Neutral Citation: [2024] UKFTT 00124 (TC)

Case Number: TC09066

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester Tribunal Centre
Alexandra House
14-22 The Parsonage
Manchester
M3 2JA

Appeal reference: TC/2017/04490

CUSTOMS DUTY – tariff classification – quantum of the C18 - handbags and purses – whether the handbag considered has an outer surface of sheeting of plastics or of textile materials – no – whether the outer surface of the handbag considered has the same visual appearance as an applied layer of manufactured plastic sheeting – no – whether the classification of the handbag considered was wrong in the C18 – yes – whether the appellant satisfied its burden of proof in establishing that the rest (or any part of the rest) of the C18 was wrong – no – appeal allowed in part

Heard on: 12-14 September 2022 & 6 June 2023
Judgment date: 6 February 2024

Before

TRIBUNAL JUDGE RICHARD CHAPMAN KC
MR DEREK ROBERTSON

Between

LAURENCE SUPPLY CO (LEATHER GOODS) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Laurence Gordon, former director of the Appellant (with Mr Mark Gordon, director of the Appellant, in attendance)

For the Respondents: Miss Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a C18 Post Clearance Demand Note dated 5 May 2017 ("the C18"). The C18 relates to imports by Laurence Supply Co (Leather Goods) Limited ("Laurence Supply") of fashion handbags and purses ("the Handbags" and "the Purses" respectively and, together, the Goods") from China between 6 May 2014 and 4 May 2017 and is in the total sum of £603,548.58, being customs duty in the sum of £502,956.38 and import VAT in the sum of £100,592.20. HMRC also issued a penalty notice in the sum of £2,500, but this penalty has been paid and is not the subject of this (or any) appeal.

2. The context for the C18 is the common customs tariff. The legal background to customs classification was summarised by the Upper Tribunal (Joanna Smith J and Judge Greenbank) in *Build-a-Bear Workshop UK Holdings Ltd v HMRC* [2021] UKUT 67 (TCC) as follows at [11] and [12]:

> "[11] In summary, the customs classification for goods imported from outside the EU is based on the CN adopted under Article 1 of EC Regulation 2658/1987 (the "Tariff Regulation"). The CN is derived from the World Customs Organisation's harmonized system of commodity nomenclature as laid down by the International Convention on the Harmonized Commodity Description and Coding System 1983 to which the EU is a party.
>
> [12] The Court of Appeal in *Invamed Group Limited v Revenue and Customs Commissioners* [2020] EWCA Civ 243 ("*Invamed*") per Patten LJ at [5], reproduced as "a convenient summary of the legal structure of these arrangements" a passage from the judgment of Lawrence Collins J in *Vtech Electronics (UK) plc v Commissioners for Customs & Excise* [2003] EWHC Ch 59 ("*Vtech*") at paragraphs [6]-[12]:
>
> > "[6] The Common Customs Tariff came into existence in 1968. By Article 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.
> >
> > [7] The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature ("CN") established by art 1 of Council Regulation 2658/1987. The CN is established on the basis of 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.
> >
> > [8] Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes "to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System". The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.
> >
> > [9] The CN, originally in Annex 1 to Regulation 2658/87, is re-issued annually…The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature ("CN subheadings"); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

> [10] 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.
>
> [11] There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System ("HSENs"). The Community has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as CNENs.
>
> [12] Binding Tariff Information 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. They are called BTIs, and such information is binding on the authorities in respect of the tariff classification of goods…"

3. Given the period in question in this appeal, the relevant regulations are (until 30 April 2016) Article 1 of Council Regulation 2658/87 and Article 20 of Regulation 2913/92 ("the Community Customs Code") and (after 1 May 2016) Articles 56 and 57 of Regulation 952/2013 ("the Union Customs Code).

4. The Combined Nomenclature headings and sub-headings ("the CN Codes") in issue for the purposes of this appeal are as follows:

CN Code:	Description:	Rate:
4202	Trunks, suitcases, vanity cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverages bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanised fibre or of paperboard, or wholly or mainly covered with such materials or with paper:	
	- Handbags, whether or not with shoulder strap, including those without handle:	
4202 21	-- With outer surface of leather or of composition leather	
4202 21 00 10	--- Handmade	3.0%
4202 21 00 90	--- Other	3.0%
4202 22	-- With outer surface of sheeting of plastics or of textile materials:	
4202 22 10	--- Of sheeting of plastics	9.7%

4202 22 90	--- Of textile materials	
4202 22 90 10	---- Handmade	3.7%
4202 22 90 90	---- Other	3.7%
4202 29 00	-- Other	3.7%
	- Articles of a kind normally carried in the pocket or in the handbag:	
4202 31 00	-- With outer surface of leather or of composition leather	3%
4202 31 00 10	--- Handmade	3.0%
4202 31 00 90	--- Other	3.0%
4202 32	-- With outer surface of sheeting of plastics or of textile materials:	
4202 32 10	--- Of sheeting of plastics	9.7%
4202 32 90	--- Of textile materials	
4202 32 90 10	---- Handmade	3.7%
4202 32 90 90	---- Other	3.7%
4202 39 00	-- Other	
4202 39 00 10	--- Handmade	3.7%
4202 39 00 90	--- Other	3.7%

5. Additional note 1 to Chapter 42 provides as follows in respect of "outer surface":

> "For the purposes of the subheadings of heading 4202, the term 'outer surface' is to refer to the material of the outer surface of the container being visible to the naked eye, even where this material is the outer layer of a combination of materials which makes up the outer material of the container."

6. The relevant Explanatory Notes provide as follows in respect of "plastic sheeting":

> "**In the form of plastic sheeting**
>
> If a container has an outer material that is a combination of materials where the outer layer being visible to the naked eye is plastic sheeting (example, woven fabric of textile fibres in combination with plastic sheeting), it is irrelevant for classification purposes whether the sheeting was manufactured separately before creating the combined material or whether the plastic layer is the result of applying a coating or covering of plastics to the material (for example, woven fabric of textile fibres), provided that the resultant outer layer being visible to the naked eye has the same visual appearance as an applied layer of manufactured plastic sheeting."

7. The C18 stated, "Bags and purses with an outer material made predominantly of polyurethane have been misclassified to a variety of commodity codes," noted that the CN Codes were entered as 4202 22 10 00, which HMRC amended to 4202 22 10 00 upon the basis that they were, on HMRC's case, handbags with an outer surface of plastic sheeting. These

codes related to the Handbags rather than the Purses, as the equivalent commodity code for the Purses was 4202 32 90 00. However, each of these codes had a rate of 9.7%.

8. Laurence Supply contends that the Goods were all made of either what it termed a "suedette" material which it contends is to be treated as "textile material" (4202 22 90 00 for the Handbags and 4202 32 90 00 for the Purses) or what it termed interchangeably as "leatherette" or "leather look" material which it contends is to be treated as "other" (4202 29 00 00 for the Handbags and 4202 39 00 for the Purses). For the avoidance of doubt, we refer below to "leatherette" to denote items predominantly made of polyurethane which Laurence Supply says it intended to be like leather (such term being neutral as to what leatherette in fact looks like) and "suedette" to denote items predominantly made of polyurethane which look like suede and which it was common ground are to be treated as "textile material".

9. We note that HMRC accepted that Laurence Supply will succeed in respect of any particular item within the C18 if it can establish on the balance of probabilities that that item was either a Handbag or a Purse with a classification of either "textile materials" or "other". It follows that Laurence Supply will succeed in full if it can establish on the balance of probabilities that all of the Goods were either Handbags or Purses with classifications of either "textile materials" or "other". As such, we refer below to the Goods as a whole rather than separating out the Handbags and the Purses unless the context otherwise dictates. Further, in order to avoid confusion, we refer to the CN Codes contended for by HMRC (being 4202 22 10 00 and 4202 32 10 00) as "the 9.7% CN Codes" and those contended for by Laurence Supply (being 4202 22 90 00, 4202 29 00, 4202 32 90 00, and 4202 39 00) as "the 3.7% CN Codes".

10. The only items before the Tribunal for physical inspection were a light tan coloured leatherette handbag and a blue suedette purse. In order to be consistent with the labels which have been placed upon these items by the parties throughout this appeal, we refer to the light tan handbag as "Item C" and the blue purse as "Item D". It was common ground that Item D was to be classified to a 3.7% Commodity Code, that HMRC has accepted this prior to the C18, and that it did not form part of the C18.

11. Laurence Supply's submissions included arguments that HMRC considered its tax and duty position at a visit in 2013 without raising the current issues and that HMRC had acted unreasonably in its approach to the enquiry and the C18. We treat these submissions as a public law challenge to the C18.

12. We note that Laurence Supply has not applied to HMRC for remission of the debt in the C18 as highlighted by Miss Vicary in her written closing submissions in which she referred to Articles 119 and 120 of the Union Customs Code. As such, HMRC has not made any decision as to remission, there has therefore been no appealable decision as to remission, and so we do not have the jurisdiction to consider remission within this appeal. Indeed, it has been no part of Laurence Supply's case (whether when Laurence Supply had legal representation or thereafter) that the debt should be remitted (other than by way of argument that their classification is correct) and there has been no argument as to whether remission is still available or as to any time limits for the same. We therefore make no further comment as to whether (even after this decision) there remains any potential for Laurence Supply to apply to HMRC for remission.

13. It follows that the key issues for determination are as follows:

(1) The proper classification of Item C.

(2) The proper quantum of the C18.

(3) The public law challenges to the C18.

FINDINGS OF FACT

14. We make the following findings of fact at this stage in respect of Laurence Supply's business and HMRC's investigations. Our findings of fact in respect of classification (including the expert evidence), quantum and (insofar as is necessary) public law challenges are dealt with separately below.

Preliminary Points

15. We begin with the following preliminary points.

16. We have taken into account the documents which have been placed before us and the written and oral evidence of Mr Laurence Gordon, Mr Mark Gordon, and Professor Stephen Bush on behalf of Laurence Supply (an expert in polymer engineering and process manufacture), and of Mrs Emma Wilkes (the decision-making officer), Mr Mark Rose (an officer in the HMRC's tariff classification service), and Mrs Kay Woodhouse (the officer supporting Mrs Wilkes) on behalf of HMRC. In order to differentiate between Mr Laurence Gordon and Mr Mark Gordon, we will continue to use their full names in this decision.

17. We note that Mr Laurence Gordon was, during his evidence, at times dismissive of the questions put to him by Miss Vicary and at other times took a rather inflammatory tone in his responses. However, in the context of this appeal, we do not find that this in any way detracted from his credibility. Instead, it was a measure of his emotional connection to the case. We have no reason to doubt the credibility of Mr Laurence Gordon's evidence.

18. Mr Mark Gordon was a calm and measured witness. He was fair and frank in explaining the limits of the documents and information available to him, and was clear about what he remembered well and what he did not remember well or at all. He was keen to help the Tribunal insofar as he was able to do so. Again, we have no reason to doubt his credibility.

19. Professor Bush's expertise was not in doubt. He gave detailed evidence which was not contradicted by any contrary expert evidence. We note in this regard that he was the only expert witness, but that he was called by Laurence Supply rather than acting as a joint expert. Although Judge Brown KC made directions dated 24 February 2022 ("the February 2022 Directions") permitting HMRC to call their own expert, they chose not to do so.

20. We note that the February 2022 Directions also required HMRC to redact parts of Mr Rose's evidence, as well as the removal of an exhibited report referred to as "the Camden Report", as these constituted inadmissible expert evidence. Despite Laurence Supply's objection to the Camden Report in the context of the February 2022 Directions, Mr Laurence Gordon applied at the start of his opening submissions for this report to be adduced in evidence, to which HMRC objected. We refused that application for the reason (amongst others) that Judge Brown KC had already ruled that it was inadmissible. As such, we have only read the redacted witness statement of Mr Rose and have not read the Camden Report. The cross-examination of Mr Rose was relatively short. Again, we have no reason to doubt his credibility. However, we note that Mr Rose's evidence took the form of a commentary on his predecessor's (Mrs Dee Rigling) tariff classification rulings and processes in reaching these rulings, as he had no involvement of his own. We therefore take this into account in assessing the weight of Mr Rose's evidence.

21. Mrs Wilkes gave her evidence in a fair and open manner. She explained the basis of her decision making but, rightly, did not seek to use her evidence as an opportunity to defend or further justify her decision. Again, we have no reason to doubt her credibility.

22. Mrs Woodhouse verified her witness statement but was not cross-examined upon the basis that her evidence was largely the same as Mrs Wilkes'.

Laurence Supply's Business

23. Laurence Supply was incorporated in 1975 and was (and remains) a family business. The business was started by Mr Laurence Gordon, his brother, and their father. They traded in handbags, largely sourcing them from UK factories. In the 1980s, Laurence Supply moved to importing handbags and purses from South Korea and then Taiwan. By 1995, Laurence Supply was importing from China. At about that time, Mr Laurence Gordon's eldest daughter joined Laurence Supply as a merchandiser. The business soon grew and Mr Laurence Gordon's son, Mr Mark Gordon, joined in about 1998. Mr Laurence Gordon's younger daughter subsequently joined the business as well and Mr Laurence Gordon's elder daughter left work to concentrate on her children. Mr Mark Gordon then focussed on sourcing bags and purses, materials and sales, effectively taking over Mr Laurence Gordon's leadership role when he began to step back from the business about eight years ago.

24. The methodology for Laurence Supply's sourcing of handbags and purses was explained by Mr Gordon, which we accept as accurate. There were two different methodologies, which depended upon whether the relevant styles were designed to specifications provided by Laurence Supply and held in stock in their warehouse or alternatively styles made to a customer's order.

25. As regards stock lines, Mr Mark Gordon would take sample items with him to China as examples and then tell the factories what he wanted them to produce. The manufacturer would show him swatch cards of the material and the colour, and he would choose what he wanted. The manufacturer would then send Laurence Supply a sample, which Mr Mark Gordon would then either agree or request changes by email. Once the specification was finalised, an order would be made if Laurence Supply felt that the price was acceptable. There were approximately 70 or 80 stock lines per year until Laurence Supply stopped building up stock in about 2016. This did not involve 70 or 80 trips per year to China, as a number of styles would be agreed in respect of each trip.

26. The majority of Laurence Supply's customers were high street fashion brands which wanted handbags and purses made to their order and their specification. Mr Mark Gordon would have a design meeting with the customer and either bring Laurence Supply's own samples or be presented with the customer's samples. The customer would then tell Laurence Supply what needed to be changed on the sample. The sample and the instructions as to what to change would then be sent to the manufacturer in China. Again, the manufacturer would then provide Laurence Supply with a sample and Laurence Supply would respond with agreement or changes by email.

27. Laurence Supply dealt with a large number of different styles of handbags and purses. The Goods in the C18 comprised between 1,000 and 1,300 different styles.

The 2013 Visit

28. An HMRC inspector visited Laurence Supply in November 2013. She inspected the files, stock and showroom. She considered the customs duty that had been paid on the handbags and purses that had been imported, all of which had been as 3.7% CN Codes. The only issue taken by the Officer was that Laurence Supply had been supplying the manufacturers with labels which had originally been made in the UK. Laurence Supply was not aware that this was irregular, but agreed with HMRC to an assessment in this regard. A C18 was issued and duly paid.

HMRC's Investigations in 2016 and 2017

29. Mrs Wilkes contacted Laurence Supply in November 2016 and issued an opening letter on 23 November 2016 requesting (amongst other things) information about the import

documentation for 21 items within five import entries. Various exchanges of correspondence and telephone calls then took place.

30. This correspondence included an email dated 8 December 2016 from Mrs Wilkes attaching a spreadsheet requesting information about the 21 items. Mr Mark Gordon responded in an email to Mrs Wilkes dated 13 January 2017 which included the following:

> "It is our belief after a lot of checking and research, hence why it took so long to come back to you, that all of our handbag imports should have been classified to commodity code 4202 22 9090. Where any imports have been classified to commodity code 4202 12 9190 (school satchel, executive case, brief case) this is a clerical code on behalf of our clearing agent. We had previously instructed them to use this commodity code when we used to import school bags and satchels. We did not notice the error because the duty rates were consistent at 3.7%. Please be assured that we have reminded them of the importance of being precise with future entries.
>
> As for entry 027700A, item 3, the product in question which I have attached the image is not actually a PU purse. Again I can only blame the wrong entry on the C88 as an error on the side of our clearing agent. The same error type relates to entries 047731A and 009343J again we can only apologise for these errors but they were missed by us because there was no difference in the duty rate payable (3.7%).
>
> It is our assertion that all of our handbags should be classified as 4202 22 9090 and that all of our purses should be classified as 4202 32 9090.
>
> One of the most time consuming parts of getting this reply to you was locating all the 21 images for you, but I got there in the end.
>
> I have also attached your spreadsheet which includes the outer material type and confirmation of the commodity code."

31. 20 of the 21 images referred to were in the bundle ("the Images"). The spreadsheet referred to by Mr Mark Gordon was also in the bundle ("the Spreadsheet"), and includes a column headed "Outer Material" which included ten entries for "Suedette", five entries for "Polyurethane", two entries for "Nylon Polyester", two entries for "Satin Polyester", one entry for "Woven Nylon", and one entry for "Cotton". The Images were only of modest quality and showed only the front of each handbag. Mr Mark Gordon said that all the handbags in the five invoices queried by Mrs Wilkes in her correspondence and contained within the Spreadsheet corresponded to one of the Images. Mr Mark Gordon was asked by Miss Vicary, and then again by the Tribunal, if he could marry up each of the Images with each of the entries on the Schedule. Mr Mark Gordon only sought to do so in respect of three of the Images but did not explain how he could tell that these were the correct matches. On being asked by Miss Vicary as to where the Images came from, Mr Mark Gordon said that he had found them on his iPad and that he either had the order of the customer or the contract name of the supplier but he did not now know which. He fairly accepted that he had no evidence to link each of these Images to any particular import. In the light of this evidence, we find as a fact that, whilst the Images were of items which Laurence Supply had imported during the relevant period, it is not now possible to identify on the balance of probabilities which imports these were.

32. After further correspondence in which Mrs Wilkes sought documentary evidence of the composition of various handbags, Mrs Wilkes arranged a visit to Laurence Supply's premises. This took place on 1 February 2017 and was attended by Mrs Wilkes, Mrs Woodhouse, Mr Mark Gordon, and Mr Laurence Gordon. Access to the available stock was provided to Mrs Wilkes and Mrs Woodhouse. This comprised seven handbags and one purse as, although the

stocklist provided in advance had contained 21 items, these had now been despatched from the warehouse to fulfil orders. Mr Wilkes and Mrs Woodhouse took two items for further analysis, being one handbag (Item C) and one purse (Item D). These were the only items which contained suedette.

33. Mrs Wilkes says in her witness statement that this was because it was not in dispute that those other items would be classified at the higher duty rate, as the only dispute at that time related to suedette. However, she refined this in the course of Mr Laurence Gordon's cross-examination of her to the effect that there was no dispute that the other six were not to be treated as textiles. She said that the argument has shifted in that at the time of the visit the question was as to whether or not the items could be treated as textiles, which was what the majority of the Goods had been declared as being. Mr Laurence Gordon was adamant in his oral evidence that no agreement had been reached as to the classification of the other six samples. We find as a fact that neither Mr Laurence Gordon nor Mr Mark Gordon accepted during the visit that the six samples which were not taken should be treated as subject to the higher rate. The only common ground at that stage was simply that Item C and Item D were the only items of the eight samples which contained suedette.

34. After the visit, Mrs Wilkes submitted a request to HMRC's tariff classification service for a liability ruling on Item C and Item D. This was passed to Officer Dee Rigling. The result of this was advice that Item C should be classified as 4202 22 1000 at a rate of 9.7% and Item D should be classified as 4202 32 9090 at a rate of 3.7%. Mrs Wilkes explained this to Laurence Supply in an email dated 20 February 2017 as follows:

> "In short, they have accepted that the suedette material should be classified as a textile material, as you thought. The key part for classification purposes, taking this into account, is what the outer material is made from predominantly. In the case of the handbag, the predominant material is of plastic sheeting, therefore the classification team have decided that it should be classified to 4202 22 1000 (duty rate 9.7%). If you recall, the front surface is of the suedette material, and the back, base and corners of the bag are of plastic sheeting.
>
> In the case of the purse, it is half of plastic and half of textile (suedette) material so it has been classified to the heading corresponding to that of textile material 4202 32 9090 (duty rate 3.7%). As neither material predominates, it is classified to the code last in numerical order in the tariff.
>
> It is necessary going forward to quantify the error as accurately as possible. I looked at 8 bags and purses on the visit - one of which has an outer surface of at-least-half textile material. My estimation would be that around 90% of the goods you import have an outer material made predominantly of plastic sheeting.
>
> Please review your previous imports and provide a reasonable estimation of the percentage of handbags / purses which you believe should be classified to the heading 4202 22 1000 / 4202 32 1000, going back 3 years. Please provide an explanation of how you reached this percentage figure so that I can be satisfied of its accuracy."

35. We note that Mr Rose explained how Officer Rigling would go about considering the classification. However, as he was not involved in the process itself, we can make no findings at all as to whether she conducted a "naked eye" test.

36. Further correspondence passed between Mrs Wilkes and Laurence Supply or its representatives. This included an email dated 2 March 2017 to Laurence Supply's representatives saying that, "I have requested that Mark quantify the purses/bags which don't

have an outer surface predominantly of polyurethane by 6th March 2017," and a further email dated 30 March 2017 in which Mrs Wilkes stated that, "I had requested that Mark quantify the suedette material bags, with a deadline given of 27/3/2017. As of yet, I haven't received a response."

37. Mrs Wilkes then issued a right to be heard letter on 3 April 2017. This included the following:

> "On the visit I removed a suedette purse for sampling purposes. Entry No/Date: 290 023363G 20/01/2017 "Soft foldover purse." The classification team determined the suedette outer material constitutes a textile material. They determined that the item is made in two equal parts – one half made from a polyurethane plastic, and one half made from a textile material. As neither material predominates, the item is classified to the code which appears last in numerical order. In this instance the outer of textile material. The item is therefore classified to commodity code 4202.32.9090 with a duty rate of 3.7%. This entry has therefore been excluded from my calculations. I requested during my visit on the 1st February 2017 that you quantify bags/purses imported which were made of a textile material but I did not receive any such further information from you. On 20/02/2017, following receipt of the non-live liability ruling from the classification team I asked you to quantify the number of bags/purses with an outer material made predominantly from a suedette material, deadline 06/03/2017. I did not receive any such information from you. Following your employment of a Customs Consultant, I extended this deadline to 27/03/2017. I again did not hear anything from you and so I sent a reminder by email with a further deadline extension to 03/04/2017. As I have not received any further such exceptions from you, I have assumed in my calculations that all other of your imported goods are made with an outer material predominantly of polyurethane."

38. Further correspondence passed but which did not provide any substantive response or information other than to reject Mrs Wilkes' findings and, in an email from Mr Mark Gordon dated 27 April 2017, to assert that 23% of the Goods would be non-textile. Mr Mark Gordon's email included the following:

> "Considering the amount of styles imported by Laurence Supply Co Ltd over the past 3 years. We would need to take a snap shot of our products to establish an overall percentage between textile and nontextile. For what better snap shot than to take the 20 styles randomly selected by yourself (as shown attached)? Today we have taken the time and calculated that this would equate to a true assessment value of 23%.
>
> We hope that you will now see the injustice of your proposed 100% assessment and raise a proper and fair assessment at 23%."

The C18

39. Mrs Wilkes issued a decision letter on 4 May 2017, together with the C18. This included the following:

> "Although you've given us additional information, this does not affect our view of the amount due on the Post Clearance Demand. This is because I have not been provided with sufficient evidence to back up the assertion that only 23% of the goods imported by Laurence Supply Co (Leather Goods) Ltd have an outer material made predominantly of plastic-sheeting.
>
> You have requested that the assessment be based on the email you sent 13/01/2017 with 21 images of bags, accompanied by a spreadsheet describing the material composition of the bags. 10 of which are described as suedette, 5

> as polyurethane, 2 as nylon polyester, 2 as satin polyester, 1 as cotton, and 1 as woven nylon. At the time I explained that the attached images were not sufficient evidence of material composition. I have not been provided with purchase orders or any other documentary evidence showing material composition of these goods. I have seen no documentary evidence that anything other than polyurethane is being used in the production of the bags / purses imported by Laurence Supply Ltd."

40. The C18 did not include the imports of Item D.

41. Mrs Wilkes fairly accepted that during her investigations and in issuing the C18 she had in mind only the distinction between (a) plastic pulled into a yarn that would be classified as a textile and (b) plastic sheeting. She did not consider the possibility of the classification being "other" and so only considered classification as being either as plastic sheeting or as textiles.

CLASSIFICATION

The Law

The CN

42. There was no dispute as to the way in which the CN is to be approached.

43. The CN is to be considered in accordance with the General Rules for the Interpretation of the Combined Nomenclature ("the GRIs"), which provide as follows:

> "Classification of goods in the Nomenclature shall be governed by the following principles:
>
> 1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.
>
> 2.(a) 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 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, insofar as this criterion is applicable.

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

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

5. In addition to the foregoing provisions, the following rules shall apply in respect of the goods referred to therein:

(a) camera cases, musical instrument cases, gun cases, drawing-instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) subject to the provisions of rule 5(a), packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

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 otherwise requires."

44. The GRIs are a hierarchical set of principles, and they must be applied in sequential order (see *HMRC v Epson Telford Limited* [2008] EWCA Civ 567 *per* Sir John Chadwick at [8]).

45. Classification is to be considered by way of objective characteristics and properties according to the relevant CN headings, the intended use might be an objective criterion for classification, and the explanatory notes are an important aid to construction but do not have legally binding force. These principles were set out as follows by the CJEU in *BVBA Van Landeghem v Belgishe Staat*, Case C-486/06, at [23] to [25]:

"[23] First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-6749, paragraph 27).

[24] Second, the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see 0400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case 0183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-6675, paragraph 18).

> [25] Lastly, according to the Courts case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*BAS Trucks*, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *Kawasaki Motors Europe*, paragraph 36)."

46. An undefined term is to be given its customary meaning. The ECJ stated as follows in *Skatteministeriet v Imexpo Trading A/S,* Case C-379-02 at [17]:

> "[17] In the present case, plastic chairmats such as those at issue in the main proceedings can be regarded as floor coverings. They are, in fact, carpets of various shapes, one purpose of which is to protect floor coverings. First, the customary meaning of the word 'covering' is something that covers something else to protect or strengthen it and, second, a covering which covers a floor covering must itself be regarded as a floor covering. The wording of Chapter 57 of the Combined Nomenclature, entitled 'carpets and other textile floor coverings', as well as the analogous wording of several headings in that chapter confirms that a carpet must, in principle, be regarded as a floor covering."

47. The "naked eye" test referred to in additional note 1 to the Chapter 42 (set out in paragraph 5 above) rests upon consideration of what is visible rather than the stiffness of the material. The ECJ stated as follows in *Howe & Bainbridge BV v Oberfinanzdirektion Frankfurt am Main* C-317/81 at [14]:

> "[14] That part of Question 1 must therefore be answered to the effect that the expression "can be seen with the naked eye" in Note 2(A) (a) to Chapter 59 of the Common Customs Tariff is to be interpreted as meaning that the impregnation, coating or covering of the fabric must be directly visible on simple visual examination and that the wording of the note does not allow the conclusion to be drawn from the stiffness of a fabric that it has received such treatment."

48. It follows that touch and feel are not relevant, as this goes beyond a visual inspection with the naked eye. Although not binding on us, we note that the First-tier Tribunal adopted this approach in the closely analogous case of *Optoplast Manufacturing Company Ltd v The Commissioners of Customs and Excise* [2003] UKVAT (Customs) C0017 ("*Optoplast*") at [23] and also in *Euro Packaging UK Limited v HMRC* [2017] UKFTT 01060 (TC) ("*Euro Packaging*") at [30] and [31].

The Expert Evidence

49. The only expert evidence before us was from Professor Bush in the form of two witness statements and oral evidence. We were informed that Professor Bush was the expert who appeared in *Optoplast.* At the start of oral closing submissions. Mr Laurence Gordon made an application to adduce in evidence the glasses case which had been considered by Professor Bush in *Optoplast*. We refused this application for reasons that we gave in the hearing, which included the unfairness to HMRC in not having the opportunity to cross-examine Professor Bush on the point (the evidence having closed and Professor Bush not being present during oral submissions) and that the First-tier Tribunal's reasoning is to be considered by reference to the decision in *Optoplast* rather than reopening the expert evidence that had been presented in the case.

50. Professor Bush explained that he had examined four items provided to him by Laurence Supply and three obtained by Professor Bush from elsewhere. One of these items was, we find as a fact, Item C. We make such a finding because Professor Bush included "C" in his identification of Exhibit 1 (although, curiously, this was removed from an amended version), the description of Exhibit 1 as being "Tan 'River Island' handbag with handle" matches Item C, the back is described as patterned leatherette and the front as soft tan suede, and Miss Vicary did not put to Professor Bush – understandably, given our previous points – that Item C was not considered by Professor Bush. The other items examined by Professor Bush had not been made available to either HMRC or the Tribunal.

51. In his first witness statement, Professor Bush described the back of Item C as, "fractal patterned leatherette, non-reflective," and said that its likely construction of its outer surface was, "Mixed liquid PU reactants coated on to an embossing roller plus curing over, with a textile substrate moving under it." In turn, Professor Bush described the front of Item C as, "soft tan suedette," and said that the likely construction of its outer surface was, "PU impregnated cloth, probably kitted cotton, brushed with special tool?" In the course of oral evidence, Professor Bush explained that this type of material is "leatherette" or "leather cloth" and is an example of a "fabric-based polymer composite". In his second witness statement, Professor Bush explained how a fabric-based polymer composite was made as follows:

> "They are not applied as a polymer, but as two reacting fluid streams which are brought together on a woven textile substrate to give exceptional "wetting" – penetrating contact at the point of contact under a roller where the polymer is formed."

52. In his first report, Professor Bush explained "fabric wetting" as follows:

> "Moreover, it must be emphasised that when we are dealing with polyurethane injected or coated on to a textile substrate, the PU reactants must penetrate more or less right through the substrate as they are reacting with each other and must thoroughly "wet" the fabric fibres at the same time. A true fabric polymer composite (FPC) will thus be formed. Neither the original chemical reactants, nor the fabric substrate can be disengaged from each other: they no longer have an independent existence.

53. Professor Bush also explained that, when applied as a liquid coating to a fabric substrate, PU can subsequently be embossed to give almost any desired appearance.

54. We accept Professor Bush's evidence (and find as a fact given the absence of contrary expert evidence, Professor Bush's witness statements, and our assessment of the credibility of his evidence in the course of cross-examination) that Item C was an embossed fabric-based polymer composite and that this means that it was formed by polyurethane penetrating a fabric substrate. We take this to mean that the outer surface of Item C is made of a combination of polyurethane and textile fibres.

55. We find that the rest of Professor Bush's evidence was of no assistance to us. As set out above, the other items examined by him were not before the Tribunal and so we could not consider what they looked like. We note that it was not Laurence Supply's case that any of the items other than Item C considered by Professor Bush were within the C18. Professor Bush also gave evidence as to the use and nature of what he termed cellular plastic sheeting. However, as he accepted that this was simply one category or type of plastic sheeting, we find that this was of limited assistance to us when considering what plastic sheeting looks like. Further, Professor Bush gave evidence in respect of the items considered in *Optoplast*. However, our analysis of *Optoplast* is to come from the First-tier Tribunal's decision itself rather than reopening the evidence that was heard in that case. Finally, Professor Bush gave

evidence as to his views as to the application of the Combined Nomenclature. However, these are a matter for this Tribunal.

Submissions

56. Mr Laurence Gordon submitted that the 3.7% CN Codes were correct. He said that Item C does not look like plastic sheeting and instead looks like leatherette. It was the appearance of faux leather that made Laurence Supply's products attractive to consumers and so they are deliberately designed not to look like plastic sheeting. He also submitted that *Optoplast* was a very similar product and so the same result should apply. Further, *Euro Packaging* showed how the "naked eye" test was to be applied.

57. Miss Vicary submitted that the 9.7% CN Codes were correct. She submitted that the label on Item C states that the interior of Item C is 100% polyester whilst the exterior is 100% polyurethane. If an item is not plastic sheeting then it will be treated as such if it has the appearance of plastic sheeting. The back, base and corner panels make up the majority of Item C and have the appearance of an embossed plastic sheet. Manufacturing processes should be ignored as it is the visual inspection which is important. Further, *Optoplast* and *Euro Packaging* were not binding and were of limited use because they turned on their own facts and the specific goods in question. Miss Vicary also relied upon the basis of the tariff classification service report, which she reproduced in her skeleton argument. In particular, this included the following:

> "A handbag. The back and base of the handbag and two lower corners of the front are all made from a polyurethane plastic, with embossed grain design. The remaining part of the front is made from a textile with pile surface (suede look). With adjustable shoulder strap made of the same plastic. The main compartment has a zip closure across the top. With pockets at sides and front fastened by zip. Measuring approximately 31cm wide 24cm high and 12 deep. Beige in colour.
>
> ...
>
> GIR 1 has been used to classify this product by the terms of heading 4202 - trunks, suitcases, vanity cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, insulated food or beverages bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette-cases, tobacco pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanised fibre or of paperboard, or wholly or mainly covered with such materials or with paper.
>
> GIR 3(b) has been used as the plastic outer surface is considered to be the essential character.
>
> GIR 6 has been used to classify this product to subheading level 420222 - handbags, with outer surface of plastic sheeting or of textile material.
>
> CN code 42022210 - of plastic sheeting.
>
> ...
>
> Beige handbag - river island label. Excluded from 4202229090 as the outer surface is not made predominantly from textile, but is made predominantly of plastic sheeting. Therefore, in accordance with additional note 1 to chapter 42 and the CNENS to 42021211-19, the bag is classified to the material forming the outer surface of the container and GIR 3(b) determines classification to the material giving the product its essential character. In this instance the

predominant material of the outer surface and giving the essential character is considered to be the plastic sheeting."

58. Miss Vicary placed these submissions in the context of the GIRs as follows: for the purpose of GIR1, the item is a handbag, it is an article with an outer surface of sheeting of plastics or of textile; for the purpose of GIR3(b), it is the back, base and corner panels of Item C which give it its essential character; and, for the purposes of GIR6, the outer material that is visible to the naked eye is a sheeting of plastics.

Discussion and Decision on Classification

59. We find that Item C should not be classified as CN code 4202 22 10 00 (plastic sheeting) and instead is to be classified as CN code 4202 29 00 00 (other). This is for the following reasons.

60. First, for the purposes of GIR1, we agree that Item C is a handbag and so within Chapter 4202.

61. Secondly, for the purposes of GIR3(b), we agree that it is the leatherette (which term, as set out above, we use neutrally) that gives Item C its essential character rather than the suedette (which term we again use neutrally) as it is more than 50% of the outer surface of the handbag.

62. Thirdly, the leatherette is a fabric polymer composite. For the reasons set out by Professor Bush (which we accept as set out above), this means that the plastic is mixed with the textile substrate rather than being placed on top of it. We accept that this creates a sheet or sheeting using the ordinary meaning of the terms and when considering the objective characteristics of Item C. This is because Item C has the appearance of being made up of separate flat panels that are stitched together. The back panel of Item C is a single piece of leatherette which has been stitched to another piece of leatherette that forms the bottom panel. Two more pieces of leatherette are stitched at the bottom corners. The sides of the back panel are stitched to zips and to suedette. We also note that the ordinary and customary meaning of a "sheet" or "sheeting" does not require rigidity, as is obvious when referring to, for example, a sheet of paper or a fabric sheet used to cover a bed. However, it is not a "sheeting of plastics" or "plastic sheeting" because the sheet or sheeting is not just of plastic; as it is a fabric polymer composite, the sheet is a combination of plastic and textile.

63. In accordance with GIR6, the Explanatory Note is therefore engaged because the sheeting visible to the naked eye is the result of applying a coating or covering of plastics to the material. The question is whether, as set out in the Explanatory Note, "the resultant outer layer being visible to the naked eye has the same visual appearance as an applied layer of manufactured plastic sheeting." The leatherette does not have the same visual appearance as an applied layer of manufactured plastic sheeting for the following reasons:

(1) The leatherette looks like leather.

(2) The leatherette has visible embossing which mimics the grain expected of natural leather. This grain does not appear to have a regular pattern.

(3) The leatherette has a low level of shine which gives the appearance of unpolished leather.

(4) The stitching is apparent, which gives the impression of a leather panel.

(5) We would not expect an applied layer of manufactured plastic sheeting to have the appearance of leather as set out in sub-paragraphs (1) to (4) above. Crucially, the leatherette within Item C looks like leather and does not look like plastic.

64. Fourthly, we do not treat *Optoplast* or *Euro Packaging* as being determinative of the present appeal. The items in question are different and do not bind us when considering Item C.

65. It follows that we find that HMRC have classified Item C wrongly within the C18.

QUANTUM

The Law

Best Judgement

66. There was a dispute as to whether HMRC must establish that the C18 was to best judgement.

The Submissions

67. Mr Laurence Gordon, on behalf of Laurence Supply, accepted that it was for Laurence Supply to establish the correct classification of the Goods. However, he submitted that it was for HMRC to establish that the C18 had been issued to best judgement. He did not cite any authorities for this. However, he noted that best judgement had been referred to in the present case by Judge Brown KC in a previous case management hearing.

68. Miss Vicary, on behalf of HMRC, submitted that assessments to customs duty cannot be made on a best judgement basis. Instead, where HMRC discover an error in the tariff classification of goods, they must recalculate the customs duty due in the light of the available information. Miss Vicary referred us to *Skatteministeriet v Sportsgods A/S* [1998] ECR I-5285 and *Cooneen Watts & Stone v HMRC* [2015] EWCA Civ 1261.

Discussion and Decision on Best Judgment

69. We agree with Miss Vicary that there is no requirement for HMRC to establish that the C18 was made to best judgement. The relevant articles of the Community Customs Code (particularly Articles 217 to 221) and the Union Customs Code (particularly Articles 101 to 107) make no reference to a requirement for best judgement and instead require HMRC to recalculate in the light of the new information at their disposal when they discover an error in the tariff classification of goods. This is to be contrasted with for, example, excise duty where best judgment is expressly provided for (see section 12(1) of the Finance Act 1994). Further, there is no wider duty upon HMRC when assessing for customs duty, as explained as follows by the Court of Appeal in and *Cooneen Watts & Stone v HMRC, supra, per* Laws LJ at [38] and [39]:

> "[38] I do not think it necessary to consider whether Nugee J was right to accept jurisdiction to entertain HMRC's contention as to Chapter 65, for in my judgment there is nothing in the substance of Mr Beal's points on unfairness or procedural irregularity. As to the first – that his clients were deprived of the opportunity to make a case for code 6506 in the proceedings – the issue in the appeal was whether the case they did make, for code 6211, was correct. HMRC owed them no duty to advance assertions of their own which might suggest an alternative case in the appellants' hands, or to do so soon enough to enable such a case to be made. From first to last the burden was on the appellants to choose what case if any they would put forward for MEU relief. I would emphasise and endorse these observations made by the FTT:
>
> > "116. The importer has an obligation to ensure that it enters the correct customs classification on any customs declaration at the time of importing a consignment of goods (see Article 199 of the Implementing Regulation). From the time of publication in the Official Journal, no person is deemed to be unaware of the nature and extent of charges to customs duty (see *Binder v. Hauptzollamt Bad Reichenhall* [1989] ECR

> 2415, at [19]). The importer is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities (See Case T-239/00 *SCI UK Ltd v. Commission* [2002] ECR II-2957 at [55]). It is the responsibility of traders to make the necessary arrangements in their contractual relationships to guard against the risks of an action for post-clearance payments.
>
> 117. By virtue of the provisions of the Code and the Implementing Regulation set out above, HMRC are obliged as a matter of EU law to enter the correct CN classification for goods imported into the United Kingdom (See Case C-413/96 *Skatteministeriet v Sportsgoods A/S* [1998] ECR I-5285 at [23–25] and [36–37]). In principle, when the customs authorities discover an error in the tariff classification of goods indicated in a declaration of release for free circulation, they must recalculate, in the light of the new information at their disposal, the amount of customs duties legally due at the date when that declaration was accepted."

> [39] These considerations apply equally to Mr Beal's alternative submission, that a prior decision by HMRC that Chapter 65 applied would have enabled his clients to seek an amended MEU certificate showing code 6506 in relation to the headgear, and to claim relief accordingly. But I think there is a further, related point. Even if (contrary to my firm opinion) HMRC could be said to owe a duty of some kind to canvas Chapter 65 in the decision-making process, a breach of such a duty would have nothing to do with these proceedings and could not be remedied within them. As I have said the only issue in the appeal was whether the claim for relief by reference to heading 6211 was right. If, as Nugee J held and I agree, it was not, such a supposed failure of duty would not make it so. It would afford no basis for allowing the appeal."

70. We note that Mr Laurence Gordon told us that Judge Brown KC treated this as a best judgement decision. He has obtained and provided us with a transcript of the relevant hearing, which related to a strike out application made by Laurence Supply (at a time when it was represented) and a further application made by Laurence Supply for the classification issue to be heard as a preliminary issue prior to matters of quantum. Judge Brown KC dismissed both of these applications and also made various case management directions. Judge Brown KC was not presented with argument as to whether or not this was a best judgement decision. Indeed, the transcript reveals that Miss Vicary referred to the C18 as a best judgement assessment (which she presumably now says was wrong) and did so in the context of submissions relating to the relevance or otherwise to the application for a preliminary issue of the absence of documentation from Laurence Supply to challenge the quantum of the C18. The only other reference to best judgement within the transcript is in Judge Brown KC's oral reasons for her decision to refuse the application for a preliminary issue, in which she stated as follows:

> "In addition, I think it's irrelevant ... that the documentation is not available, and therefore would put the Appellant to considerable time, effort and money. That is a matter that arises as a consequence of having appealed. I expressed my shock immediately, when Mr Rowell said that the list of documents would need to be expanded.
>
> With all due respect, Mr Rowell, you can only expand the list of documents with the permission of the Tribunal. The fact that your instructing solicitors and client don't actually have the documents to put on their original list of documents is not a matter that is relevant for the Tribunal to take into account, when faced with a best judgement assessment. The appeal should have been made on the basis of the information having been gathered, or, the gathering

> should have been taking place over the last two years since the appeal was lodged."

71. Judge Brown KC was not, therefore, deciding as a matter of law that this was a best judgement assessment. Instead, she was making a comment about the relevance or otherwise of the fact that Laurence Supply did not have any documentation available. As such, we are not bound to treat the C18 as a best judgement decision and, for the reasons set out above, we do not do so. We note that Judge Brown KC issued a full written decision on 13 July 2021 which made reference to the decision being made by HMRC on a best judgement basis but, again, unsurprisingly did not deal with whether this was technically the correct analysis given that it was not in issue between the parties at that stage.

Burden of Proof

The Submissions

72. It was not clear whether Mr Laurence Gordon accepted that the burden of proof as to quantum was upon Laurence Supply (although he clearly accepted that the burden of proof as to classification was upon Laurence Supply, his focus throughout was upon criticism of what he said were HMRC's failings in respect of the C18 and said that Laurence Supply was under no obligation to provide the documents which HMRC had been asking for).

73. Miss Vicary submitted that the burden is on an appellant to show on the balance of probabilities that the assessment contained in the C18 is wrong. Miss Vicary referred us to *Brady (HM Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635, *Grunwick Processing Laboratories v Comms of C & E* [1987] STC 357 and *Vital Nut Co Ltd v HMRC* [2017] UKUT 192 (TCC). The task is not to balance two competing views and determine which is more likely to be correct as instead the burden is upon the appellant to establish its case. Miss Vicary referred us to *Golamreza Qolaminejte (aka Anthony Cooper) v The Commissioners for Her Majesty's Revenue and Customs* [2021] UKUT 119 (TC). In addition, Miss Vicary submitted that the burden of proof could not be satisfied by calculating the amount of duty due on a pro-rata or estimated basis. Miss Vicary referred us to *Build-a-Bear Workshop UK Holdings Limited v HMRC* [2021] UKUT 67 (TCC).

Discussion and Decision as to Burden of Proof

74. We agree with Miss Vicary that the burden of proof is upon Laurence Supply. In *Vital Nut Co Ltd v HMRC, supra,* the Upper Tribunal made the point that it is not for HMRC to justify the classification in the C18 but it is instead for the taxpayer to establish that the classification is wrong and what it should be instead. The Upper Tribunal stated as follows at [15](4)(c):

> "(c) Before the FTT, it was common ground between the parties that the burden of proving which was the applicable class fell on the taxpayer, here Vital Nut. This was also not a controversial point before us. In this case, the Commissioners issued a C18 Post Clearance Demand Note (C1802/163608) which was predicated on the classification of the papaya under commodity code heading 20.06. Vital Nut accepted that it was not for the Commissioners to justify this classification. Rather, the onus was on Vital Nut to show that the 20.06 classification was wrong and that commodity code heading 20.08 was the appropriate one: *Brady (HM Inspector of Taxes) v. Group Lotus Car Companies plc* [1987] 3 All ER 1050."

75. However, we do not agree with Miss Vicary that *Build-a-Bear Workshop UK Holdings Limited v HMRC, supra,* establishes that the amount of duty cannot be calculated on a pro-rata or estimated basis. Although this had been the submission of leading counsel for HMRC (see [241]), the Upper Tribunal took care to say that they were going no further than to say that it

is for the Tribunal to examine the evidence to consider if the burden of proof has been met. The Upper Tribunal stated as follows at [244] to [248]:

> "[244] Pursuant to s16(6) Finance Act 1994, the burden of proof in customs and excise appeals is on the appellant other than in relation to the specific matters which are set out in subparagraphs (a) to (c) of that sub-section.
>
> [245] The burden is therefore on BAB to show on the balance of probabilities that the assessments contained in the C18s were wrong, in whole or in part.
>
> [246] We therefore agree with Mr Thomas that, to the extent that BAB has failed to provide any evidence of the nature of the goods that were imported under a particular EPU code, the assessment in the relative C18 must stand.
>
> [247] As a matter of principle, however, we do not go any further than that. It is for the FTT in appropriate cases to examine the evidence that is put forward by an appellant to challenge an assessment and to determine if it meets the appropriate standard of proof.
>
> [248] In this case, as a consequence of its decision not to address questions of the quantum of liability, the FTT made no relevant findings of fact. It might be assumed that the FTT accepted Mr Cook's evidence and regarded Mr Cook's evidence as meeting the burden of proof, but there is no clear finding to that effect. Mr Cook has not appeared before us and we are in no position to make any decision on the weight of his evidence in relation to the C18s."

76. It follows that whether the burden of proof is met is fact specific. If, in the factual circumstances of a particular case, a pro-rata or estimated basis is sufficient to establish on the balance of probabilities that the assessment is wrong in whole or in part, then such a challenge may succeed. However, this depends upon how reliable and accurate the pro-rata or estimated basis is and as to the weight of the evidence supporting it.

Findings of Fact

77. We bear in mind the findings of fact that we have made above. We also make the following findings of fact with specific regard to matters of quantum.

78. In response to Miss Vicary's questions in cross-examination, Mr Mark Gordon explained that he did not have any documents or samples which would evidence the specifications provided for either of the approaches to sourcing the Goods or which would evidence what the material used was. He said that his sister did all the designing but that she does not normally retain her emails for more than a year. He did not remember whether he had asked to her to search for these emails. He had the purchase orders and sales orders but these did not show what the material was like. We accept Mr Mark Gordon's evidence in this regard.

79. We note at this stage that Laurence Supply relied upon photographs of 20 handbags, being the Images referred to above. No attempt was made to explain how many of these 20 handbags were within the C18. In any event, we were not in a position to conduct a naked eye test upon these handbags as the Images only showed the front of each handbag and were of only modest quality. Nevertheless, the quality of the photographs was sufficient to establish that they comprised a range of different styles, not only as to how the handbags themselves looked but also as to the appearance of the material used. Importantly, we find that the Images did not establish that the leatherette used for Item C was typical of the other items in the Images. Only one of the Images (which was of a zipped clutch bag) showed embossing that was the same as the leatherette on Item C, and even this was only one relatively small part of what appeared to be a patchwork of differently styled materials. We also find that Laurence Supply did not refer to the leatherette in a uniform manner, as the entries on the Schedule also referred to "Satin Polyester", "Woven Nylon", and "Cotton".

80. We find that HMRC told Laurence Supply of the need to provide evidence of the Goods, in particular by way of Mrs Wilkes' letters dated 20 February 2017, 30 March 2017 and 3 April 2017. Whilst Mr Laurence Gordon is correct that there was no obligation upon Laurence Supply to provide the documents requested by HMRC, the effect of Laurence Supply's failure to do so then or since means that no such documents are before this Tribunal.

81. Indeed, the importance of the need to establish the classification of the other Goods, or at least the extent to which they correspond to Item C or Item D, has been apparent throughout this appeal. The Amended Grounds of Appeal, drafted by Counsel, state as an alternative case to the classification argument that, "the Appellant will adduce evidence as to the true proportions of PU leatherette and textile Goods imported during the assessed period." Further, Laurence Supply made two applications for classification to be heard as a preliminary issue, each of which was refused (the first by Judge Fairpo on 19 September 2020 and the second by Judge Brown KC in her oral decision on 22 June 2021 and her written decision released on 16 August 2021). Even Mrs Wilkes' witness statement invited evidence as to which Handbags or Purses were suedette upon the basis that, "there would still be scope to vary the C18 raised," (albeit that this was only in the context of establishing similarity to Item D rather than Item C).

82. Mr Laurence Gordon said in closing submissions that, during the period which the C18 covers, Laurence Supply only ever supplied leather look (which term he used interchangeably with leatherette) and suedette Handbags and Purses. However, we note that neither Mr Laurence Gordon or Mr Mark Gordon actually said this in either of their witness statements or in their oral evidence. Even if we were to treat this as their evidence, we cannot find as a fact that the Goods were exclusively the same as the leatherette in Item C or the suedette in Item D. This is for the following reasons: neither Mr Laurence Gordon nor Mr Mark Gordon's evidence went that far; even if we could treat it as evidence, Mr Laurence Gordon's submission does not actually go that far either (as he just referred to "leather look" rather than saying that all such items were the same as, or made from the same material as, Item C); Mr Mark Gordon said that there were 1,000 to 1,300 different styles; and, as set out above, the photographs do not show that the leatherette in Item C was typical of the leatherette goods.

Submissions

83. Mr Laurence Gordon submitted that Laurence Supply only supplied leather look and suedette Handbags and Purses. He also relied upon the Images. He also relied upon the 2013 visit as evidence that HMRC had accepted that CN codes for textiles were appropriate. Further, he submitted that HMRC accepted that the six items which it did not take as samples (only taking two samples) were polyurethane leather.

84. Miss Vicary submitted that Laurence Supply has simply failed to satisfy the burden of proof as to the quantum of the C18. She further submitted that Laurence Supply had effectively refused to provide any further documentation. She noted that on 26 October 2020 HMRC highlighted the absence of documents such as purchase orders describing what the Goods were, to which Laurence Supply's solicitor stated that, "we confirm that our client does not intend to rely upon any purchase orders ... Our client is satisfied that the documents it has listed sufficiently support its case." However, there are no documents which provide any evidence about what the Goods were, what any leatherette or suedette looked like, or how many were similar either to Item C or Item D. Further, the Images are of no assistance as they cannot be correlated with the Goods and in any event do not enable a consideration of the "naked eye test".

85. In closing submissions, Miss Vicary submitted that the removal of Item C from line 253 of the C18 reduces the sum assessed by £2,064.36 to £601,484.22. Laurence Supply have not provided any alternative figures or calculations.

Discussion and Decision as to Quantum

86. We find that Laurence Supply has failed to satisfy the burden of proof in respect of any of the Goods within the C18 other than Item C. This is for the following reasons.

87. First, HMRC rightly accepted that if it could be established that *all* the Goods looked like either Item C or Item D then Laurence Supply would not need to establish which looked like which, as the rate would be 3.7% in either case. However, we find that Laurence Supply has not established that *all* the Goods looked like either Item C or Item D. Indeed, Laurence Supply (acting clearly honestly and fairly) did not go so far as to suggest that this was the case. The high point was the submission that Laurence Supply only supplied leather look and suedette Handbags and Purses. This is different to saying that they were the same as Item C or Item D, as particularly "leather look" could cover a range of appearances, as shown in the Images. We repeat our findings at paragraph 82 above in this regard. In any event, neither Mr Laurence Gordon nor Mr Mark Gordon elaborated in evidence or submissions upon what appearance they meant by the rest of the Goods being leather look, leatherette or suedette.

88. Secondly, in principle it would have been open to Laurence Supply to provide evidence as to how many of the Goods predominantly used a material which looked like either Item C or Item D. However, Laurence Supply did not do so, whether by identifying specific imports or by estimating (backed up by sufficient evidence for such an estimation) the proportion of the Goods which looked either like Item C or Item D, or by a suitable sampling exercise as envisaged by the Amended Grounds for Appeal. We are surprised that Laurence Supply does not seem to have attempted to do this. We would expect there to be some evidence available as to the designs or specifications of the Goods, whether in the context of Laurence Supply's communications with their manufacturers or their customers. The closest to any analysis was the assertion in the email dated 27 April 2017 referred to above that 23% of the imports were non-textile. However, this was not expanded upon (or even adopted) in the witness evidence or submissions, its basis is unclear, and, if based upon the Images, does not explain why these were representative of the rest of the imports. Indeed, no real explanation was given as to why the other 77% were said to be "textile" or why (if at all) they are to be correlated with Item D.

89. Thirdly, the Images do not establish that any of the Goods are to be classified to the 3.7% CN Codes. We repeat paragraph 79 above in this regard.

90. Fourthly, although HMRC did not take issue with the use of 3.7% CN Codes at the time of the 2013 visit, this does not enable Laurence Supply to establish what the Goods were between 6 May 2014 and 4 May 2017.

91. Fifthly, as set out in paragraph 33 above, the reason for Mrs Wilkes only taking two samples was because it was common ground that Item C and Item D were the only items of the eight samples which contained suedette. In accordance with Mr Laurence Gordon's own evidence (and, again, as we have found as a fact at paragraph 33 above) no agreement was reached as to the classification of the other six items.

92. Sixthly, it is important to note that the context of the burden of proof as to quantum is not simply as to the accuracy of the calculations. It is for Laurence Supply to establish, on the balance of probabilities, which of the imports within the C18 were wrongly classified. Laurence Supply has not sought to do this, and in any event has not done so.

93. Laurence Supply did not provide any alternative submissions or figures for the reduction of the C18 following the reclassification of Item C. In any event, we agree that only line 253 of the C18 appears to relate to Item C and so we also agree that the C18 is to be reduced by £2,064.36 to £601,484.22.

Submissions

94. Mr Laurence Gordon did not make any submissions as to any authorities on the availability of public law principles. We make no criticism of him for this whatsoever, as this was an issue which was generated by the Tribunal wanting to make sure that Laurence Supply's case could be considered at its highest. This arose from Mr Laurence Gordon's submission that HMRC had acted unfairly or should otherwise be held to their findings in their 2013 visit or that HMRC had approached the calculation of the C18 wrongly by simply applying a flawed classification to all of the Goods.

95. We therefore invited Miss Vicary to address the question of whether it was in principle open to Laurence Supply to argue that the C18 (in particular the inclusion of all of the Goods in it) was irrational or if any legitimate expectation argument may arise from the 2013 visit. Of course, these would in any event depend upon our findings of fact if these arguments are within our jurisdiction. We are grateful for Miss Vicary's research, which she presented in a fair and constructive manner. In short, she submitted that there is no supervisory jurisdiction to allow this to be taken into account in the present case and that the statutory scheme does not engage any public law principles. Miss Vicary referred us to *HMRC v Abdul Noor* [2013] UKUT 071 (TC), *KSM Henryk Zeman SP Zoo v HMRC* [2021] UKUT 182 (TCC), and *Xerox Limited v HMRC* [2022] UKFTT 00092 (TC).

Discussion and Decision on the Availability of Public Law

96. We agree with Miss Vicary that the C18 cannot be challenged before this Tribunal upon public law principles. Whilst it is clear that this Tribunal does not have a general supervisory jurisdiction, public law principles can still be considered where the statutory language permits it, such as where the statutory language gives rise to a discretion to be exercised by HMRC. The position was summarised, albeit *obiter*, as follows by the Upper Tribunal in *KSM Henryk Zeman SP Zoo v HMRC, supra*, at [69] to [75] (in that case finding that the particular legislation and subject-matter in issue in that case did allow for public law principles):

> "[69] It is clear from the detailed list of appeal subjects in section 83 that the FTT does not have a *general* supervisory jurisdiction (*Corbitt*). We agree with that proposition and nothing we say is intended to derogate from it.
>
> [70] That is not, however, the same thing as saying that a taxpayer may not in at least certain of the cases described in section 83(1) defend himself by challenging the validity of a decision on public law grounds. The starting point is that he should be able to (see *Beadle* at [44]). The question which arises is whether the statutory scheme expressly or by implication excludes the ability to raise a public law defence (again, see Beadle at [44]).
>
> [71] In the present case, the relevant statutory language provides that if certain conditions are fulfilled, the Commissioners "may assess the amount of VAT due … to the best of their judgment" (s.73(1)), and if they do then an appeal shall lie to the tribunal "with respect to" the assessment or its amount (s.83(1)(p)).
>
> [72] The word "may" is permissive, not mandatory. It must follow that an assessment is made not by operation of the statute but by a discretion exercised by HMRC. We prefer a construction of section 73(1), and therefore of section 83(1)(p), which recognises and gives effect to that word. We therefore respectfully disagree with the approach adopted in *Gore* at [30] and [44] (see [65] and [67] above), which treats the word "may" as descriptive of a separate enforcement function and attributes no weight or meaning to it in the context of section 73(1) looked at on its own terms.

> [73] A taxpayer has a right of appeal to the tribunal "with respect to … an assessment … under section 73(1)." Although made in a different context, and indeed in the context of statutory language which is narrower than that in section 83(1)(p) (see [39] above), we agree with the comments on Sales J in *Oxfam* at [63] as to the ordinary and natural meaning of the phrase "with respect to". As a matter of language, it defines the scope of the tribunal's appellate jurisdiction not by reference to any particular legal regime or type of law, but instead by reference to the subject-matter of the subsection.
>
> [74] Here the subject matter of subsection 83(1)(p) is, straightforwardly, "an assessment … under section 73(1) … or the amount of such an assessment." And for there to be "an assessment … under section 73(1)" the Commissioners need to have made a decision that there should be one (see [72] above).
>
> [75] On its face, therefore, we find it difficult to see that this statutory language excludes the availability of a general public law defence based on legitimate expectation. Such a defence would seem to fall squarely within the subject-matter described."

97. The point was considered in a customs duty context in *Caerdav Ltd v HMRC* [2023] UKUT 00179 (TCC) ("*Caerdav*"). The Upper Tribunal held that the customs duty and VAT chargeable as a result are mandatory and leave no room for domestic public law defences to be considered. The Upper Tribunal stated as follows at [152] to [158]:

> "[152] The starting point is therefore that appeal grounds which concern public law arguments should be pursued in judicial review proceedings rather than before the FTT. However, we, like the FTT, accept that the FTT may have jurisdiction to consider appeal grounds based on public law arguments (such as legitimate expectation) depending on the statutory provisions under consideration.
>
> [153] Thus, the statutory context is key, as the UT in *Henryk* explains.
>
> [154] In this appeal, the taxpayer appeals under s.83(1)(b) VATA, which permits appeals to the FTT with respect to *"the VAT chargeable… on the importation of goods from a place outside the member States."* Like the right of appeal under s.83(1)(c) VATA, the VAT chargeable on the importation of goods is not a matter of discretion but is mandatory and in an appeal the FTT is concerned with whether the conditions prescribed for a charge to arise under the legislation are present and the amount of the charge.
>
> [155] This is in contrast to the manner in which s.83(1)(p) VATA provides a right of appeal against the discretion of HMRC whether to make an assessment under section 73(1). Hence there is a distinction drawn between subsections 83(1)(c) and (p) VATA set in the authority on which the Appellant relies – *Henryk*:
>
> > "We note one point immediately, which is that on the face of it, the scope of section 83(1)(p) is broader than the scope of section 83(1)(c) (the provision in issue both in Oxfam and Noor), because an appeal lies only with respect to the amount of an assessment but instead with respect to "an assessment… under section 73(1)." And the wording of section 73(1), on the face of it, is permissive not mandatory – 'the Commissioners may assess the amount of VAT due to the best of their judgment and notify it."
>
> There is a discretion inherent in s.83(1)(p) VATA read together with section 73, which were the statutory provisions considered in Henryk which led it to decide public law arguments could be pursued in the FTT appeal. However, there is no discretion conveyed by subsections 83(1)(b) or (c) VATA which

> are the mandatory provisions concerning the appeals applicable in this case and in *Noor* respectively.
>
> [156] The same point applies to the appeal against the Customs duty. Section 13A(2) of the Finance Act 1994 defines a relevant decision for customs duty:
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> > "(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union], as to
> >
> > (i) whether or not, and at what time, anything is charged in any case with any such duty or levy;
> >
> > (ii) the rate at which any such duty or levy is charged in any case, or the amount charged;
> >
> > (iii) the person liable in any case to pay any amount charged, or the amount of his liability; or
> >
> > (iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled."
>
> [157] These are mandatory provisions. As noted in *Noor* at para 194 "all Member States must apply the common external tariff to imports from third count[r]ies. HMRC does not have a discretion about whether or not to apply a customs duty". On an appeal, the FTT is concerned with whether the facts prescribed for a charge to arise are present and the amount of the charge.
>
> [158] We thus agree with the FTT's analysis set out at [200] above and reject Ms Choudhury's suggestion that the statutory provisions under consideration conveyed any right of appeal against the exercise of a discretionary power by HMRC. There was no error of law in the FTT concluding that, as a matter of statutory interpretation, it had no jurisdiction to consider public law grounds, such as legitimate expectation, in appeals brought under sections 83(1)(b) VATA and sections 13A(2) and 16(5) Finance Act 1994."

98. We therefore adopt the approach taken by the Upper Tribunal in *Caerdav,* as it is equally applicable to classification appeals such as the present case given that the same appeal provisions are engaged, and also given that HMRC's underlying obligations are mandatory. It follows that the reasonableness of the C18 is not within our jurisdiction as HMRC was not exercising any discretion in that regard.

99. Similarly, it follows that we cannot consider any domestic law legitimate expectation arising from the 2013 visit as our jurisdiction is as to whether the facts prescribed for a charge to arise are present and the amount of the charge. In any event, we find as a fact that no legitimate expectation arose from the 2013 visit that the Goods in the C18 could be classified using 3.7% CN Codes. First, HMRC did not inform Laurence Supply that all future goods could be classified using 3.7% CN Codes; at its highest, HMRC's conduct in not taking issue with the use of the 3.7% CN Codes can be treated as meaning that the goods considered at that time by HMRC were correctly classified. Secondly, there is no evidence as to the appearance of, or material used in, the goods considered by HMRC at the time of the 2013 visit. Thirdly, for the reasons set out above, there is no evidence as to the appearance of, and material used in, the Goods comprising the C18 and so it is not possible to assess their similarity (or otherwise) to the goods considered during the 2013 visit.

100. There were no submissions by either party as to whether or not there is jurisdiction to consider a freestanding EU law concept of legitimate expectation (see the discussions, albeit in the context of remission, in *Caerdav* at [118] and *Fatima Jewellers Ltd v HMRC* [2023]

UKFTT 00889 (TC) at [52] to [59]). However, even if legitimate expectation in this context could be considered, we find that no legitimate expectation could arise or have any effect for the reasons set out in paragraph 99 above.

DISPOSITION

101. It follows that we allow the appeal in part to take into account the reclassification of Item C. The C18 is therefore reduced by £2,064.36 to £601,484.22. We sympathise with the frustration that Laurence Supply may well feel about being successful on the classification issue and yet only achieving a very modest reduction of the C18. This is particularly stark given that HMRC themselves appear to have anticipated the possibility that some of the Goods would be similar at least to Item D. However, in the absence of sufficient evidence being provided by Laurence Supply, there are no grounds to reduce the C18 any further.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

102. 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.

RICHARD CHAPMAN KC
TRIBUNAL JUDGE

Release date: 06th FEBRUARY 2024