



[2022] UKFTT 00014 (TC)

TC 08367/V

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2019/09602

CUSTOMS DUTY – classification of television stands – whether metal support or glass top provides essential character – application of GIR – application of classification regulation – decision in principle – appeal upheld in part

BETWEEN

AVF GROUP LTD

Appellant

-and-

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

Respondents

**TRIBUNAL: JUDGE ANNE FAIRPO
MR MARK BUFFERY**

The hearing took place on 1 July 2021. The hearing was held on the Tribunal video hearing platform. A face to face hearing was not held because of restrictions arising from the coronavirus pandemic.

Mr A West, for the Appellant

Ms C Brown, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal against a decision by the Respondents (HMRC) to issue a C18 Post Clearance Demand Notice. The Notice was issued on 3 September 2019 for £56,558.51, being £47,132.09 for customs duty and £9,426.42 for import VAT.
2. The Notice arises because HMRC contend that the Appellant (AVF) has incorrectly classified certain products as being “other metal furniture” (9403 20 80 00), with duty of 0%. HMRC consider that the appropriate classification is as “other furniture” (9403 89 00 90), with duty of 5.6%. HMRC contend that there has, accordingly, been an underpayment of duty.

Background

3. AVF manufactures television stands (amongst other products), made from a variety of materials.
4. Correspondence and documents exchanged before the hearing indicated that the financial information which had been used to produce the Notice had not been prepared on a consistent basis as between component parts of the stand, due to uncertainty as to the information required.
5. Accordingly, this Tribunal was asked to provide a decision in principle as to the appropriate tariff for certain television stands made by AVF. The quantum of any amounts which may be due under the Notice following such decision in principle is then to be resolved between the parties.
6. It was agreed that the specific products to be considered by the tribunal in this case were television stands with a tripod (or “oil rig”) arrangement, with three legs, primarily made of metal, and three glass shelves (one at the base of the product, one in the middle and one on the top, on which the television rested).
7. The whole stand is held together by metal rods which are permanently fixed to the glass top (being screwed into bosses which are glued to the glass) and run through the various parts of the leg to hold the whole leg together.
8. It was common ground that the products fall within Chapter 94 of the CN, and more particularly within 9403 (Other furniture and parts thereof). The relevant notes to Chapter 9403 include the following:

“Tables made of different materials are classified according to the material of which the support (legs and frame) is made, unless, by application of general rule 3(b) for the interpretation of the Combined Nomenclature, the material from which the top is made gives the table its essential character, for example by being of a higher value (this could be the case, if the top is made of precious metal, glass, marble, rare wood).”
9. We note that the explanatory notes are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force.
10. Further, there is a specific Commission Regulation which applies to television stands which are very similar to those produced by AVF. This is Commission Regulation 313/2011 which states:

“In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.”

“Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2) [9403 20 80], by virtue of the reasons set out in column (3) of that table.”

11. The product covered by Regulation 313/2011 is a television stand, with glass top and shelves and legs of metal, where metal is approximately 47% of the value of the product and glass is approximately 44% of the value of the product. The Regulation classifies this product to 9403 20 80 (other metal furniture) “because the glass top, being of less value, does not give the product its essential character and so the product is to be classified according to the material of which the support is made”. Although not specifically stated, the Regulation appears to follow the guidance in the explanatory notes to Chapter 94 in respect of tables.

Jurisdiction

12. The Tribunal’s jurisdiction in respect of decisions as to tariff classification arises under s16 Finance Act 1994, which is applied by regulation 3(1)(a) Customs Reviews and Appeals (Tariff and Origin) Regulations 1997/534. Accordingly, the Tribunal’s powers include the power to quash or vary the decisions under appeal, and substitute its own decisions for any decisions quashed on appeal. This power is in addition to the more limited power, exercisable only where the Tribunal are satisfied that HMRC could not reasonably have arrived at the decisions, to direct that the decisions are to cease to have effect and to direct that HMRC conduct a further review of the decisions.

Burden of proof

13. It is for the appellant to show that the grounds on which its appeal has been brought are established: s16(6) Finance Act 1994.

Tariff classification approach

14. The Combined Nomenclature (CN) are set out in Annex 1 to EC Council Regulation 2658/87. The CN use an eight-digit numerical code to classify products. The first six digits are referred to as headings, eight digit level numbers are referred to as subheadings.

15. The approach to be taken in determining the tariff was not in dispute, in that the appropriate tariff should be determined by considering the General Rules for the Interpretation of the CN (“GIRs”) which are contained in Section 1A of Part 1 of Annex 1 to Council Regulation 2658/87 and have the force of law. They include the following potentially relevant provisions:

16. Under rule 1, classification is to 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 succeeding provisions.

17. However, neither of the headings put forward by the party clearly defines the products which are the subject of this appeal, so it is necessary to consider Rule 2. The relevant part is rule 2(b), which states that the classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

18. It was common grounds that the products in this case consisted of (primarily) metal and glass, so that rule 3 needs to be considered. This provides as follows:

“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 substance 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.”

19. In this context, it was agreed that Rule 3(a) does not assist and so Rule 3(b) needs to be considered and, if Rule 3(b) does not provide a result, then Rule 3(c) needs to be considered.

20. Finally, rule 4 states that “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.”

Case law regarding classification regulations

21. The decision in *VTech Electronics (UK) Plc* [2003] EWHC 59 (Ch) (“*VTech*”) sets out a summary of the law relating to classification regulations:

“[18] Article 9 of Council reg 2658/87 makes provision for the adoption of regulations concerning, inter alia, the classification of goods in the CN. Such regulations are proposed by the European Commission but must be submitted to the Customs Code Committee, a committee composed of representatives of the Member States and chaired by representatives of the Commission (Council reg 2658/87, art 7).

[19] The Customs Code Committee is a body constituted specifically for the purposes of classification, and its composition varies depending on the nature of the product at issue. Where the Committee approves the Commission's proposals, they may be adopted by the Commission; where it does not, they must be communicated to the Council which may take a different decision (Article 10).

[20] The consequence is that the Council has conferred upon the Commission, acting in co-operation with the customs experts of the Member States, a broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. But the power of the Commission to adopt the measures does not authorise it to alter the subject matter of the tariff headings which have been defined on the basis of the harmonised system established by the International Convention whose scope the Community had undertaken not to modify: Case C-309/98 *Holz Geneen v Oberfinanzdirektion Munchen* [2000] ECR I-1975, para 13.

[21] Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, art 249 (formerly art 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.

[22] It is common ground between the parties that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from

the European Court that the Regulation is invalid. In Case C-119/99 *Hewlett Packard BV v Directeur Generale des Douanes* [2001] ECR I-3981, Advocate General Mischo said (in reasoning which was followed and approved by the Court) that classification regulations are adopted “when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute.” (para 18). He went on:

“20. It should be borne in mind that a classification regulation is adopted . . . on the advice of the Customs Code Committee when the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute.

21. It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or to a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.

22. The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product.”

But, he said, the approach adopted by a classification regulation for a particular product could not unhesitatingly and automatically be adopted in the case of a similar product: “On the contrary, as always, where reasoning by analogy is employed great care is called for.” (para 24)

23. Regulations may be declared invalid, but only by the European Court (or, in a direct action commenced by a private party, by the Court of First Instance of the EC): Case 314/85 *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199, para 17. Unless and until that happens, national courts are of course obliged to give effect to a regulation.”

22. Following the UK’s departure from the EU, UK tribunals (and courts) continue to be generally prohibited from declaring EU law instruments (including a classification regulation) invalid; however, such challenges are permitted where provided for in regulations. In particular, the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019/673 permits the Tribunal in certain circumstances to declare void an EU law instrument where the Tribunal finds the instrument to be invalid on any of the grounds set out in the second paragraph of Article 263 of the Treaty on the Functioning of the EU. The Tribunal may not make such declaration of invalidity unless notice of the proceedings has been given to a Minister of the Crown at least 21 days (or such other period as the Tribunal shall direct) before the date on which the declaration is made. The Minister is entitled to be joined as a party to the proceedings.

23. It was common ground that UK’s having left the EU on 31 January 2020 and entered a transition period until 31 December 2020 had no impact on these proceedings relating to a Post Clearance Demand Note dated 18 September 2019.

Discussion

Application of Regulation 313/2011

24. In this case, as there is a Regulation relating to television stands, the question is whether that Regulation must be applied either directly or by analogy to the AVF stands.

25. HMRC contends that the Regulation requires that, where the glass in a television stand is greater in value than the metal, the television stand must be classified by reference to the glass component.

26. The product described in Regulation 313/2011 is as follows:

“A piece of furniture (so-called ‘television stand’) with measurements of approximately 80 × 40 × 45 cm.

The product consists of a top and two shelves made of clear tempered glass, and four cylindrical legs of approximately 45 × 5 cm made of metal.

The maximum weight load of the product is 80 kg.

The metal components and the glass components comprise approximately 47 % and 44 %, respectively, of the total value of the product.”

27. The reasoning given for the classification of the product as 9403 20 80 is:

“Classification is determined by General Rules 1, 3(b) and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 9403, 9403 20 and 9403 20 80.

Tables and similar furniture made of different materials are classified according to the material of which the support (legs and frame) is made, unless, by application of General Interpretative Rule 3(b), the material from which the top is made gives the table its essential character, for example, by being of a higher value (see also the CN Explanatory Notes to heading 9403).

Classification under CN code 9403 89 00 as furniture of other materials (glass) is therefore excluded, as the glass top, being of less value than the metal support, does not give the product its essential character.

Consequently, the product is to be classified according to the material of which the support is made.

The product is therefore to be classified under CN code 9403 20 80 as other metal furniture.”

28. AVF contended that Regulation 313/2011 does not automatically classify the product as between glass and metal according to the material of higher value, submitting that the Regulation refers to the application of GIR 3(b) and the determination of the essential character of the product. AVF contended that the correct test should therefore be to consider GIR 3(b) more generally to determine the essential character of the stands. They submitted that the material which gives the television stands its essential character is the metal of the legs, as metal was required in order that the legs have the necessary strength. They contended that the shelves were effectively a form of filler and that the specific material was not as important.

29. However, this reference to GIR 3(b) in the Regulation arises where the Regulation quotes from the HSEN in respect of Chapter 94; it is not part of the conclusion of the Regulation. The Regulation instead concludes (as set out above) that:

“Classification under CN code 9403 89 00 as furniture of other materials (glass) is therefore excluded, as the glass top, being of less value than the metal support, does not give the product its essential character.

Consequently, the product is to be classified according to the material of which the support is made.”

30. Therefore, we consider that the conclusion of the Regulation is that glass cannot determine the essential character of a glass and metal television stand where the value of the glass is lower than the value of the metal.

31. We find, however, that the Regulation does not conclude the reverse: that is, the Regulation does not state that where the glass components are higher in value than the metal components, the glass must determine the essential character of the product.

32. We note that the stand detailed in regulation 313/2011 is specific as to size and capacity, but the reasoning given for the classification makes no reference to any specific details of the stand other than the relative values of the materials. The stand described is apparently constructed in the same way in the same way as stands produced by AVF: that is, it is made up of glass shelves to which the legs are secured directly. There is no sub-frame connecting the legs. There are differences, notably that the stand described in the Regulation has four legs, compared to the three legs used in the relevant AVF products, and the glass shelves are unpainted, whereas those in the majority of the relevant AVF products are painted. We note also that the photograph of a stand in the Regulation is stated to be purely for information.

33. Neither party made any particular submissions as to the distinction between the product in Regulation in 313/2011 and those which are the subject of this appeal. We do not consider that there is any meaningful distinction with regard to the principal characteristics of the product between a television stand with three legs versus four legs, nor between stands with painted versus unpainted glass shelves.

34. We note the comment in *VTech* that care should be taken when considering whether to apply a regulation by analogy.

35. In this case, and noting particularly that the specific characteristics of the stand are not referred to in the reasoning, we do not consider that the differences between the stand in the regulations and the stands made by AVF to be such that Regulation 313/2011 should not be applied to the relevant stands made by AVF.

36. Neither party argued that the Regulation should be regarded as invalid, and we do not consider that there are any grounds to challenge the validity of the the Regulation as, bearing in mind the comments of the judge in the *VTech* decision, we do not consider that there is any manifest error in the classification put forward by the Regulation.

37. As such, we find that Regulation 313/2011 applies to determine the tariff applicable to those AVF products where the value of the glass components is lower than the value of the metal components. That tariff is 9403 20 80.

38. There are, however, some AVF products for which AVF agreed that the value of the glass components would be greater than the value of the metal components. Given that we find that Regulation 313/2011 does not establish that these products must be classified under 9403 89 00, it is necessary to consider the application of GIR 3(b) to those products.

Application of GIR

39. The notes for Chapter 9403 provide (as already noted) that the material which makes up the support of a table-like structure should be regarded as giving the essential character of the product unless by application of GIR3(b) the material from which the top is made gives the product its essential character. The HSEN notes an example where this could apply is where the top is made of a more valuable material than the support and included various types of material by way of example.

40. The dispute in this case effectively arises because the material of the top of the relevant television stands is glass, which is one of the materials included in the notes example. As we see no reason to depart from the guidance in the notes, we consider that the question is whether the application of Rule 3(b) means that the glass used in the stands does in fact provide the products with their essential character; if it does not then, following the explanatory notes, the material which makes up the support will be regarded as giving the essential character.

41. AVF contended that the glass should not be regarded as giving the relevant television stands their essential character because the role of the glass in the stands was that of a filler and that the shelves could be made of metal or wood or any other similar material that was strong enough to provide the necessary support. Glass had been chosen because it was relatively inexpensive and relatively light and therefore less expensive to transport, rather than for any particularly decorative aspect. In many of the AVF television stands, the glass was painted black and it was submitted that the effect was not visually distinct from a metal shelf.

42. In giving evidence, Mr Simon West, director for AVF, accepted that some products, made for a specific retailer, utilised a thicker glass than the generic AVF products. This was done at the request of the retailer and it was agreed that this was for decorative purposes.

43. Considering the wording of the guidance notes, we note that it is not automatically the case that material of a higher value will set the essential character of the television stand. The guidance note for Chapter 9403 states that the essential character must be determined using Rule 3(b), rather than by reference to value specifically. The reference to a higher value providing the essential character is given as an example rather than an absolute.

44. In determining what gives a product its essential character, the Tribunal is entitled to refer to the explanatory notes to the Harmonised System of the WCO ('HSEN') but these are not binding. We note that HSEN 8, in respect of GIR3(b), states: "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods." Again, value is an example rather than the determinative aspect to be considered.

45. The test in GIR3(b) considers which component should be regarded as giving the product its essential character. In *Turbon C-250/05* the question was the classification of ink cartridges whose function was to supply ink to ink-jet printers. The product comprised two components: the cartridge and the ink. The CJEU said that as the purpose of the product to be classified was to supply ink to a printer, the essential character of the product was given by the ink. This was the case even though the ink was useless unless delivered in the cartridge [20-23].

46. AVF contended that, as it was not disputed that the purpose of a television stand is to elevate a television to a comfortable height for viewing and it was the metal legs which provided the elevation, the support components should be regarded as providing the essential character. It was submitted that the support was akin to the ink in *Turbon* so that, even though the shelves were also needed for the product to function, it was the legs which provided the essential character to a television stand of this type.

47. We consider that the existence of the guidance notes in respect of Chapter 9403 means that the support structure cannot be determinative of the classification without also considering the role of the shelves in this product. AVF's argument as to the role of the support structure would logically mean that the top component of table-like furniture could never provide the essential character of such a product as the nature of such furniture is that it is elevated above the ground and provides support for items placed on it and such elevation can only be provided by the support structure.

48. We note that the explanation in brackets in the explanatory notes refers to the top giving the essential character to a table in certain cases where "the top is made of precious metal, glass, marble, rare wood" which results in the top being of a higher value than the support. We note that the explanatory note also refers specifically to tables, although it could apply by analogy to other table-like products such as a television stand.

49. We consider that the wording and the list of materials in the explanatory note indicates that the top component in the example which determines the tariff is chosen for a purpose beyond the utilitarian provision of an elevated surface and, in particular, is intended to provide an objective decorative function. In such cases the top part of the table (being the most visible element) may therefore provide the essential character of the product by fulfilling that specific decorative purpose. We consider that it is not simply the relative cost of the material that provides the essential character of the product.

50. Applying this to AVF's products, the evidence was that the majority of the relevant products used glass which was painted black and was not visually distinct from the metal supports; glass was used because it was easier to manufacture and therefore easier to source and cheaper than other potential shelf materials. It was also lighter than equivalent metal shelves and therefore cheaper to transport. We consider that the top in these products does not, therefore, provide the essential character of the product.

51. However, a small number of AVF's products, including those supplied to a specific retailer, used a thicker type of glass for the shelves than that used in AVF's other products. This was at the request of the retailer, and it was not disputed that the retailer was seeking a particular decorative effect with that specification. We find that the top of these products, therefore, does provide the essential character of the product.

Conclusion

52. Considering, therefore, the effect of Commission Regulation 313/2011, and bearing in mind the non-binding explanatory notes, we make the following decision in principle in relation to AVF television stands made of glass and metal:

(1) for products where the value of the glass component is less than the value of the metal components, Regulation 313/2011 applies such that the relevant tariff is 9403 20 80 and so, to the extent that AVF products which are subject to the Notice fall within this category, the appeal is upheld;

(2) for products which do not fall in (1) above and where the glass is not specified (whether by a retailer or otherwise) to be of a greater thickness than that used in AVF's generic television stands and where the top is painted black so the it is not visually distinct from metal, we conclude that the glass does not give the essential character of the product and is classified by the metal support to 9403 20 80 following the guidance in the explanatory note in Chapter 94, which we see no reason to depart from and so, to the extent that AVF products which are subject to the Notice fall within this category, the appeal is upheld;

(3) for products which do not fall into (1) and (2) above, we conclude that the glass used in those products is intended to have a specific decorative function as well as a support function and therefore provides the essential character of the product. As such, these products will be classified by the material of the top to 9403 89 00. To the extent that AVF products fall into this category, the appeal is dismissed.

Right to apply for permission to appeal

53. 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.

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 23 DECEMBER 2021