpose of the bra are set out at [21] – [25]. Although referred to as a mastectomy bra throughout the decision, the FTT accepted the evidence of Mrs Seehaus that it was not solely for post-mastectomy use, but was also designed for patients who had had a lumpectomy, ie removal of a tumour, or where there had been breast reconstruction.

20. In [23], the FTT stated that it found that the primary purpose of the Carmen Mastectomy bra was to hold the silicone breast form(s) in place. In [25], the FTT accepted that another purpose of the breast form and the mastectomy bra was the lessening of the psychological impact of having had a mastectomy but found that that purpose was not obvious from an examination of the Carmen mastectomy bra.

21. The FTT made several important findings of fact in [27]. First, it found that the purpose of the Carmen Mastectomy bra was not discernible from its objective appearance. Then it held that:

> "We do not find that the mastectomy bra is itself worn to compensate for a defect or disability within 9021, because it is worn to carry the breast form, and without the breast form it would not achieve any of the above purposes ascribed to it. The breast form is worn to compensate for a defect, and also for the various reasons given by Mrs Seehaus above, that cannot be said of the mastectomy bra itself. Its appearance is so close to that of a normal brassière that it could not be determined from its objective characteristics that it is worn to compensate for a defect or disability …"

22. Finally, having described the materials from which Carmen Mastectomy bra was made, the FTT concluded at [27] that:

> "We do not consider that the support provided by the mastectomy bra to the breast form derived solely from its elasticity, and therefore the garment should not be excluded from Chapter 90 on the basis of Note 1(b)."

FTT's decision

23. The FTT set out the reasons for its decision that the Carmen mastectomy bra should be classified as a brassière and not as an orthopaedic appliance at [32] and [33].

24. The FTT concluded at [32] that:

> "CN 9021 (set out above) refers where relevant to "appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability". It also refers to "artificial parts of the body". Whilst we consider that the breast form is an artificial part of the body, we do not find that the mastectomy bra itself can so be described. It is worn in order to carry an artificial part of the body without being such itself. It is also worn (in cases where there is a single mastectomy) to carry the normal breast. … The breast form could not compensate for the [bodily] deformity without a mastectomy bra because there is no way that it could achieve its desired compensatory effect on its own, there being nothing to hold it in place. The mastectomy bra does not by itself correct the deformity caused by the absence of relevant muscle structure that previously held in place a natural breast. It is only through the combination of breast form and mastectomy bra that the existing bodily deformities can be corrected, further bodily deformities prevented and the relevant part of a woman's body (whether artificial or otherwise) be supported or held. The mastectomy bra cannot perform any corrective functions on its own without being used in conjunction with the breast form and therefore it cannot come within 9021."[1]

25. At [33], the FTT stated that:

> "Our conclusions are not based on the material composition of the bra. On examination of the mastectomy bra we could find no evidence that its function was not just the containment of the breast form, but was also the prevention of shoulder pain and problems arising from the absence of lymph nodes. We are fortified in our conclusion as to the objective characteristics of the mastectomy bra by the fact that it is symmetrical. It is not made to be either specifically left handed or right handed but may be used equally by a person who is missing either a left or a right breast or both."

26. At [34], the FTT referred to certain decisions of the customs authorities in the United States of America and the Republic of Ireland to the effect that a mastectomy bra was properly classified as a brassière under heading 6212. The FTT observed that:

> "These decisions relied on a finding that the mastectomy bras were excluded from 9021 by Note 1(b) [to Chapter 90], ie that their intended effect derived solely from elasticity. Whilst we accept the need for consistency in the approach of the different authorities who are

[1] The passage quoted from [32] is from the amended version of the decision and not from the uncorrected one which was still on the FTT website at the time of writing.

> considering very similar products, we are not governed by these cases in arriving at our decision to dismiss this appeal, and indeed arrive at our conclusion that the mastectomy bra is properly to be classified under commodity code 6212 1090 00 for the reasons stated above, and not because of Note 1(b)."[2]

Grounds of appeal

27. Amoena now appeals on the grounds that the FTT erred in law in that:

(1) it failed to apply correctly or at all the guidance given by the CJEU in Case C-514/04 *Uroplasty BV v Inspecteur van de Belastingdienst – Douane district Rotterdam* [2006] ECR 1-67219 ("*Uroplasty*") and reached conclusions wholly inconsistent with that guidance; and/or

(2) it failed to apply correctly or at all the guidance given by the CJEU in Joined Cases C-260/00 to C-263/00 *Lohmann GmbH & Co KG et al v Oberfinanzdirektion Koblenz* [2002] ECR I-10045 ("*Lohmann*") and reached conclusions wholly inconsistent with that guidance; and/or

(3) it wrongly and without giving any reasons rejected Amoena's submission that the classification proposed by HMRC and later adopted by the FTT leads to unnecessary inconsistencies in the classification of the Carmen mastectomy bra for different but closely related purposes, namely VAT and the Medical Devices Directive and thereby undermines any sense of legal certainty; and/or

(4) it wrongly dismissed the appeal on the basis, at [33], that "the bra is imported independently of the prosthesis [and, consequently,] the function of the prosthesis cannot determine the correct classification of the bra".

Authorities on the approach to classification

28. In Case C-400/05 *B.A.S. Trucks BV v Staatssecretaris van Financien* [2007] ECR I-311, the CJEU held at [27] – [29]

> "27. It should be noted at the outset that it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the combined nomenclature and of the notes to the sections or chapters.
>
> 28. The explanatory notes drawn up, as regards the combined nomenclature, by the Commission and, as regards the [Harmonised System ("HS")], by the World Customs Organisation may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force.
>
> 29. In addition, the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and

[2] The passage quoted from [34] is from the amended version of the decision and not from the uncorrected one which was still on the FTT website at the time of writing.

that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties."

29. In *Uroplasty*, which concerned CN heading 9021, the Advocate General (Kokott) explained the correct approach to classifying commodities in the Combined Nomenclature at [42] – [44] of her Opinion as follows:

> "42. First, the intended use and material composition of the article must be precisely determined. Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken according to the article's intended use and material composition. There must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters a definitive classification may be reached. If not, then in order to resolve the conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules. Lastly, classification must be made under the subheadings.
>
> 43. Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first subheading can be compared only with the wording of other first subheadings of the same heading; and the wording of a second subheading can be compared only with the wording of other second subheadings of the same first subheading.
>
> 44. In this exercise the wording of the headings and the explanatory notes of the CN are to be interpreted so as to be consistent with the Harmonised System. The Court has consistently held that the explanatory notes drawn up, as regards the Harmonised System, by the World Customs Organisation, may be an important aid to the interpretation of the individual tariff headings, although they do not have legally binding force."

30. The CJEU in *Uroplasty* adopted the same approach as the Advocate General and confirmed the relevance of the intended use of an article to its classification at [40] - [42] where it said:

> "40. According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found 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.
>
> 41. The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope.
>
> 42. For the purposes of classification under the appropriate heading, it is important, finally, to recall that 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."

CJEU guidance on CN 9021

31. In *Lohmann*, the importer applied for a binding tariff information (BTI) in respect of orthopaedic imports such as lumbar and wrist supports. The BTI issued by the tax authorities classified them under CN heading 6307 90 10 for knitted textiles, rather than under CN heading 9021 for orthopaedic appliances as the importer had sought. On a reference, the CJEU referred to explanatory notes from the World Customs Organization Harmonised System (HSENs) and held that products fell within CN heading 9021 if they had physical characteristics (materials or operation) distinguishing them from ordinary belts or general supports.

32. The CJEU in *Lohmann* observed at [30]:

> "30. … it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters"

33. The CJEU in *Lohmann* addressed the issue of when everyday goods, normally classified under their generally applicable CN heading, should be classified as products in CN heading 9021 because they have been designed or adapted to perform a medical function. The CJEU held at [39] and [40]:

> 39. The criteria for distinguishing simple or ordinary products from those serving a medical purpose therefore include the method of manufacture of the product concerned, the nature of the materials of which it is made, its adjustability to the handicaps which it is intended to correct or other special characteristics, in particular the specificity of its purpose.
>
> 40. Where a product exists in different versions and where, in its simple or ordinary version, it serves a general purpose, whilst in a different version designed to perform a medical function it is used for orthopaedic purposes, it is only in the latter version and by application of the abovementioned criteria that it is to be classified in CN heading 9021.

34. The products under consideration in *Lohmann* are similar to the bra which is the subject of this case in that they are versions of everyday products adapted or intended for medical use. Applying the CJEU's guidance clearly requires consideration of the method of manufacture of the Carmen mastectomy bra, the nature of the materials of which it is made, its adjustability and any other special characteristics, in particular how specifically it is designed or adapted for its purpose.

35. The CJEU in *Lohmann* also considered the extent to which the fact that a product is mass produced affected the suitability and specificity of the product to its intended medical function. The CJEU stated at [41] and [42]:

> 41. With regard to adjustment to handicaps, this can be done either at the stage of manufacture of the product or, in the case of a prefabricated product, at a later stage, in particular at the stage of use, by means of special mechanisms afforded by the product itself, whether by a doctor or by the patient himself.
>
> 42. Since technical progress in the field of manufacturing orthopaedic appliances increasingly enables such appliances to be mass produced and subsequently adjusted to meet the patient's specific needs, in particular at the time of their use, to insist upon adjustment to the patient's needs at the time of manufacture would be unreasonable and could increase the financial burdens on the social security systems."

36. This shows that the fact that a product is mass produced and is only adjusted to be suitable for a patient later does not mean that it necessarily lacks the required specificity of purpose. We do not understand the CJEU's reference to the financial burdens on the social security systems as being a criterion for a product to be classified in CN heading 9021 but simply as a consequence that could follow from a requirement that only bespoke products could be orthopaedic appliances.

37. The CJEU in *Lohmann* gave its conclusion on the issue of classification at [45] as follows:

> "45. The answer to the first question in each of the cases is therefore that CN heading 9021 must be interpreted as meaning that products such as wrist orthoses, lumbar support belts, elbow supports and knee supports fall within that heading if they display characteristics which distinguish them, in particular by the materials of which they are made, their method of operation or their adjustability to the patient's specific handicaps, from ordinary belts and supports for general use. It is for the national court to ascertain whether that is the case in the main proceedings."

38. The second question in *Lohmann* concerned the meaning of "solely" in Note 1(b) to CN Chapter 90. The CJEU gave the following guidance at [48]:

> "48. It is clear from the wording of Note 1(b) to CN Chapter 90 that, if the elasticity of the belt or support is the sole factor which contributes to the intended effect on the organ to be supported or held, classification in heading 9021 is precluded. Conversely, if other factors contribute to that effect to a significant extent, the note does not apply."

39. The CJEU's answer to the second question was at [51]:

> "51. The answer to the second question in each of the cases is therefore that the term 'solely' in Note 1(b) to CN Chapter 90 must be interpreted as meaning that the note does not exclude from that chapter belts and supports of which characteristics other than their elasticity contribute to a significant extent to the intended effect on the organ to be supported or held."

This shows that the word "solely" in Note 1(b) means that there are no characteristics other than the elasticity of the material that have a significant effect on the organ being supported or held.

40. *Uroplasty* concerned the classification of silicone elastomer flakes imported in sterile one kilogram packages. After importation, the silicone flakes are mixed with a hydrogel and placed in syringes. The silicone flake hydrogel mixture is implanted into the human body to treat incontinence. The issue was whether the silicone flakes should be classified as an artificial body part under CN heading 9021 or a plastic or a medicament under two possible alternative CN headings.

41. The Advocate General in *Uroplasty* discussed the classification according to the wording of the headings at [59] - [61] of her Opinion:

> "59. Although one would normally regard the term 'appliance' [in CN heading 9021] as referring to some sort of technical apparatus, an approach based on the wording of the HS requires a broad interpretation. The English word 'appliance' means not only 'apparatus', 'instrument', or 'device' but also 'medical support' or 'support'. That the English word 'appliance' is in fact intended to include the German 'Hilfsmittel' ('medical support') is demonstrated for example by the first item specifically mentioned, indicating that crutches are 'orthopaedic appliances', which in Germany are regarded as medical supports ('Hilfsmittel').
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> 60. The French version uses the phrase 'articles et appareils' almost throughout as the equivalent to the English 'appliance', even where the English version uses the phrase 'artificial parts of the body'. Whereas 'appareil' could be rendered in German as 'Apparat' ('apparatus') or 'Gerät' ('instrument'), 'article' corresponds best to the German 'Ware' ('product') or 'Gegenstand' ('object'). This too is intended to encompass medical supports and other objects having a medical purpose. This confirms that a broad interpretation is to be given to the German word 'Vorrichtung' where it appears in the CN.
>
> 61. Thus, read as a whole heading 9021 CN assumes a broad interpretation and is intended to cover all medical objects by means of which the medical purposes identified in the heading are pursued. Accordingly, the term 'appliance' does not restrict the technical structure of a product but is intended to encompass also 'medical supports', 'supports', 'products' and 'objects' which are intended to compensate for defects by being implanted into the body."

42. The CJEU in *Uroplasty* agreed with the Advocate General's analysis and held at [52]:

> "As the Advocate General explained in paragraph 61 of her Opinion, the term 'appliance' is not restricted to the technical structure of a product. It must therefore be held that the term includes products which are intended to compensate for a defect by being implanted in the body within the meaning of heading 9021 of the CN."

43. At [66] - [69] of her opinion in *Uroplasty*, the Advocate General discussed the classification according to the wording of the subheadings and considered the meaning of orthopaedic appliance. In [66], the Advocate General considered that "an orthopaedic appliance must … be intended to substitute for at least part of some bodily function." The Advocate General held in [67] that "… the flakes do not substitute for muscle fibres, because they cannot perform their function or provide their strength, but they compensate for their failure by means of a different mechanism".

44. In [69], the Advocate General observed that:

> "… orthopaedics … is concerned with defects in body parts which support movement, such as bones, joints, muscles and tendons. This is not affected by the new Explanatory Note 6 to Chapter 90 CN, since 'supporting or holding parts of the body following an illness' is performing the function of muscles and tissue which provide support."

45. In conclusion, the Advocate General suggested that the silicone flakes should be classified under subheading 9021 90 90 CN as an 'other appliance … implanted in the body, to compensate for a defect'.

46. The CJEU agreed with the Advocate General's analysis and held in [55] – [56] that:

> "55. The function of the [silicone flakes] … is not therefore to replace a defective muscle in the human body as would a prosthesis, but to enable new tissues to develop which palliate the problems connected with incontinence. It follows that, as the referring court correctly considers, the function of the flakes does not correspond to the terms of subheading 9021 30 90 [Other artificial parts of the body – other] of the CN."
>
> 56 It also follows from paragraphs 52 and 53 of this judgment that the product is an appliance to be implanted in the body which, since it does not come within any of the other subheadings of heading 9021 of the CN, must therefore be classified under subheading 9021 90 90 of the CN as 'other appliances'."

47. We note that although the CJEU refers to the appliance being implanted in the body that is because it was a fact in *Uroplasty* that the silicone flakes were to be implanted. The language of heading 9021 clearly includes appliances which are worn or carried as well as appliances which are implanted.

48. It seems to us, applying the Advocate General's analysis in [66] - [69] of her Opinion , that something which substitutes for defective muscles, tendons or tissue, ie performs their function or provides their strength, should be regarded as an orthopaedic appliance even without Note 6 to Chapter 90 CN. The benefit of Note 6 to Chapter 90 CN is, of course, that it establishes beyond doubt that "orthopaedic appliances" in CN heading 9021 includes appliances that support or hold parts of the body following an illness, operation or injury.

Submissions and discussion

49. Mr Tim Eicke QC, who appeared for Amoena, submitted that the Carmen mastectomy bra falls to be classified under CN heading 9021 either on its own or as an accessory to the breast form which is an artificial part of the body. Mr Eicke submitted that the FTT made an error in that it placed too much emphasis on what can be determined by looking at the objective characteristics of the bra. Mr Eicke submitted that, after careful fitting and selection of the breast form, the bra is an accessory to the breast form. He also submitted that the bra could be a component part. Mr Eicke referred to *Uroplasty* which concerned silicone flakes that were not obviously an orthopaedic product at the time of importation as they could only be used for the medical purpose for which they were developed and intended later when they had been combined with a hydrogel and placed into syringes. We note that the flakes in *Uroplasty* are analogous to the breast form and the hydrogel is analogous to the mastectomy bra. The decision in *Uroplasty* was not concerned with the customs classification of the hydrogel.

50. Mr Eicke submitted that, applying the approach to classification described by the AG in [42] – [44] of *Uroplasty*, it is necessary to look at the material composition and intended use. It seems to us that the FTT accepted this at [22] where it said that

> "The intended use of the product is relevant to its classification if, in the words of the ECJ itself in the case of *Uroplasty* at paragraph 42: "it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the products objective characteristics and properties. … In this case, as the Advocate General observed in paragraph 48 of her opinion, the polydimethilsiloxane [the product being considered] could be classified, either according to its essential characteristics or according to its objective purpose under one of [four different] headings of the CN."

51. Mr Eicke contended that the FTT failed to apply correctly or at all the guidance given by the CJEU in *Uroplasty* and *Lohmann* and that it reached conclusions wholly inconsistent with that guidance. Mr Eicke contended that, applying the Advocate General's analysis at [59] – [61] of *Uroplasty*, the breast form is an appliance or apparatus for the purposes of Chapter 90 and heading 9021.

52. Mr Eicke also referred to Council Directive 93/42/EEC of 14 June 1993 concerning medical devices ("the Medical Devices Directive"). The term "medical device" is broadly defined. The Directive defines "accessory" as

> "an article which whilst not being a device is intended specifically by its manufacturer to be used together with a device to enable it to be used in accordance with the use of the device intended by the manufacturer of the device".

For the purposes of the Medical Devices Directive, accessories are treated as medical devices in their own right. It was not disputed that the Carmen mastectomy bra was a medical device under the Directive. The term "accessory" in Note 2(b) to Chapter 90 of the CN is not defined but Mr Eicke submitted that, while not directly applicable,

the meaning of accessory for the purposes of heading 9021 could be no narrower than the definition of accessory in the Medical Devices Directive.

53. Mr Eicke also referred to Group 12 of Schedule 8 to the VAT Act 1994 which zero rates drugs, medicines and aids for the handicapped. Item 2(a) of Group 12 provides that, subject to certain conditions, supplies of medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury are zero rated. Parts and accessories designed solely for use in or with such goods are also zero rated by Item 2(h) of Group 12.

54. Mr Eicke submitted that the CJEU in *Lohmann* at [30] placed great emphasis on the fact that the classification criteria identified in the case law were based on "the interests of legal certainty and ease of verification". He said that the classification proposed by HMRC and later adopted by the FTT leads to unnecessary inconsistencies in the classification of the Carmen mastectomy bra for different but closely related purposes, namely VAT and the Medical Devices Directive, and thereby undermines any sense of legal certainty. Mr Eicke accepted that there was no CJEU authority for applying a definition in EU or national legislation to define the same term in a different EU instrument. He contended that it was anomalous that different definitions should apply in different EU legislation.

55. In the absence of authority for the proposition, we do not accept that the principle of legal certainty requires a term to be defined in the same way for the purposes of different legislation. This is particularly so when, as here, the legislation relates to different areas of law, namely product standards and safety, VAT and customs duty.

56. Mr Singh, who appeared for HMRC, stated that HMRC accept that the breast form is an artificial part of the body within CN heading 9021 31. He submitted that the Carmen mastectomy bra was clearly not a part of the breast form. Mr Singh also submitted that the word "accessory" should be given its ordinary meaning. We agree that the words "parts and accessories" should be given their ordinary meaning, determined according to the context in which they appear. Mr Singh suggested that accessory means a subordinate item and the mastectomy bra is not subordinate to the breast form. Mr Singh also contended that the Carmen mastectomy bra could not be an accessory to the breast form because there were some 1500 breast forms and it could not be said for which breast form it was an accessory.

57. We do not agree that an accessory is necessarily subordinate although it may be. We do not accept the submission that an accessory must relate to a specific item. It is undoubtedly true that a single design of mastectomy bra may accommodate various types and sizes of breast forms but a bicycle bell may be fitted to a variety of bicycles and still be regarded as an accessory. The wording of Note 2(b) to Chapter 90 refers to an accessory that is suitable for use solely or principally with a particular kind of machine, instrument or apparatus. That indicates that an accessory, for the purposes of Note 2(b) is something that is used principally but not exclusively with a type of machine, instrument or apparatus rather than a specific item. While we do not consider that the definition of accessory in the Medical Devices Directive can simply

be transposed to the CN, we note that it also refers to an accessory as something that is used together with a device. In our view, an accessory is not merely something which is used in conjunction with an item: an accessory must also contribute something to the item. We consider that an accessory must provide some additional functionality or enhance the performance of the item. An accessory is an optional improvement to the product whereas a part is something that is essential or integral to the functioning of the item.

58. The CJEU in *Uroplasty* also considered whether the silicone flakes were a part or accessory suitable for use solely or principally with a particular kind of machine, instrument or apparatus in heading 9021 and thus classifiable with it according to Note 2(b) to Chapter 90. At [47] of *Uroplasty*, CJEU held

> "In addition, contrary to Uroplasty's submission, it must be held that the [silicone flakes are] not a part or accessory of a machine, instrument of apparatus within the meaning of Note 2(b) to Chapter 90 of the CN".

It appears that the CJEU reached that conclusion because it had found, in the previous paragraph, that the silicone flakes were a finished product (see also [53] of the judgment).

59. The Advocate General in *Uroplasty* had also concluded that the silicone flakes were a finished product (see [52] of the Opinion) but she also considered what would be the position if that were not the case at [63]:

> "According to Explanatory Notes 2(r) to Chapter 39 CN and 1(f) to Chapter 90 CN, heading 9021 CN takes precedence over the headings in Chapter 39 CN. According to Explanatory Note 2(b) to Chapter 90 CN, this applies even if only the ready-to-use, pre-filled hypodermic syringes are regarded as end products, because it is clear that the flakes in question are intended solely for use in them."

60. That observation shows that the Advocate General regarded the silicone flakes, if they were not a finished product, as a part or accessory suitable for use solely in the pre-filled syringes. On that analysis, the silicone flakes would be classified with the pre-filled syringes under Chapter 90. The Advocate General clearly felt able to say that the flakes were for use solely in the pre-filled syringes notwithstanding the evidence (see [39] of the Opinion) that the flakes could be implanted into the body by other means.

61. In our view, the Carmen mastectomy bra is a part of or accessory to the breast form in that the bra is used in conjunction with the breast form to enable both to function as a prosthesis for the natural breast that has been wholly or partly removed or reconstructed. As the FTT held at [32], the mastectomy bra cannot perform any corrective functions on its own without being used in conjunction with the breast form. We consider that finding to indicate that the bra is a part or accessory. We do not regard the fact that neither the bra nor the breast form would be a satisfactory prosthesis for the natural breast on their own as meaning that the bra cannot be a part or accessory for use with the breast form. We note that the silicone flakes in

Uroplasty were similarly unable to perform their medical purpose without the hydrogel and a syringe.

62. We conclude that the FTT erred when, having found that the Carmen mastectomy bra is used in conjunction with the breast form to enable the latter to perform its function as a prosthesis, it failed to conclude that the Carmen mastectomy bra is a part of the prosthesis for a natural breast or an accessory to the breast form and, applying Note 2(b) to Chapter 90, should be classified as an artificial body part under CN heading 9021.

63. As explained by the Advocate General in *Uroplasty*, the classification is on a strictly hierarchical basis. The only relevant first subheading of CN heading 9021 is CN 9021 31 "Other artificial parts of the body". That subheading does not give a rate of duty so it is necessary to look at the second subheadings. The first second-level subheading is CN 9021 31 00 which is "Artificial joints". That subheading does not seem appropriate to the artificial breast forms. The second second-level subheading is CN 9021 39 "Other", ie artificial parts of the body other than artificial joints, which seems appropriate to artificial breast forms. That second subheading does not give a rate of duty so it is necessary to look at the third subheadings under CN 9021 39. The third subheadings are CN 9021 39 10 which is "Ocular prostheses" and CN 9021 39 90 which is "Other". The artificial breast forms are clearly not ocular prostheses. We consider that CN heading 9021 39 90 is the appropriate subheading for a prosthesis for a natural breast as it follows a specific second subheading for artificial parts of the body other than artificial joints and is not an ocular prosthesis Accordingly, we conclude that the Carmen mastectomy bra should be classified under CN heading 9021 39 90.

64. The FTT considered whether the Carmen mastectomy bra is excluded from Chapter 90 by note 1(b) as a support article of textile material whose intended effect on the organ to be supported or held derived solely from its elasticity. In [27], the FTT found that the support provided by the mastectomy bra to the breast form was not derived solely from its elasticity. The FTT therefore concluded that the bra was not excluded from Chapter 90 by Note 1(b). Mr Singh criticised the FTT's finding on the basis that the FTT had not directed itself at [27] to the meaning of "solely" in Note 1(b) as explained in *Lohmann*. In *Lohmann*, the CJEU said at [51] that if factors other than elasticity contribute to the intended effect on the organ to a significant extent, then Note 1(b) does not apply. The term 'solely' in Note 1(b) does not exclude belts and supports where characteristics other than their elasticity contribute to a significant extent to the intended effect on the organ to be supported or held.

65. While it is true that the FTT did not refer specifically to the paragraphs from *Lohmann* quoted above or the meaning of the term "solely" explained in them, the FTT was clearly aware of the case in that context. The FTT referred to *Lohmann* in [27] just a few lines before dealing with the question of elasticity. It also referred to *Lohmann* in the context of elasticity at [30]. In our view, it is inconceivable that the FTT did not have the CJEU's comments in mind when it considered the extent to which elasticity contributed to the bra's effect on the breast form. We consider that the FTT, at [27], found that the Carmen mastectomy bra was not excluded from

Chapter 90 because factors other than elasticity contributed to the intended effect on the breast form to a significant extent. That was a finding of fact which the FTT was entitled to make and in the absence of any error of law, such as was described by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36, we cannot interfere.

66. Before us, as they had done before the FTT, HMRC sought to rely on certain decisions of the customs authorities in the United States of America and the Republic of Ireland to the effect that that a mastectomy bra was properly classified as a brassière under heading 6212. In [34], the FTT observed that the decisions relied on a finding that the mastectomy bras were excluded from 9021 by Note 1 (b). As the FTT found as a fact that Note 1 (b) did not apply to the Carmen mastectomy bra, the cases are of no relevance. We note that the rulings of the US and Irish customs authorities appear to assume that the mastectomy bras would have fallen within heading 9021 if they were not excluded by Note 1(b) to Chapter 90.

67. Mr Eicke also submitted that the Carmen mastectomy bra is an appliance for supporting or holding parts of the body (ie the breast forms and, in the case of a single mastectomy or lumpectomy, the remaining natural breast) following an illness or operation and, therefore, an orthopaedic appliance by virtue of Note 6 to Chapter 90. The FTT held at [32] that the breast form is an artificial part of the body and the Carmen mastectomy bra is worn in order to carry an artificial part of the body. The FTT then referred to Note 6 to Chapter 90 CN and rejected Amoena's submission that the mastectomy bra is used to prevent or correct bodily deformities. The FTT held that:

> "The mastectomy bra does not by itself correct the deformity caused by the absence of relevant muscle structure that previously held in place a natural breast. It is only through the combination of breast form and mastectomy bra that the existing bodily deformities can be corrected, further bodily deformities prevented and the relevant part of a woman's body (whether artificial or otherwise) be supported or held."

68. Mr Singh submitted that the FTT was correct to hold that the bra was not an orthopaedic appliance by virtue of Note 6 to Chapter 90 as the bra did not prevent or correct a bodily deformity. He acknowledged that the bra may have a psychological benefit to the wearer but that cannot be ascertained from its objective characteristics. He also submitted that "parts of the body" in Note 6 did not include artificial parts of the body. He pointed out that nothing in the HSENs relating to orthopaedic appliances referred to artificial parts of the body. He further submitted that the latter part of heading 9021 ("other appliances which are worn or carried … to compensate for a defect or disability") could not assist Amoena as Note 6 only applied to orthopaedic appliances.

69. We agree that the Carmen mastectomy bra does not, in isolation, correct the deformity caused by the absence of a natural breast but, as the FTT made clear, it does support the breast form which is an artificial part of the body. We reject Mr Singh's submissions that Note 6 does not apply to artificial body parts. It seems to us that the fact that CN heading 9021 includes artificial parts of the body such as artificial joints and eyes and that Note 6 to Chapter 90 specifically refers to heading 9021 suggests

that "parts of the body" in Note 6 refers to artificial parts of the body as well as natural ones. We consider that, whether applying the Advocate General's analysis in [66] - [69] of her Opinion in *Uroplasty* or Note 6 to Chapter 90 of the CN, the Carmen mastectomy bra is an orthopaedic appliance because it performs the function of the missing muscles and tissue in supporting or holding the breast form or forms, which are a part of the body, following the mastectomy.

70. The FTT at [32] clearly considered that the bra could not be classified as correcting any deformity because it could not do so on its own but only in combination with the breast form. This led the FTT to conclude that the bra is not an orthopaedic appliance as defined by the first indent of Note 6 to Chapter 90 (appliances for preventing or correcting bodily deformities). We agree with the FTT that only the combination of the bra and the breast form corrects the bodily deformity, ie is the prosthesis, but that is not the only definition of orthopaedic appliance. There is another definition in the second indent of Note 6, namely appliances for supporting or holding parts of the body following an illness, operation or injury. The FTT briefly referred to the alternative definition in [32] when it said that:

> "It is only through the combination of breast form and mastectomy bra that … the relevant part of a woman's body (whether artificial or otherwise) [can] be supported or held."

71. We understand "the relevant part of a woman's body" to refer, in part, to the breast form which the FTT had already held was an artificial part of the body. We do not understand how it can be said that the breast form can only be supported or held by a combination of the breast form and the mastectomy bra. The FTT found, at [23], that the primary purpose of the Carmen Mastectomy bra was to hold the silicone breast form(s) in place. The bra does not support and hold the breast form in combination with the breast form: the breast form is the object supported and held by the bra.

72. The second indent of Note 6 to Chapter 90 provides that orthopaedic appliances means appliances for supporting or holding parts of the body following an illness, operation or injury. In our view, the FTT did not apply the alternative definition in the second indent of Note 6 to Chapter 90 correctly to the facts that it had found. On the basis that the Carmen Mastectomy bra supported and held the breast form, an artificial part of the body, we consider that the bra must be considered to be an orthopaedic appliance as defined by the second indent of Note 6 to Chapter 90. Accordingly, the Carmen Mastectomy bra should be classified as an orthopaedic appliance under CN heading 9021.

73. The process of classification continues by considering the first subheadings of CN heading 9021. The only relevant first subheading is CN 9021 10 which is "Orthopaedic or fracture appliances". The subheading is further sub-divided and the second subheading CN 9021 10 10 is simply "Orthopaedic appliances".

74. We have reached the conclusion that that the Carmen mastectomy bra can be classified under

(1) CN heading 9021 10 10 as an orthopaedic appliance as defined by the second indent of Note 6 to Chapter 90; or, alternatively,

(2) CN heading 9021 39 90 in the category of other prostheses by virtue of Note 2(b) to Chapter 90.

75. GIR 3(a) provides that when goods are prima facie classifiable under two or more headings, the heading which provides the most specific description shall be preferred to headings providing a more general description. Clearly, CN heading 9021 10 10 "Orthopaedic or fracture appliances - Orthopaedic appliances" is more specific than CN heading 9021 39 90 "Other artificial parts of the body - Other – Other". Accordingly, the Carmen mastectomy bra falls to be classified as an orthopaedic appliance under CN heading 9021 10 10.

76. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 provides that if we find that the FTT made an error on a point of law then we may set aside the FTT's decision. Our decision is that the FTT erred in law in failing to conclude that the Carmen mastectomy bra should be classified as an orthopaedic appliance under CN heading 9021 10 10 and holding instead that it should be classified as a brassière under CN heading 6212. As a consequence, we consider that the FTT's decision must be set aside.

77. If we set aside the decision, section 12(2) of the 2007 Act provides that we must either remit the matter to the FTT for a fresh hearing or substitute our own decision for that of the FTT. If there were a need for further findings of fact which we did not feel able to make, we would have to remit the matter for reconsideration. In this case, we consider that the findings of fact made by the FTT (which we see no ground to disturb) enable us to remake the decision without remitting the matter to the FTT for a further hearing. We consider that, on the basis of the facts found by the FTT, the only possible conclusion is that the Carmen mastectomy bra should be classified as an orthopaedic appliance under CN heading 9021 10 10.

Decision

78. For the reasons set out above, Amoena's appeal against the decision of the FTT is allowed. Our decision, in substitution for that of the FTT, is that the Carmen mastectomy bra should be classified as an orthopaedic appliance under CN heading 9021 10 10.

Greg Sinfield
Upper Tribunal Judge

Nicholas Aleksander
Upper Tribunal Judge

Release date: 12 August 2013