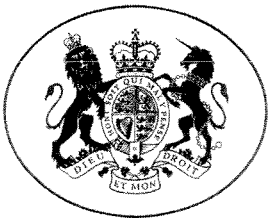
[2014] UKUT 0031 (TCC)



Appeal number: FTC/91/2012

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

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

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

- and -

COONEEN WATTS AND STONE LIMITED **Respondent**

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at the Rolls Building, London EC4A 1NL on 23-24 October 2013

Owain Thomas instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Appellants

Kieron Beal QC instructed by Carson McDowell LLP for the Respondent

DECISION

Mr Justice Nugee:

Introduction

1. This is an appeal by Her Majesty's Commissioners for Revenue and Customs ("**HMRC**") from a decision ("**the Decision**") of the First-tier Tribunal (Judge Jonathan Cannan and Mr Alan Spier) ("**the FTT**") dated 3 October 2012. It is brought with the permission of the FTT (Judge Cannan) granted on 30 November 2012. The issues between the parties relate to the correct treatment and classification for customs purposes of certain specialised military clothing imported by the Respondent, Cooneen Watts and Stone Ltd ("**CWS**"), from The People's Republic of China, which was designed for the protection of troops in combat.

2. The FTT classified the goods as "Other garments" under heading 6211 of the Combined Nomenclature ("**CN**"). HMRC contend that it was wrong to do so and that they should have been classified under other headings, principally 6203 ("jackets…trousers…shorts"). The practical significance is that if they are classified under 6211, CWS can take advantage of Council Regulation 150/2003 ("**the MEU Regulation**") which provides for the suspension of import duties for certain weapons and military equipment imported for military end use ("**MEU**"). In order to qualify for this MEU exemption, the goods have to fall within particular headings of the CN listed in the annexes to the Regulation; so far as clothing is concerned, the only CN codes listed from chapter 62 of the CN (which covers "Articles of apparel and clothing accessories, not knitted or crocheted") are codes 6210, 6211 and 6217. If therefore the goods are correctly classified to code 6203 they cannot qualify for the exemption even though they are undoubtedly intended for a military use.

Legal background

3. Before coming to the facts in detail, it is helpful to set out the legal background. I can do this by referring to the succinct statement by Lawrence Collins J in *Vtech Electronics (UK) plc v Commissioners for Customs & Excise* [2003] EWHC CH 59 (***"Vtech"***) at paragraphs [6] to [12], as follows:

> "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 Article 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 I to Regulation 2658/87, is re-issued annually: the version applicable to the present case is Annex I to Regulation 2204/99 (12.10.99 OJ L278). 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 Article 12 of the Common Customs Code (Council Regulation 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..."

In the present case the version of the CN which has been put before me is that at Annex I to Commission Regulation (EC) No 1031/2008 which came into

force on 1 January 2009: some of the relevant imports took place in 2008 but it is not suggested that there was any relevant difference in the 2008 version of the CN.

4. The levying of customs duties on goods imported into the EU is governed by Council Regulation 2913/92/EEC (**"the Customs Code"**). The Customs Code is supplemented by Commission Regulation 2454/93/EEC (**"the Implementing Regulation"**).

5. The MEU Regulation was passed on 21 January 2003 and applies from 1 January 2003. I will have to look at its provisions in more detail in due course but at the moment the significant points can be summarised as follows:

(1) The effect of the Regulation where it applies is to suspend import duties on weapons and military equipment imported by or for the defence authorities of the Member States.

(2) It does not however apply to all such equipment but only to certain equipment, namely those listed in Annex I. Annex I lists certain 4-digit codes from the CN. As stated above the only codes from chapter 62 which are included are 6210, 6211 and 6217. The only code from chapter 65 ("Headgear and parts thereof") is 6506.

(3) In order to claim the benefit of the suspension, the importer requires a certificate issued by the competent authority of the Member State for whose military forces the goods are destined. The form of certificate is set out in Annex III and certifies that the goods described in the certificate are for the use of the military forces of the particular Member State specified.

(4) The MEU Regulation provides that imported goods are subject to end use conditions as set out in the Customs Code. MEU is one of a number of examples where goods imported for a particular end use can qualify for advantageous treatment for customs purposes, and the end use conditions are intended to place such goods under the supervision of the Customs authorities for a period to ensure that the end use procedures are not abused.

(5) The combined effect of the Customs Code (Articles 21, 86 and 87) and the Implementing Regulation (Article 292) is that the importer also requires written authorisation from the customs authorities to benefit from the tariff suspension in the MEU Regulation.

The issues

6. CWS is based in Northern Ireland. It was formed in 2004 as a joint venture between two separate clothing companies for the purpose of bidding for a Ministry of Defence (**"MoD"**) procurement contract. This bid was successful and in June 2004 CWS was awarded a contract, initially for 5 years, under

which it became the Industrial Prime Vendor to the MoD for what are known as Cut and Sew products. The contract was in the event extended into 2010 and then renewed, and CWS supplies over 150 different clothing and clothing-related products under the terms of the contract, including both specialised military clothing and non-specialised clothing.

7. The present appeal is concerned with only a small number of the items of specialised clothing. They consist of various items, identified by CWS's catalogue numbers and the description in the catalogue, as follows:

Catalogue No	Catalogue description
11	Jacket lightweight Woodland disruptively patterned
90	Smock combat Windproof woodland disruptively patterned (this is a hooded garment similar to an anorak)
13	Trousers combat lightweight Woodland disruptively patterned
96	Shorts combat Woodland disruptively patterned
94	Shorts combat Desert disruptively patterned
78	Coveralls AFV crewmen exercise (this is an all-in-one garment)
40	Hat, combat Tropical, disruptively patterned
30	Cap Combat woodland disruptively patterned
56	Cover, combat helmet GS, Mk6, woodland disruptively patterned
59	Cover, combat helmet GS, Mk6, desert disruptively patterned

As appears from the catalogue descriptions, all of these items had disruptive patterns or camouflage (either woodland or desert). However they also had specific infra-red reflectance (**"IRR"**) properties, designed to minimise the

risk of the wearers being detected at night by infra-red vision sights such as night vision goggles. The IRR properties are incorporated into the fabric by a highly technical and specialised process which involves secret technology. IRR clothing is not available to the general public; it is used in combat operations and is crucially important to combat troops. In short, it is highly specialised and technologically advanced military clothing which helps save soldiers' lives.

8. There are some other items referred to below. CWS's repayment claim includes, as well as the item numbers above, the following item numbers: 46, 68, 70 and 88. None of these feature in the catalogue itself, but it is not suggested that they are not similar IRR clothing and they appear to refer to trousers (combat windproof desert), trousers (combat tropical desert), jackets (combat tropical desert) and smocks (combat windproof desert). There is one other item which features, namely a combat shirt designed to be worn under body armour. This also has IRR properties, in this case on the sleeves (the rest being covered by the armour).

9. I will refer to the items in issue collectively as **"the IRR items"**. CWS initially did not claim any MEU exemption on the importation of the IRR items, classifying them to codes which did not qualify for exemption. In 2009 however it obtained a "Certificate from Competent Authority" from the MoD which gave a CN code of 6211 for the IRR items and it thereafter (i) claimed repayment of duties paid on them for the previous year and (ii) started importing them with code 6211 and claiming exemption. In a series of decisions however HMRC (i) refused the repayment claim, save in respect of coveralls, on the grounds that the IRR items were not correctly classified to code 6211; (ii) issued a "post-clearance demand" for duty on the IRR items that had been imported with code 6211; and (iii) issued two BTIs classifying two particular items to codes other than 6211.

10. CWS appealed all three decisions to the FTT. It did so on three grounds, namely (in summary)

    (1) that the Certificate which CWS had obtained from the MoD was a sufficient classification of the IRR items to code 6211 to enable it to claim exemption for them;

    (2) that in any event the items should correctly be classified to code 6211;

    (3) that if this was wrong, as a result of the history of the matter CWS should be granted relief.

    The FTT upheld the appeals on the second of these alone, namely that the IRR items should be classified to code 6211, and hence qualified for the MEU exemption.

11. HMRC now appeal against that decision on the basis that the FTT was wrong to classify the IRR items to code 6211. CWS cross-appeals on the basis of its

other two arguments, which the FTT did not accept. There are therefore 3 issues before the Upper Tribunal:

(1) Did the FTT make any error of law in classifying the IRR items to code 6211 ?

(2) Should the FTT have held that the effect of the Certificate was as contended for by CWS ?

(3) Should the FTT have concluded that CWS were entitled to relief in any event as a result of the history ?

The facts

12. An appeal only lies to the Upper Tribunal on a point of law, but since Mr Beal QC, who appears for CWS, contends that on the third issue the FTT's factual conclusion was one that no reasonable tribunal could properly have reached, it is necessary to set out the history in some detail.

13. So far as the evidence before the FTT is concerned, the relevant history starts in 2005. Both the MoD, which is the "competent authority" under the MEU Regulation and as such responsible for certifying the military end-use (and was also the purchaser of the goods), and HMRC, who are responsible for administering the Customs Code, were involved in considering whether the IRR items could qualify for the MEU exemption.

14. The earliest contact of which the FTT had evidence was on 4 May 2005. Puma Cargo Ltd (**"Puma"**), who were CWS's customs agent, telephoned the HMRC contact centre asking whether uniform imported for MoD could benefit from MEU relief. Puma said they normally used code 6203 but asked if they could use code 6211 instead where MEU relief was available. The note of the call states:

> "advised caller that it was up to him to classify the codes correctly, however if it does not go through, he will be liable to pay the full duties, and he may even face a penalty charge if found to have done on purpose. Advised caller to speak with 01702366077 (tariff) to establish the correct code."

The FTT found (at paragraph [34] of the Decision) that CWS would have been aware of this enquiry at the time and would have known the results of it.

15. On 2 June 2005 Mr Kevin McMahon, then the Financial Controller of CWS, wrote to the MoD's Tax & Duty Team to ask if the goods which he listed fell within the defined list of CN codes in the MEU Regulation. The list included some IRR items and some other items. The response, from Mrs Moira Prattent, said that they would need to seek advice from HMRC. A further letter from Mrs Lynn Emery, who was dealing with the matter while Mrs Prattent was on holiday, said that having contacted HMRC, a full description

of the goods and the commodity code were required. She continued:

> "The importer is legally responsible for the correct Tariff classification of the goods. If you are unclear what the commodity codes for these goods are then the Tariff Classification Service at the address and phone number below is able to help...
>
> If you could send us the full details of the goods and the commodity codes then we shall progress your request."

16. On 22 June 2005 Mrs Emery e-mailed Mr Colin Davis at HMRC with a query about the custom codes eligible for import duty relief under the MEU Regulation. So far as clothing is concerned she said:

> "The MOD is now getting queries from contractors regarding clothing. As I was not party to any of the negotiations of this regulation I am finding it difficult to interpret it regarding clothing. To date the MOD are interpreting the commodity code 6211 to include any special purpose military clothing. This does not include basic uniforms. The MOD is now being asked questions on items such as protective thermal cold weather underwear made from specialist material such as Polartec power dry (apparently the Americans use it in Afghanistan!). The commodity code is 6001220000. The previous thermal material used has been found not to be suitable. I am reluctant to say yes it does qualify for relief straight away as I understand that there is some sensitivity within the EU regarding textiles. Were you party to the negotiations? If so what was the HMRC understanding of the interpretation of the clothing commodity codes?"

17. Mr Davis replied on 23 June 2005, saying among other things:

> "As you say the subject of clothing is a difficult one. I understand for example that boots were excluded from the list because there is a major EC producer of boots. If there is any special purpose military clothing that is classified within code 6211 then in our view they would fall within the scope of the Regulation. However, although normal commercial swimming costumes are also classified within 6211, they would not qualify because I don't think we could argue they are used to defend the territorial integrity of the member state. I hope this helps to illustrate where we see the line being drawn on clothing.
>
> On the specific example, you advise the goods are classified under CN code 6001 22 000. As 6001 is not included in the CN codes listed in the Annex, I'm afraid the goods are not entitled to relief under the Regulation even if they are being used for military purposes."

18. On 27 June 2005 Mr McMahon wrote to Mrs Emery with a list of goods and their commodity codes, saying

> "Hopefully you now have sufficient information to ascertain if these products qualify under regulation 150/2003."

The enclosed list included 3 IRR items (jackets and trousers), which were listed with 6203 codes; the only items listed with a 6211 code were non-IRR coveralls.

19. Mr McMahon received a reply from Mrs Prattent dated 30 June 2005 in which she said that items falling under, among others, code 6203 did not qualify for import duty waiver under the Regulation. She continued:

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

20. CWS did not take the matter any further at the time. In 2008 however they were told by another MoD supplier that there was a possibility of claiming back duty on certain items, and on 15 January 2009 Mr John Trimble, CWS's chairman, wrote to Mrs McCollum (as Mrs Prattent had become). He referred to the 2005 correspondence between her and Mr McMahon. He said that a lot of the garments supplied to the MoD were military equipment used by military forces and therefore came under the MEU scheme. He continued:

> "These garments also fall into categories 6116, 6210 and 6211 of the four digit HS headings covering weapons and military equipment on which import duties are suspended."

He then referred to the camouflage clothing items with IRR properties, contending that such items were just as important to protect the infantryman as a piece of body armour which qualified for import duty relief, and asking for a "Certificate from a Competent Authority" for waiver of import duty for submission to HMRC. Mr Trimble explained that this was of vital importance to CWS as it was about to embark on the contract re-tendering stage and any waiver of import duty would help CWS to be more competitive (as well as offer better value for money to DE&S (Defence Equipment & Support), the procurement arm of the MoD that was responsible for the contract).

21. Mrs McCollum spoke on the telephone to Mr Trimble on 26 January 2009. She told him that her department did not itself issue the certificate. Mr Trimble's note of the call includes the following:

> "Didn't realise combat clothing is so specialised. Happy to ask Customs if they are happy...

She is going to discuss it with Customs focal point in light of our clothing being protective IRR etc + used only for war (Optelec). She will also contact IPT [the integrated project team] to see if they are willing to issue the certificate."

22. On the morning of 27 January Mrs McCollum e-mailed an HMRC Officer, Mr Jim McChesney, at HMRC in Grangemouth. His e-mail signature describes his part of HMRC as "International Trade / CITEX / Cross Cutting Group / Local Compliance / HMRC". She said:

"I've had a letter from an MoD contractor concerning waiver of import duty on military clothing. As you know the MoD only allows waiver on protective/specialist clothing, we pay the duty on ceremonial, non specialist items such as normal camouflage items etc.

This contractor is importing camouflage (disruptively patterned material to give it it's proper title !!) items from outside the EU for operational requirements, at present in Iraq/Afghanistan. The camouflage material used has specific Infra Red Reflectance properties. This means that it protects the wearer from detection by weapons fitted with infra red assisted vision sights. We do feel that this particular form of camouflage clothing is of a protective/specialist nature and contributes to the protection of service personnel, in a similar way to body armour on which import duty is waived.

Would HMRC be content with our interpretation that this clothing could be imported to Military End Use and the use of a waiver certificate is allowable ??"

23. Mr McChesney replied shortly afterwards saying:

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

24. Mrs McCollum then spoke again to Mr Trimble. His note reads:

"Customs agree that we qualify for Military end use. She will go to Gerry Harvey who hopefully will agree to issue a waiver cert.

Then we apply to Local Customs office for Military end use authorisation on Form C1317"

25. She followed this up with a letter (which gives her title as "Director Financial Mgt, Tax & Duty 1a, Accounting & Tax Policy") dated 28 January 2009. This confirmed what she had said as follows:

"Agreement has been reached with our focal point at HM Revenue &

> Customs that, as the clothing has specialised protective properties, importing to Military End Use with an import waiver certificate is allowable in this case.
>
> The issuing of a certificate is the responsibility of the area within the MoD that raises/owns the contract. I have therefore contacted Mr Gerry Harvey at the DE&S Defence Clothing Integrated Project Team at Caversfield and advised him of the situation. He is going to explore the possibility of issuing a waiver certificate to cover this specific type of clothing within the new contract.
>
> I also informed Mr Harvey that it is possible to raise a retrospective certificate for this clothing. The certificate can be backdated to cover imports up to one year from the date the certificate is signed. This may enable the duty on some imports made during 2008 to be reclaimed. The retrospective certificate can also cover the remaining life of the existing contract if required.
>
> From our conversation today I noted that you were aware of the need to apply to HM Revenue & Customs for End Use registration and authorisation number. This is a requirement if you are to import items using Military End Use and an import duty waiver certificate."

26. The FTT said that it appeared to them that the way in which the exchange between Mrs McCollum and Mr McChesney was relayed to Mr Trimble had been the source of confusion on the part of CWS. Neither Mr McChesney nor Mrs McCollum made it clear that only items classified under CN code 6211 would have the benefit of MEU relief. However they said that Mr McChesney could not be criticised as he answered the question he was asked. He was not given any details of the goods in question beyond their specialist properties, and his response was limited to the question whether the items were sufficiently specialised to qualify for a certificate. The FTT added that they were satisfied that if he had been asked about the appropriate CN code for specific items, he would have referred the request to the tariff classification service: paragraph [74] of the Decision.

27. So far as Mrs McCollum was concerned, the FTT found that she did think that the goods could properly be classified to CN code 6211 (at paragraph [75], and again at paragraph [81] of the Decision). However they found that she was not responsible for CWS's misunderstanding (paragraph [75] of the Decision). This is an issue which I consider in more detail below in the context of CWS's cross-appeal.

28. A "Certificate from Competent Authority" (**"the Certificate"**) was then issued to CWS. The form followed that specified in Annex III to the MEU Regulation, and contained a series of numbered boxes for completion. In box 1 it referred to CWS's existing contract (dated 21 June 2004); and in box 10 gave the last day of validity (the date of last expected delivery or contract end

date) as 30 September 2009. There were several boxes numbered 5 (headed "Marks and numbers – Number and kind of packages – Product number of procurement contract") and in these were listed various IRR items (jackets, trousers, smocks, coveralls etc) with lengthy identification numbers which Mr Beal told me were the MoD's numbers as specified in the procurement contract. Each box 5 was accompanied by a box 6 in which was written "CN 6211" or "CN code 6211". Box 11 contained a certificate as required as follows:

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

It was signed by someone at DE&S Caversfield and dated 17 February 2009. Mr Beal drew attention to the fact that the code 6211 had been entered on the form by the MoD, not by his clients.

29. As appears above Mrs McCollum had referred to the need for CWS to apply to HMRC for end use authorisation. Mr McMahon, who was by now CWS's Finance Director, did this on 24 March 2009 by completing and sending to HMRC a form (form C1317) headed "Authorisation for End-Use relief". This form also had a series of numbered boxes. In box 4 ("Over what period do you wish to be authorised") Mr McMahon put "16 February 2008 to 17 February 2009". In box 5 ("Details of goods for which authorisation is required") he specified under (a) ("Commodity code (10 digits) where appropriate") "6211" and under (b) ("Trade and/or technical description of the goods") "Military Clothing". In box 13 ("Additional information") he wrote:

> "We have requested that the MOD issue a backdated Certificate from Competent Authority and also to cover the remaining life of the contract."

30. On 29 April 2009 an HMRC officer, Ms Carmel Crawford of the International Trade Team in Belfast, visited CWS's premises. She went through and amended the C1317 form with Mr McMahon. She explained that retrospective authorisation might be issued in certain circumstances but was not a regular means of approval, and that CWS would have to make a written request for it, advancing an appropriate justification. The FTT, who heard oral evidence from both Mr McMahon and Ms Crawford, made the following findings of fact (at paragraph [38] of the Decision): they accepted that there was a conversation in relation to the flowchart at section 7 of HMRC's Public Notice 770 (which dealt with end use relief), but they were not satisfied that Ms Crawford was confirming in terms that MEU was available for the specific goods being imported by CWS. They did not think it likely that Ms Crawford would have confirmed that the goods intended to be imported were properly classified under code 6211; and they accepted her evidence that she discussed with Mr McMahon CWS's responsibility to ensure the correct classification of the goods.

31. Following Ms Crawford's visit and in the light of her advice, Mr McMahon wrote a letter addressed to her and dated the same day, explaining that CWS had requested retrospective authorisation as it had only recently come to light that they had the capacity to make such an application; and that they had requested the application to be backdated to 16 February 2008 as being one year before the date of the Certificate, a copy of which he enclosed. He estimated that the amount involved "could be in excess of £650k".

32. On 30 April 2009 Ms Crawford spoke to Mr Ian Stanners at HMRC in Grangemouth (in the same department as Mr McChesney). She followed up the call with an e-mail giving the details. She explained that she had visited CWS, that they had requested an authorisation retrospective to 16 February 2008 and that the duty implication was in the region of £600-700,000. She added:

> "Trader advised that they were advised by MOD initially that the import of military clothing (Ch.6211?) was not covered by the End-Use regulations initially, but produced correspondence per my visit from the MOD confirming that this scenario was now covered by HMRC…
>
> I would be much obliged if you would give me your thoughts on the above in relation to retrospective date allowing trader to claim for the period 17/02/08 to date, and the date of expiry of such an authorisation. As I have had no experience on the end-use facility to date, your advice would be appreciated."

She then faxed to Mr Stanners a copy of the Certificate and CWS's application for authorisation. The FTT found (at paragraph [60] of the Decision) that the reference to "Ch 6211 (?)" was not, as had been suggested to her in cross-examination, a query to Mr Stanners as to the correct classification, but was simply a signal to him that CWS was classifying the clothing as CN 6211 but she had not confirmed this with the tariff classification service.

33. Mr Stanners replied by e-mail on 1 May. He said:

> "I received a phone call from Kevin McMahon. He explained the circumstances of the situation, but refused to forward any correspondence to me. He gave me the MOD contact name & telephone number of the person who wrote the letter to him on the 28th of January 2009, regarding the infra-red disruptive fabric incorporated in the combat uniforms, worn by the military in Iraq. One of my colleagues, Jim McChesney was speaking to Moira McCollum at the MOD, this morning & raised the subject with her. She confirmed the details & stated that an amended retrospective military end-use Certificate will be issued to Cooneen Watts & Stone to cover the infra-red disruptive fabric only. Therefore you can grant retrospection from the 16th of February 2008 until the 30th of

September 2009, when the current contract ends.

I phoned Richard Condell with the news.

Trader can submit their C285 in due course for the infra-red clothing."

The reference to Mr Condell is to CWS's Management Accountant. The reference to "C285" is to an application for repayment of duty. So far as the telephone conversation between Mr McChesney and Mrs McCollum is concerned, the FTT found as a fact (at paragraph [77] of the Decision) that it was unlikely that he was asked to give any view on whether the goods were properly classified to code 6211; and that the extent of his involvement was to confirm whether the clothing was sufficiently specialist to fall within the scope of the MEU Regulation.

34. On 5 May 2009 Ms Crawford made a file note summarising Mr Stanners' e-mail as having confirmed that retrospection should be granted from 16 February 2008. She telephoned CWS and advised that that the end use authorisation would be granted. She then wrote to Mr McMahon confirming that the application to use end-use relief had been approved and giving an authorisation number. Her letter (**"the Authorisation"**) said, among other things:

"You are authorised to import/receive the goods:

- **indicated in box 5 of the C1317**"

and said that the authorisation was valid for the period 16 February 2008 to 30 September 2009.

35. Mr McMahon then contacted Puma. He asked them to change the import codes, which they did, and the first goods with the new codes were imported and processed by HMRC on or about 7 May 2009. For example, combat jackets had previously been imported under the code 6203331000 and were changed to 6211331000. The 6203 code is a reference to "Men's jackets" (and specifically jackets made of synthetic fibres (industrial and occupational)), and the 6211 code is a reference to "Other garments" (and specifically those made of man-made fibres (industrial and occupational clothing)).

36. Mr McMahon also applied for repayment of back duty. He did this by applying on 3 July 2009 to HMRC's National Duty Repayment Centre in Dover, claiming repayment of a total of £827,437. The relevant form (C285) again had a box (no 6) for "CN code" in which Mr McMahon put 6211. The goods were identified by CWS item numbers, namely 11, 13, 30, 40, 46, 56, 59, 68, 70, 78, 88, 90, 94 and 96: see paragraphs 7 and 8 above. The goods had been imported between 28 February 2008 and 28 April 2009.

37. The Authorisation was due to end on 30 September 2009. On 26 August 2009 Mr McMahon applied to HMRC in Belfast for renewal of the Authorisation from 1 October 2009 to 30 June 2010. This was granted by an HMRC officer in Belfast, Ms Carol McCoy, on 28 August 2009.

38. Mr McMahon also applied for a revised certificate from the MoD. This was re-issued on 24 September 2009 in the same terms as the original Certificate, save that the last day of validity was now given as 30 March 2010.

39. CWS's claim for repayment was forwarded to HMRC's Duty Liability office in Southend, where it was dealt with by another HMRC officer, Ms Lisa Cureton-Burgess. On 15 September 2009 she contacted Mrs McCollum in the MoD asking why the Certificate was issued with code 6211 for goods such as trousers and jackets which was not the correct code for them. Mrs McCollum replied on 7 October 2009. She referred to her e-mail exchange with Mr McChesney (paragraphs 19 and 20 above) and continued:

> "The 4 digit CN Code list held by the MoD, and agreed by HMRC, which comes from the list within the EC Regulation 150/2003, contains very few codes relating to clothing. 6210 states 'Protective Suits such as Explosive Ordnance Disposal' and 6211 'Suits (if woven) such as Immersion suits, combat body armour jacket, NBC suit'. Note that the examples listed are for guidance only. Given these descriptions we felt this clothing fell within 6211.
>
> Having looked at the limited information we hold on full commodity codes I can understand why 6203 could be suitable. But these items are specialised protective combat fatigues and due to the special material used are not just made of cotton, wool etc. I enclose an e-mail between my colleague Lynn Emery and Colin Davies, our focal point within HMRC Policy, where Lynn asked for clarification on Code 6211 – see highlighted text. She stated that the MoD believed 6211 could be used for special purpose military clothing. As you can see from Colin's reply he was content with this interpretation.
>
> We felt therefore that this clothing could fall within 6211 'other garments' codes such as 6211 32 10 or 6211 33 10, which both refer to industrial/occupational garments."

The "CN code list … agreed by HMRC" referred to in this letter was not produced in evidence before the FTT; Mrs McCollum did not herself give evidence; and none of the witnesses who did was aware of its existence.

40. On 13 October 2009 Ms Cureton-Burgess e-mailed Mr McChesney saying that the Certificate stated items such as hats, trousers, jackets with code 6211, and adding

> "I work within the Tariff Classification area and used to be a classification officer so therefore know that this is the incorrect

heading for such goods."

She asked if Mr McChesney had visited CWS or seen a sample or obtained a classification.

41. His reply on 19 October 2009 was to the effect that having spoken to Mrs McCollum

> "we felt that if the goods could be covered by a code from the approved list the goods could be allowed under MEU Moira mentioned code 6211, which according to her list covered uniform, and this was covered by EC Reg 150/2003 I agreed to them being approved. I did not check that the commodity code covered the goods being imported it was the fact that the goods were being supplied with an infra red dispersal coating to protect military staff rather than just a normal uniform that I had agreed to the goods being included under an MEU authorisation."

42. Ms Cureton-Burgess then sought the help of HMRC's Tariff Classification Service (**"TCS"**). On 7 December 2009 Mr Eli Ezekiel of the TCS issued 5 rulings known as "Non-live liability rulings". These are rulings in respect of goods that have already been imported (hence "non-live"); they do not have the status of BTIs. They were not provided to CWS at the time. Mr Ezekiel classified the coveralls (described as an all in one garment) to code 6211. He classified the other 4 matters to other codes as follows:

Trousers	6203
Lightweight jacket	6203
Military style coat to cover the upper part of the body	6201
Combat helmet, designed to be worn by the military, covered in a coated fabric	650610

It is common ground that in referring to a combat helmet, Mr Ezekiel was wrong: CWS do not import helmets, and had not included a helmet in their repayment claim. What they had included were covers for combat helmets (items 56 and 59).

43. Ms Cureton-Burgess produced her decision on the repayment claim on 5 January 2010. She wrote to Mr McMahon rejecting CWS's claim save as to £8,390.25, which was the duty paid on coveralls. She accepted that these had been correctly classified to code 6211 and therefore qualified for the MEU exemption. But as to the rest she said:

> "You have confirmed that the garments involved with these imports are all military clothing and vary from trousers, shorts, jackets, coveralls to hats. However they have all been classified to Heading

> 6211 which (apart from the coveralls) is incorrect. I note that before the authorisation was granted you were classifying all these garments correctly.
>
> Therefore I can only agree on repayment, under Article 237, on the imports that have been classified correctly to Heading 6211."

She also said that she would be informing CWS's local HMRC office in Belfast.

44. CWS applied for a Formal Departmental Review (**"FDR"**) of the decision. The FDR was carried out by Ms Sharon Barbouti, a Review Officer of HMRC, and on 20 April 2010 she issued her decision, in which she upheld the original decision to reject the repayment claim. She recommended to CWS that they seek a definitive ruling on classification for CWS's goods and explained how CWS could apply for a BTI. CWS appealed the FDR decision to the FTT, and this (**"the repayment appeal"**) is the first of the three appeals which the FTT heard together.

45. As stated above CWS had been importing goods under code 6211 and claiming the benefit of the MEU exemption since May 2009. On 27 January 2010 Mrs McCollum e-mailed Mr McMahon saying that the MoD had to abide by HMRC's ruling and that an amended Certificate, limited to coveralls, would be sent to CWS. Mr McMahon had mentioned other items which might qualify for import relief such as smocks and helmet covers but in response to this Mrs McCollum wrote:

> "Following the misunderstanding between ourselves and HMRC on the IRR items, the MOD would need an HMRC ruling on the classification codes for these items before we suggest to the project team that they could be added to the waiver certificate."

On 29 January 2010 the MoD duly issued an amended Certificate, limited to coveralls. CWS received it in February and asked Puma to declare the relevant goods to Home Use, which they did with effect from 1 March 2010.

46. On 27 April 2010 Ms Crawford of HMRC Belfast visited CWS's premises to quantify the amount of duty relief that CWS had received while importing the goods with code 6211. She took away documentation relating to 56 invoices and after auditing the documentation wrote on 5 May 2010 to the effect that as per CWS's authorisation 6211 goods (coveralls) qualified for end-use relief, but that she had disallowed the remainder of the items on the basis that they were deemed to be misclassified and did not qualify for end-use relief; she calculated the customs debt thereby incurred in the sum of £743,059.54.

47. The letter was accompanied by schedules which detailed the goods imported under the 56 invoices. The items disallowed and the codes entered on the schedules were as follows:

Jackets Combat (DP)	6203/6201
Occupational Trousers (DP)	6203
Combat caps (camouflage pattern)	6505 9030
	6505
Cover for Combat Helmets (DP)	6507
Combat Hat (DP)	6505
	6506

There was also one entry for goods which had nothing to do with IRR, namely bales, which were classified to a 5208 code (chapter 52 covers cotton goods). Ms Crawford's covering letter made it clear that the codes noted on the schedules were not actual rulings. The FTT found that she had based them on the FDR in the repayment claim and the non-live liability rulings.

48. This was followed on 27 May 2010 by a formal Post Clearance Demand Note (form C18) in the same sum of £743,059.54, based on "Misclassification of goods that not covered by end-use authorisation."

49. CWS applied for an FDR of the decision to issue this demand as well. The FDR was carried out by Mr Stuart Peacock, another Review Officer of HMRC, and on 1 September 2010 he issued his decision, in which he upheld the decision to issue the C18 demand. In doing so he described the goods in question by reference to the non-live liability rulings, so he repeated the error made by Mr Ezekiel in referring to a combat helmet. CWS appealed this decision to the FTT and this (**"the C18 appeal"**) is the second of the three appeals heard by the FTT.

50. In the meantime CWS had on 26 April 2010 submitted 2 BTI requests, one in relation to a combat smock, and the other in relation to a combat shirt to be worn under body armour. It did so because it was going through a re-tendering process at the time and it was concerned that a competitor might obtain a favourable BTI ruling and be in a position to undercut it. The BTIs were issued by the TCS in Southend on 13 May 2010, the smock being classified as 6201930000 (Men's woven anoraks, of man-made fibres), and the shirt as 6206300090 (Women's shirts and shirt-blouses, of cotton, other than hand printed by the batik method). CWS appealed the BTIs and this (**"the BTI appeal"**) is the third of the three appeals heard by the FTT.

HMRC's appeal

51. I will consider first HMRC's appeal which is to the effect that the FTT erred in law in classifying the IRR items to code 6211. In order to explain the basis of HMRC's appeal it is necessary first to set out the relevant provisions of the

CN.

The CN

52. As referred to above the version of the CN put before me is that annexed to Commission Regulation (EC) 1031/2008. Annex 1 to the Regulation contains the CN. The CN consists of 3 Parts. Part 1 contains the Preliminary Provisions and Part 2 the Schedule of Customs Duties. Part 3 contains various Tariff annexes, none of which is relevant.

53. The Preliminary Provisions in Part 1 include at Section 1 the General Rules. Part A of the General Rules contains the "General rules for the interpretation of the CN", known as the General interpretation rules (**"GIR"**). These "have the force of law" (*Vtech* at [16]). The relevant GIR for present purposes are as follows:

> "1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions."
>
> ...
>
> 3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
>
> (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;
>
> (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;
>
> (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally

merit consideration.

...

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

(GIR 2(b) (referred to in GIR 3) concerns mixtures or combinations of materials or goods consisting of more than one material or substance. It is not relevant to the present case.) It can be seen that as stated by Henderson J in *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) (***"Flir"***) at [14]

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

54. Part 2 of the CN sets out the relevant codes by sections, chapters, headings and sub-headings, together with the appropriate tariff. Section XI (chapters 50 to 63) deals with textiles and textile articles; chapter 62 deals with "Articles of apparel and clothing accessories, not knitted or crocheted." Section XII (chapters 64 to 67) deals with footwear, headgear, umbrellas and a variety of other accessories; chapter 65 deals with "Headgear and parts thereof".

55. The competing codes are as follows:

Chapter 62

6201	Men's or boys' overcoats, car coats, capes, cloaks, anoraks (including ski jackets), windcheaters, wind-jackets and similar articles, other than those of heading 6203
6201 93 00	Other [which would include anoraks] of man-made fibres
6203	Men's or boys' suits, ensembles, jackets, blazers, trousers, bib and brace overalls, breeches and shorts (other than swimwear)
6203 39	Jackets and blazers of other textile materials
6203 39 11	Of artificial fibres...Industrial and occupational
6203 49	Trousers and breeches of other textile materials
6203 43 11	Of artificial fibres...Industrial and occupational

6203 43 90	Other [which would include shorts] of synthetic fibres
6206	Women's or girls' blouses, shirts and shirt-blouses
6206 30 00	...of cotton
6211	Tracksuits, ski suits and swimwear; other garments
6211 33	Other garments, men's or boys' of man-made fibres
6211 33 10	...Industrial and occupational

Chapter 65

6505	Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hairnets of any material, whether or not lined or trimmed
6505 90 30	Peaked caps
6505 90 80	Other
6506	Other headgear, whether or not lined or trimmed
6506 10	Safety headgear
6506 10 80	...of other materials
6507 00 00	Headbands, linings, covers, hat foundations, hat frames, peaks and chinstraps, for headgear.

56. The general principles of interpretation of the CN are not in doubt (although there is an issue between the parties which I will have to look at more closely later). They were summarised by Henderson J in *Flir* at [11] as follows:

> "11 The Court of Justice of the European Communities ("the ECJ") has repeatedly stated that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The two categories of Explanatory Notes, that is to say the HSENs and the CNENs, are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 *Intermodal Transports BV v Staatssecretaris van*

Financien, [2005] ECR I-8151, at paragraphs 47 and 48."

See also the more detailed statement in *Vtech* at paragraphs [13]-[15].

The Decision of the FTT

57. So far as this aspect of the case is concerned, the Decision of the FTT can be summarised as follows:

(1) In paragraph [83] they set out the legal framework against which goods are classified for customs duty purposes by reference to the statement in *Flir*.

(2) In paragraphs [101] to [106] they set out some general principles of classification including the fact that the intended use of a product may be determinative of the appropriate CN heading if it is ascertainable from the objective characteristics of the product itself, and referred to certain Court of Justice cases, namely *Ikegami Electronics (Europe) GmbH* C-467/03 (***"Ikegami"***), *Wiener SI GmbH v Hauptzollamt Emmerich* C-338/95 (***"Wiener"***) and *Neckerman Versand AG v Hauptzollamt Frankfurt am Main Ost* C-395/93 (***"Neckerman"***).

(3) They considered the correct classification in paragraphs [146ff]. At paragraphs [146] to [149] they rejected a submission by Mr Beal that it would be illogical for the IRR items not to be classified to code 6211 when both body armour and IRR coveralls fell within it. They said that it was not possible to identify, on the basis of the evidence before them, any policy behind the types of weapons and equipment entitled to relief, and had heard no evidence in relation to body armour.

(4) At paragraph [150] they rejected a submission by Mr Beal that the IRR items were exactly like other "industrial and occupational clothing", pointing out that although this wording appears in code 6211 33 it also appears in other headings such as 6203; and concluding that whether the clothing is industrial or occupational did not assist in the classification issue.

(5) In paragraph [152] they referred to a submission by Mr Beal that HMRC, in particular Ms Cureton-Burgess, had omitted to take into account the specialist protective properties of the ITT items and said "We accept that criticism." In paragraph [155] they cited the following passage from the judgment in *Flir*:

> "Once the conclusion has been reached that the products fall within both headings, the rest in my judgment follows without difficulty. Neither heading can be regarded as providing the more specific description, because the two functions identified by the Tribunal are of equal importance, and it would in my view be a travesty of the facts to say that the

products operate mainly, or predominantly, as thermometers. As the Tribunal say in paragraph 13 of the Decision, "neither is the more specific description: they are in part thermometers and in part instruments for checking quantities of heat, and neither is more specific". It is common ground that, if GIR 3(a) does not apply, rule 3(b) cannot be used to resolve differences in function. Accordingly, recourse must be had to rule 3(c), which is admittedly arbitrary in its operation, but does at least provide an answer to the question."

They then in paragraph [156] referred to a submission by Mr Thomas that the specialist nature of the goods was not relevant to classification, and said:

"We do not accept that submission, in so far as the specialist nature of the goods is reflected in their functionality."

(6) In paragraph [159] they said that heading 6211 was in the nature of a residual heading for garments which the draftsmen did not want to classify elsewhere in chapter 62. Having referred to the particular examples of ski suits, swimwear and tracksuits they said:

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

However they said at paragraph [160] that there was no suggestion that the term, "other garments" in CN 6211 takes any meaning from the reference to tracksuits, ski suits and swimwear in the same heading.

(7) At paragraphs [162] and [163] they addressed a submission by Mr Thomas based on GIR 3(a) as follows:

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

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

(8) At paragraphs [164] to [165] they referred to submissions by Mr Thomas to the effect that the function of goods was only relevant to

their classification if it was relevant to the particular heading, and by Mr Beal to the effect that there was a "free standing entitlement to look at function", as to which they said they were not entirely sure what he meant but they did accept that in some headings there will be an express reference to function and in others (such as "nightdresses" which was the heading in issue in *Wiener*) there might be an implicit reference to function.

58. Their conclusions are set out at paragraphs [165] to [171] which should be quoted in full:

> "166 It seems to us that heading 6211 does refer to the function of the garments contained within it. Whether something is a tracksuit, ski suit or swimwear will depend on the function it is intended to perform.
>
> 167 In our view a camouflage jacket, intended for military use but which is available to the public generally, is still a jacket. Elements of style or fashion do not characterise it as anything other than a jacket. However when IRR properties are incorporated within the garment, which is not available to the public generally, the garment has a function which is not related to style or fashion. Such a garment fulfils two functions – firstly it is an item of clothing intended on one level in common with jackets generally, to protect the wearer from the elements. Equally important at least is the function it performs in protecting the wearer from detection by enemy forces.
>
> 168 The point that arises in the present case is that the garments fulfil their function as a jacket, whilst also fulfilling a specialist protective function by reference to their IRR properties. In other words, making the wearer less detectible to an enemy using night vision goggles. Put simply, the question is whether in those circumstances the garments fall to be classified as for example jackets/trousers or as other garments.
>
> 169 Mr Thomas submitted that the description "jacket" may be considered more specific than the description "other garments". It is in that context that the decision in Flir is helpful. The Court held that neither heading was more specific than the other because neither of the functions was more specific than the other. Hence GIR 3(a) did not apply.
>
> 170 In our view GIR 3(a) does not operate to classify the goods in question as jackets. It would only apply if the function of a jacket as an item of apparel is considered more specific than

its function in protecting the wearer from detection. Similarly in relation to the other items of clothing we are concerned with in this appeal.

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

HMRC's grounds of appeal

59. Mr Thomas, who appears for HMRC, advanced 3 grounds in support of their appeal:

(1) The FTT misapplied GIR 1 in reaching the view that the goods were properly classifiable under heading 6211.

(2) The FTT erred in finding that certain of the items were garments (within chapter 62) and not headgear (within chapter 65).

(3) The FTT misapplied GIR 3(a) when it found that the description "other garments" was more specific than the individual descriptions such as jackets, trousers, shirts.

60. It is convenient to take Grounds 1 and 3 first, as Ground 2 raises some rather different issues. It can be seen that Grounds 1 and 3 refer to the misapplication by the FTT of GIR 1 and GIR 3(a) respectively, so raising the question whether in reaching its decision the FTT was in fact applying GIR 1 or GIR 3(a).

61. There was a dispute about this. Mr Thomas contended that the FTT decided the issue under GIR 3(a). He pointed out that they expressly referred to his submission on GIR 3(a) in paragraph [162], and reverted to GIR 3(a) in paragraph [170]. There they said that GIR 3(a) would apply (to classify the goods in question as jackets) if the function of a jacket as an item of apparel were considered more specific than its function in protecting the wearer from detection; they then at paragraph [171] refer to the latter function as "specific and specialised". He invites me to read this as a decision that for GIR 3(a) purposes the latter function was more specific, and hence the goods should be classified under heading 6211. He points out that if they had been deciding the classification under GIR 1, there would have been no need to refer to GIR

3(a) at all, as the GIR impose a hierarchical approach, and one does not get to GIR 3 if the classification can be done under GIR 1.

62. Mr Beal on the other hand invites me to read the decision as an application of GIR 1. In his submission, in paragraph [170] the FTT rejected the application of GIR 3(a) on the grounds that neither function was more specific; and the actual decision, found in paragraph [171], is a classic example of a tribunal deciding between two competing classifications on the basis of the objective characteristics of the goods in question, the FTT deciding which of the two classifications those characteristics best fit. This is a straightforward application of GIR 1 and not of GIR 3(a), which is not mentioned in paragraph [171] at all.

63. I do not think it is necessary for me to resolve this particular dispute. It would certainly have been clearer if the FTT had distinguished between GIR 1 and GIR 3(a) and said in terms which rule they were applying and why; but the ultimate question is whether their evaluation of the facts justified the decision they came to. If the actual decision is capable of being upheld by one legal route or another, it does not seem to me to matter that they might have used the wrong one. Since Mr Beal sought to uphold the decision of the FTT as an application of GIR 1, I will assume that this is what the FTT was doing and consider whether the decision can be justified under that rule; I will then consider whether the decision could be justified under GIR 3(a) in the alternative.

Fact or law ?

64. Mr Beal submitted that there was no question of law involved in HMRC's appeal. By s. 11(1) of the Tribunals, Courts and Enforcement Act 2007, an appeal only lies to the Upper Tribunal on a point of law arising from a decision by the FTT.

65. Where an appellate tribunal is limited to an appeal on a point of law, it is important that it confine itself to what are truly questions of law and does not substitute its own view of the facts for that of the fact-finding body. There are many authoritative statements to this effect, and Mr Beal showed me some of them, in particular the recent statement of principle in *Pendragon plc v HMRC* [2013] EWCA Civ 868 (***"Pendragon"***) at [70] to [78] where Lloyd LJ referred to the most familiar observations about this in respect of tax appeals being found in Lord Radcliffe's speech in the well-known case of *Edwards v Bairstow* [1956] AC 14. There the question was whether a particular joint venture was an adventure in the nature of trade. Lord Racliffe observed that since the law did not supply a definition of what constitutes 'trade', it was for the Courts to interpret it, as a matter of law, and so lay down its limits, but that within the wide field so marked out, it was for the Commissioners to say whether a trade does or does not exist.

66. In *Pendragon* itself the question was whether an elaborate scheme for the

leasing of demonstrator cars by a car sales group (which conferred a significant VAT advantage on the group) involved conduct falling within the European principle of abuse of right. This effectively turned on whether the essential aim of the transactions was to obtain an illegitimate tax advantage. The FTT held that it was not, the essential aim being to obtain finance. The Upper Tribunal (Morgan J) reversed this, but the Court of Appeal held that he had not been entitled to substitute his own view for that of the FTT.

67. In the course of his judgment Lloyd LJ referred to what had been said by both Jacob LJ and Mummery LJ in *HMRC v Procter & Gamble* [2009] EWCA Civ 407, a VAT case which turned on whether Pringles were 'similar to potato crisps' and 'made from the potato'. Again the appellate court (in that case Warren J) had reversed the decision of the lower tribunal (the VAT and Duties Tribunal), but the Court of Appeal held that he had not been entitled to. Jacob LJ (at [7]) referred to the tribunal as being not only the primary fact finder but also the primary maker of a value judgment based on those primary facts, and said that unless it had made a legal error (reached a perverse finding or failed to make a relevant finding or misconstrued the statutory test), an appeal court could not interfere; at [9] he referred to a statutory test often requiring a "multi-factorial assessment based on a number of primary facts ... what is commonly called a value-judgment"; at [10] he referred to earlier authorities where this approach had been applied to such diverse issues as whether there had been 'fair dealing' with a copyright work, whether a person was 'unfit' to be a director, or whether an invention was an 'improvement' over an earlier one; and at [11] he said that particular deference was to be given to the decisions of specialist tribunals whom Parliament had entrusted to be the primary decision maker. Mummery LJ (at [74]) said that in the absence of an untenable interpretation of the legislation or a plain misapplication of the law to the facts, the tribunal's decision ought not to be disturbed. The issue on appeal is not whether the appellate body agrees with the conclusions, but whether as a matter of law, the tribunal was entitled to reach its conclusions.

68. Similar statements of principle can be found in tariff classification cases. I was referred in particular to the judgment of Dyson J in *Commissioners of Customs and Excise v General Instrument (UK) Ltd* [2000] 1 CMLR 34. Here the question was whether a particular apparatus (an addressable converter) was to be classified as 'reception apparatus for television', 'transmission apparatus for television' or 'electrical apparatus having functions not specified elsewhere'. Dyson J (at [27]) rejected a submission that tariff classification is always a question of law, referring to the statement of Advocate General Jacobs in *Wiener* that:

> "legal imperatives aside, tariff classification is in essence a matter of factual evaluation in view of the features and properties of the products to be classified."

Dyson J went on to say (at [28]) that if the Tribunal applies the correct principles and rules of interpretation, the Court will not normally interfere

with the factual evaluation it has carried out and added:

> "In my view, this restraint on interferences should be respected with particular vigour in cases where (as here) the factual assessment involves complex technical issues."

This statement was cited with approval by Lawrence Collins J in *Vtech* at [86].

69. I have these principles well in mind. It is obviously important that the appellate tribunal scrutinises the grounds of appeal with care to be sure that they are not what Peter Smith J described in *HMRC v Photron Europe Ltd* [2012] UKUT 275 (TCC) as "a classic disguised factual challenge dressed up as questions of law."

70. However I do not accept Mr Beal's submission that this applies to HMRC's appeal in the present case. HMRC challenge none of the primary facts found by the FTT. Nor do they challenge the assessment of the FTT that the IRR jacket (to use the example the FTT gave) is not simply a jacket but has a specialist protective function. What they challenge, in Ground 1 of their appeal, is the conclusion that this entitled the FTT to classify the jacket under heading 6211 as an 'other garment'. Mr Thomas relies on two points in particular: first that 'other garment' means a garment other than the garments specified elsewhere in chapter 62, and 'jacket' means a jacket however specialised, so that if an item is a jacket, then it cannot be classified as an 'other garment' however specialised it is; and second that it was impermissible for the FTT to rely on the function of the IRR items, as the heading 'other garments' says nothing about the function of them.

71. Both these seem to me to be points of law. The first is a question of interpretation. It is akin to the question what 'trade' means which Lord Radcliffe referred to in *Edwards v Bairstow*. The answer may be a very wide one, and if it is, it is a matter for the person making the factual evaluation to say whether it falls within that wide field; but the permissible limits of the meaning are a matter of law. See also the decision of Briggs J in *HMRC v GE Ion Track Ltd* [2006] EWHC 2294 (Ch) at [30] which records a submission that there is a distinction between construction (in that case of GIR 3), which is a question of law; and applying that construction to the facts, which is not. Briggs J did not need to decide if that submission was right, but in my judgment the distinction was rightly drawn and applies equally to the interpretation of the CN headings themselves, so long as what the appellate tribunal is really being asked to do is answer a question of construction rather than a disguised factual question.

72. The second issue is even more clearly a matter of law. It is a question of legal principle whether it is permissible for a person making a tariff classification to take account of the functions of the goods in question when that function is not referred to in the heading in question. There is a clear issue between the parties on this but I do not see how that can possibly be characterised as a

factual issue. It is an issue of law, to be decided by reference to the European jurisprudence, and both counsel have referred me to a number of the decisions of the Court of Justice in the course of their submissions on the issue.

73. I therefore reject Mr Beal's submission that there is no point of law in HMRC's appeal and that it should be dismissed on that ground. I will however try to ensure that I do not fall into the temptation of substituting my own view of the facts – not just the primary facts, but the multi-factorial assessment or value judgment based on the primary facts – for that of the FTT, the specialist tribunal to whom such decisions are entrusted.

HMRC's appeal – Ground 1

74. With that introduction, I can now address the substantive question raised in Ground 1 of HMRC's appeal, namely: did the FTT misapply GIR 1 in reaching the view that the goods were properly classifiable under heading 6211 ?

75. In my judgment the answer is Yes.

76. The FTT classified the IRR items under heading 6211 as 'other garments'. This prompts the question 'other than what ?'; but it is not a difficult question to answer. It must it seems to me refer to garments other than those referred to elsewhere in chapter 62. This is what the FTT said, in my judgment correctly: see at paragraph [159] where they describe it as a "residual heading for garments which the draftsmen did not wish to classify elsewhere in chapter 62" and as a "catch all for other types of garments which the draftsmen did not classify separately." In the end this was not as I understand it in dispute: Mr Thomas's submission was that it meant "garments other than those mentioned in the preceding words and other than those provided for in the remainder of the chapter"; Mr Beal's was that "'other garments' is a valid classification if the product is not properly captured by an earlier heading."

77. It follows that the question is whether the IRR items are properly classifiable under the other headings in chapter 62 as, for example, jackets or trousers. If they are, they cannot be other garments. (It incidentally follows in my judgment that there is on analysis no possibility of GIR 3 applying in this case. GIR 3 applies where goods are prima facie classifiable under two or more headings. A garment cannot both be a jacket and at the same time not a jacket. Either it is a jacket (in which case it is not an 'other garment') or it is not a jacket (in which case it may be). It therefore either fits into the classification of 'jacket' or 'other garments', but cannot be prima facie classifiable under both).

78. In my judgment therefore what the FTT should have done is answer the simple question whether a particular garment is or is not a jacket, or trousers, or whatever, as the case may be. It was not necessary to ask whether 'jacket' or 'other garments' was a better fit; this led them, in my judgment quite wrongly,

to try and identify what characteristics 'other garments' might have. I revert to this point below but the only characteristics that in my judgment 'other garments' need have is that they are garments that are not properly classifiable as jackets or trousers or whatever. This is what it means to be a catch all or residual heading defined by being 'other'.

79. As stated in the passage from *Flir* cited above, it is the consistent jurisprudence of the Court of Justice that (in the words of the Court's judgment in *Holz Geenen GmbH v Oberfinanzdirektion München* C-309/98 (***"Holz Geenen"***) at [14]):

> "in the interests of legal certainty and for ease of verification, the decisive criteria 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."

The Court described this as settled law and the cases put before me amply bear this out: the earliest similar statement I was shown was in *Weber v Milchwerke Paderborn-Rimbeck e.G.* Case 40/88 at [13], which is in almost identical terms, but which itself referred back to earlier decisions dating back to 1972.

80. The question therefore is what are the objective characteristics and properties as defined in the wording of the relevant heading. If the relevant heading is 'jacket', what are the objective characteristics and properties of a jacket ? The closest the FTT came to giving an answer to this question is at paragraph [167] where they said that elements of style or fashion do not characterise a garment (in that case a camouflage jacket) as anything other than a jacket, and described the IRR jacket as a garment which fulfils two functions, the first of which is

> "as an item of clothing intended on one level in common with jackets generally to protect the wearer from the elements."

This was not I think intended by the FTT as a comprehensive or exhaustive statement of the objective characteristics and properties of a jacket (and if it had been, one could readily take issue with it, as it is easy to think of examples where jackets are not primarily worn for protection from the elements – for example jackets worn primarily for reasons of formality or social conformity), but it suffices to indicate at least some of the characteristics of a typical jacket as identified by the FTT.

81. It seems to me that the question that the FTT should have asked itself was whether the IRR jacket had these characteristics (or any other relevant characteristics of a jacket). It is not entirely clear if they asked themselves that question, or if they did what their answer to it was. On my reading of the Decision, they did indeed ask themselves that question and answered it Yes: see at paragraph [167] where they said that the garment fulfils two functions,

protecting the wearer from the elements being one of them; at paragraph [168] where they referred to the garments "fulfil[ling] their function as a jacket"; at paragraph [170] where they refer to the "function of a jacket as an item of apparel" (where it appears from the context that they mean that the IRR jacket does have this function); and possibly also at paragraph [171] where they say that to describe them "simply as jackets" would not adequately reflect the product. I read this last statement as meaning that the FTT recognised that they were jackets, but not simply jackets, although I accept that this is not the only possible interpretation.

82. Mr Beal however submitted that this was not the right way to read the FTT Decision. In his submission the FTT found that although the IRR jacket had some of the characteristics of a jacket, this description did not adequately capture its essential character. He submitted that in effect they decided that the IRR jacket was not a 'jacket' (within the meaning of heading 6203) at all. He eschewed the phrase 'common or garden jacket' but he did submit that 'jacket' in heading 6203 meant 'a jacket as ordinarily understood', and that the IRR items were so specialised that to describe them as 'jackets' would not be doing justice to their essential character.

83. I will therefore assume that Mr Beal may be right and that the FTT did ask themselves whether the IRR jackets had the objective characteristics of a 'jacket' and answered it No. But if they did this, it seems to me that they must have fallen into error. Since they had identified the characteristics of a jacket as being an item of clothing intended to protect the wearer from the elements, and since they had found that the IRR jacket does that, I do not see how they could, consistently with their own factual evaluation, have failed to conclude that the IRR jacket had the objective characteristics of a jacket as identified by them. This is not to substitute my own view of the facts for theirs but to require their view of the facts to be applied consistently and in accordance with the principles laid down by the Court of Justice.

84. Moreover I consider that any other view would be perverse. Take the example of the IRR trousers (CWS catalogue no 13), which to my mind is even more straightforward than that of jackets. As with a jacket, trousers are, in the words of the FTT, an item of clothing intended to protect the wearer from the elements. No doubt there are other objective characteristics of trousers, such as their shape, the fact that they cover the legs separately, that they are worn for reasons of modesty as well as protection, and the like. The FTT did not in fact consider what the objective characteristics of trousers are. But whatever characteristics trousers have, I find it impossible to see how any fact-finding tribunal, directing itself correctly, could fail to conclude that the IRR trousers had those characteristics. The IRR trousers are marketed and sold as 'trousers': CWS's brochure includes them under the heading 'Trousers & Slacks' and describes them as 'Trousers combat lightweight'. (As Mr Beal says, it is established law that the way in which goods are sold and marketed is relevant to the identification of their objective characteristics). The IRR trousers share all the characteristics of trousers as ordinarily understood; and if

a soldier was wearing them, no-one would say that he was not wearing trousers, or was wearing something other than trousers.

85. In what sense therefore can it be said that the IRR trousers are not 'trousers' or the IRR jacket is not a 'jacket' ? The FTT relied on the highly specialist protective properties that the IRR items have and their function in protecting the wearer from enemy forces, and Mr Beal seeks to support this. I accept entirely that this function is a significant feature of the IRR items – indeed crucially important to the lives of the combat troops who wear them – and is one of their objective characteristics, as found by the FTT at paragraph [171]. But I do not see how having this highly specialised and crucially important feature turns the IRR trousers into anything other than trousers, or the IRR jacket into anything other than a jacket. It means that the IRR trousers are not just ordinary trousers, but very special trousers; but they are undoubtedly still trousers, and I do not see how any tribunal could reasonably conclude otherwise.

86. Mr Beal submitted that a 'jacket' was a garment whose distinctive feature was its 'jacketness', whereas the distinctive feature of the IRR items was first and foremost their "IRRness": they just happened to be in the shape of jackets and trousers. I do not accept that this sort of inquiry, verging on a search for Platonic forms, is what the process of tariff classification, at any rate in this case, either requires or permits. Rather, for the reasons I have given the inquiry should in my judgment be whether the items have the objective characteristics of a jacket: if they do, whatever other qualities they have, and however important those other qualities are, they are 'jackets' rather than 'other garments'.

Relevance of the function of the IRR items

87. Mr Beal said that the FTT was entitled to have regard to the functions of the IRR items, and that the function of protecting the wearers by helping prevent their detection by enemy forces was a relevant function. Here I think one needs to be careful to identify and follow the principles laid down in the Court of Justice. The basic principle, as shown by the citation from *Holz Geenen* above, is that the decisive criteria are to be sought in those "objective characteristics and properties as defined in the wording of the relevant heading of the CN" (emphasis added). The wording of the relevant headings of the CN ('Jackets' ... 'trousers' etc) says nothing, or very little, about the function of the garments concerned. It certainly says nothing which *excludes* garments with protective functions. As we have seen, the FTT in fact held that one of the characteristics of 'jackets' was that they protected from the elements. Moreover both jackets and trousers expressly include industrial and occupational garments (see for example headings 6203 39 11 and 6203 49 11); and Note 4 in the CNEN to chapter 62 (which as said above in the citation from *Flir* is, although not legally binding, an important aid to interpretation) refers to these items as items

> "which because of their general aspect (simple or special cut or design related to the function of the garment) and the nature of their fabric, which is generally tough and non-shrink, make it clear that they are designed to be worn solely or mainly in order to provide protection (physical or health) for other clothing and/or persons during industrial, professional or domestic activities."

It follows that insofar as the headings in 6203 say anything about function, they include not only ordinary jackets and trousers but jackets and trousers worn mainly or solely in order to provide physical protection. As Mr Thomas aptly put it, Mr Beal's submission amounts in effect to saying that 6203 includes jackets and specialised protective jackets but not highly specialised ones. There is nothing in "the wording of the relevant heading of the CN" which supports this conclusion.

88. If there is nothing in the wording of the other relevant headings in chapter 62 (6203 etc), what about 6211 ? The FTT found (at paragraph [166]) that heading 6211 did refer to the function of the garments contained within it. This is not I think a view which it is possible to sustain. 6211 contains four items in the main heading (Tracksuits, ski suits, swimwear and other garments). Of these the first three are specialised garments which do refer to their function (to be used for ski-ing, swimming etc), but the final category of 'other garments' does not. It is, as said before, a residual or catch all category, and as such it cannot sensibly be read as saying anything about the function of the goods that fall within it. No doubt most goods that do fall within this category will be of a more or less specialised character (6211 42 10 instances aprons, overalls and smock-overalls) but this is because the usual types of clothing (jackets, trousers, shirts etc) have their own headings elsewhere in chapter 62. It does not follow that it is one of the objective characteristics of 'other garments' that they have a specialised function, or indeed that there is any function at all referred to in the wording of this heading. In my judgment there is no function referred to in the wording of 'other garments' apart from the function of being a garment; and in this respect the FTT was in error.

89. Mr Beal submitted that questions of the function or intended use of goods are not confined to those cases where there is an express reference to function within the terms of the heading itself. I agree that there need not be an *express* reference; an *implied* reference will suffice (as the FTT itself said at paragraph [165]). If however the wording of the heading contains nothing from which any reference to function, express or implied, can be derived, then I do not see how Mr Beal's submission is consistent with the basic principle as set out in *Holz Geenen* that the objective characteristics and properties in which the criteria for classification are to be sought are those contained in the wording of the relevant heading of the CN.

90. Mr Beal referred me to a large number of cases in support of his submission, and it is clear that there are many instances where the Court of Justice has had regard to the intended function or use of the goods in question. But this is

because very many of the headings do refer, expressly or impliedly, to the function or use of goods. Thus in *Neckerman* the relevant heading was 'pyjamas' and the Court of Justice held (at [7]) that the objective characteristics of pyjamas, which distinguished them from other ensembles, could be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear. If goods had that characteristic, the fact that it might be possible to envisage another use for them did not preclude them being classified as pyjamas (at [8]), so that it sufficed that being worn in bed was the main intended use; it did not have to be exclusive (at [9]). This seems to me a good example of the Court finding in the wording of the heading ('pyjamas') an implicit reference to the function or use of the goods, namely to be worn in bed, this being the characteristic that distinguishes pyjamas from other sets of garments. *Wiener* was a very similar case where the relevant heading was 'nightdresses', and the reasoning in *Neckerman* was followed.

91. The other examples relied on by Mr Beal were:

(1) *B.A.S. Trucks BV v Staatssecretaris van Financiën* C-400/05

Here the goods were second-hand dumper trucks and the relevant heading was 'Dumpers designed for off-highway use'. This contains an express reference to function, and the Court of Justice took into account the intended use of the trucks.

(2) *Bioforce GmbH v Oberfinanzdirektion München* C-177/91

Here the goods were hawthorn drops and the relevant heading was 'medicaments…' This contains an express or implicit reference to function, namely the use of the product to treat or guard against medical conditions, and the Court of Justice took into account the therapeutic and prophylactic characteristics of the product.

(3) *Deutsche Nichimen v Hauptzollamt Düsseldorf* C-201/91

Here the goods were a satellite television receiver and the relevant classification was 'television receivers … video tuners'. This contains an express reference to function, namely the use of the product to receive signals designed to be viewed on a screen, and the Court of Justice took into account the fact that the goods were designed to convert television signals so that they could be treated in order to become visible on a screen (even though the goods did not have a screen themselves).

(4) *Krings GmbH v Oberfinanzdirektion Nürnberg* C-130-02

Here the goods were two mixtures intended for the production of tea-based drinks and the relevant heading was 'Extracts, essences and concentrates of tea … preparations with a basis of extracts, essences or concentrates of tea.' The Court of Justice took into account the

intended use of the products, namely to be mixed with water to create beverages with a basis of tea. It seems to me that the Court must have regarded this use as a characteristic implicit in the wording of the heading.

(5) *Ikegami*

Here the goods were a digital recording machine and the competing headings were 'automatic data processing machines' and 'video recording or reproducing apparatus'. Both these headings contain express reference to functions, and a Note to the CN provided that machines performing a specific function other than data processing were to be classified in the headings appropriate to their specific functions. The Court of Justice therefore took into account the specific functions of the machine and held that it came within the ambit of the Note.

(6) *Sony Computer Entertainment Europe Ltd v Commission* T-243/01

Here the goods were Sony's Playstation®2 and the competing headings were 'automatic data processing machines' and 'video games of a kind used with a television receiver' and the Court of Justice took into account that the intended use of the goods was mainly for playing video games. This seems to me to be a case where the Court regarded the heading 'video games' as including consoles for playing video games, which is an implicit reference to function or intended use.

(7) *HMRC v Epson Telford Ltd* [2008] EWCA Civ 567

Here the goods were ink cartridges for printers and the competing headings were 'printing ink' and 'parts of [printers]'. Unlike the other cases referred to above, the decision turned on an application of GIR 3(b), namely whether the fact that they contained ink or the fact that they were printer parts gave the cartridges "their essential character". The Court of Appeal, applying a purpose-based test, held that it was the ink which gave them their essential character. This seems to me to raise rather different issues and to be of no assistance in the present case, which is not concerned with GIR 3(b).

(8) *Olicom A/S v Skatteministeriet* C-142/06

Here the goods were network cards with a modem function and the competing headings were 'data processing machines' and 'telecommunication apparatus'. Both headings contain explicit references to the function of the goods, and the Court of Justice decided the classification by taking account of the function of the goods.

92. Having looked at all the cases which Mr Beal cited to me, I remain

unpersuaded that there is any general principle that the function or intended use of goods is always relevant to tariff classification. Rather in my judgment the position is that the function or intended use of goods can be an objective characteristic of goods, and is relevant to tariff classification if referred to, expressly or impliedly, in the wording of the relevant heading of the CN. In very many cases, as the reported cases show, the wording of the relevant heading does contain, either expressly or impliedly, a reference to their function or use. This is perhaps particularly true of machines, which are usually described by reference to what they do (data processing machines, receivers, video recorders, telecommunication apparatus); but is also the case with other goods (pyjamas, nightdresses, medicaments, preparations). Indeed unless the heading is a simple description of the material of which goods are made, there is likely to be *some* reference, express or implied, to the function of goods. This is true of chapter 62 itself which is concerned with 'articles of apparel' which indicates that the goods it is concerned with are those intended to be worn as clothing.

93. What however I do not accept is that the heading 'other garments' in CN 6211 says anything more about the function or intended use of the goods falling within it than that they are garments. It is not disputed that the IRR items such as jackets and trousers are garments; but this does not assist in classifying them in CN 6211 rather than CN 6203. In my judgment, apart from the characteristic of being garments, the only characteristics that goods need have to fall within CN 6211 as 'other garments' is that they are not properly classifiable under the other heads in chapter 62 as jackets or trousers or whatever.

94. It follows that the function of the IRR items in providing life-saving protection to troops in combat, while a very important property of the goods, is not a characteristic or property that is "defined", expressly or implicitly, "in the wording of the relevant heading of the CN" whether the wording looked at is that of heading CN 6203 or CN 6211. In my judgment therefore the FTT made an error of law in paragraph [171] of the Decision where they had regard to the function of the IRR jackets in helping to prevent detection by enemy forces, and on the basis of that classified them as 'other garments' under CN 6211.

95. Mr Beal relied on two other points in support of his submissions, each of which I can deal with quite briefly. First, he said that the inclusion of 6211 (along with 6210) in the list of codes annexed to the MEU Regulation was highly relevant. Since chapter 62 only deals with clothing, this showed that the EU legislature must have thought that specialised military clothing would fall within these codes. In common with the FTT, I do not think this is a point on which any weight can be placed. It is apparent that in adopting the MEU Regulation the view was taken that in order to qualify for relief, the goods imported had to be both destined for military use *and* be within certain codes of the CN. In other words the MEU Regulation cannot be taken as intending to exempt all specialised military equipment. It is not possible to discern the

basis on which certain codes were included and others were not, and the adoption of the tariff classification codes as a method of determining what qualified for exemption and what did not was almost bound to throw up anomalies. Thus for example a 'ski suit' is clearly within heading 6211, but a 'ski jacket' is equally clearly not, as it is expressly mentioned in heading 6201. This means that if specialised ski wear was imported for military end use (not perhaps an implausible scenario) the question whether it was exempt or not would turn on whether it was a jacket or suit. No rational basis for such a distinction could be suggested. Similarly the effect of including code 6211, but not code 6203, in the Annex to the MEU Regulation is that coveralls, not being listed elsewhere in chapter 62, are included but jackets, which are listed elsewhere, are not. This does not mean the EU legislature thought that soldiers fighting in Iraq and Afghanistan fought only in coveralls and not in jackets; but that the method adopted of specifying only certain of the tariff codes inevitably leads to anomalous distinctions with no apparent rational basis. It is not a reason for adopting any different interpretation of the CN headings.

96. Second, Mr Beal said that the FTT was wrong to dismiss, as it did, a suggested analogy with body armour, which he said was classified under code 6211. There was indeed some reference in the documents to body armour being exempt from import duty (see paragraphs 19, 20, 22 and 39 above); but before the FTT HMRC did not accept this was the case, and the FTT heard no evidence relating to body armour. In these circumstances I see no error by the FTT in concluding that they could draw no useful analogy with body armour: see the Decision at paragraph [148]. In any event, even if it is assumed that Mr Beal is right and body armour is properly classified under code 6211, all this would tend to show is that body armour did not fall under any of the other heads in chapter 62. Since I was told that the combat shirt was designed to be worn under body armour, and since in the case of the combat shirt the IRR properties are only found on the sleeves and not the body, it seems a reasonable inference that body armour takes the form of a sleeveless item covering the trunk alone. I can quite see that this might not fall under any of the specific heads in chapter 62: such a garment is not a jacket, nor a shirt, nor a vest. The closest analogy with ordinary garments (although not very close) is perhaps a waistcoat, but waistcoats (unless included as part of a suit) are themselves not listed in the specific headings in chapter 62 and so would fall within 6211, which is indeed what the CNENs to 6211 indicate:

> "this heading also covers tailored waistcoats separately presented, not knitted or crocheted."

In these circumstances, the fact that body armour is classified under code 6211, assuming that it is, is not I think of any help in resolving the different question where the IRR items should be classified.

97. For the reasons I have sought to give the IRR jackets were in my judgment properly classifiable as 'jackets' under code 6203. Similar reasoning applies

to the other IRR items that were garments. The FTT did not in fact give any separate consideration to the IRR items other than jackets, simply saying at paragraph [171] that all clothing with IRR properties was best described as an 'other garment'; but the conclusions I have reached above in relation to jackets and trousers apply equally to the shorts (also properly classifiable under code 6203). They also apply to the two items which were the subject of the BTIs, namely the combat smock which the TCS classified as an 'anorak' under code 6201, and the combat shirt which the TCS classified as a women's shirt under code 6206 (it was in fact unisex but Note 8 to Chapter 62 provides that items which cannot be classified as men's or women's are to be classified as women's): in each case CWS only took issue with the BTI on the ground that the items should have been classified as 'other garments', but did not otherwise criticise the classification.

98. That deals with all the IRR items except the caps, hats and helmet covers. They raise a rather different issue which is Ground 2 of HMRC's appeal and which I deal with below.

HMRC's appeal: Ground 3

99. I can deal with Ground 3 briefly. Mr Beal did not suggest that the FTT had relied on GIR 3(a) in the Decision, or seek to uphold their decision on the basis of GIR 3(a). I am satisfied that he was right not to do so, as for reasons already given GIR 3(a) cannot logically have any application in the present case as it is not possible for the same item both to be, for example, a jacket and not a jacket: see paragraph 77 above.

100. In any event, if GIR 3(a) had had any application, I agree with Mr Thomas that the other headings in chapter 62 ('jacket', 'trousers' etc) are by their very nature more specific than the heading 'other garments' which is a catch all heading. The FTT referred (at paragraph [170]) to the question whether the function of the IRR jackets as an item of appeal was more specific than their function in protecting the wearer from detection (and in paragraph [171] referred to the latter function as "specific and specialised"); but GIR 3(a) is not concerned with which *function* is more specific but with which "heading ... provides the most specific *description*" which is a different matter.

101. It appears from paragraph [169] of the Decision that the FTT may have taken the view that in considering which heading was more specific they could consider which function was more specific because of the passage from the judgment of Henderson J in *Flir* which they had cited at paragraph [155]. But if so, I consider it clear that they were in error. In *Flir* the goods were thermal imagers and the competing classifications were 'thermometers' and 'instruments for measuring or checking quantities of heat'. Both these headings describe goods by their functions, so it was natural for Henderson J to say that:

> "Neither heading can be regarded as providing the more specific

> description, because the two functions identified by the Tribunal [viz thermometers and instruments for checking quantities of heat] are of equal importance."

But this reasoning cannot be applied to headings ('jackets' ... 'other garments') which do not describe goods by reference to their functions. The plain language of GIR 3(a) in such a case requires the tribunal to consider which heading provides the more specific description, and to that question there could have only been one answer.

102. In my judgment GIR 3(a) cannot be used to justify classifying the IRR items as 'other garments' under CN 6211.

HMRC's appeal: Ground 2

103. Ground 2 is that certain of the IRR items should not have been classified under CN 6211 as they did not fall within chapter 62 at all. They fell within chapter 65 as headgear. Mr Thomas submitted that this applied to the cap and helmet covers (catalogue items 30, 56 and 59); but (as Mr Beal correctly identified) the same point also applies to the hat (catalogue item 40).

104. Mr Beal objected to the point being taken. It was not taken in HMRC's statement of case, or its skeleton argument, before the FTT; but was first raised in Mr Thomas's closing submissions, after the evidence had closed and after he had made his own submissions. Mr Beal submitted (i) that in the circumstances the FTT had no jurisdiction to deal with the point; (ii) that it was not open to HMRC to seek to raise points which if they were to be made should have been made earlier; and (iii) that it was fundamentally unfair for HMRC to proceed in this way.

105. I will take the jurisdiction point first. Mr Beal relies on the decision of the FTT (Judge Berner) in *GE International Inc v HMRC* [2010] UKFTT 343 (TC) as authority for the proposition that the FTT has no original jurisdiction to decide on a question of doubtful customs classification; its jurisdiction is to hear appeals from decisions: see at [8]:

> "Put shortly, the Tribunal has no jurisdiction on a mere reference. It is not open to a taxpayer or any other person, or to HMRC, simply to refer to the Tribunal a question of doubtful customs classification. Appeals to the Tribunal lie only with respect to decisions of HMRC in a review under section 15 of the Finance Act 1994 ("FA 1994") of a decision under section 14 of that Act, and can only be entertained if the appellant is the person who required the review in question (see section 16). Absent a decision, and a review, there is no right of appeal. In the same way, once the disputed decision has been withdrawn, there is no jurisdiction for the Tribunal to consider the classification decision *in vacuo*."

106. This is no doubt right, but one must be careful to see precisely what it means.

In the *GE* case itself HMRC had issued a BTI classifying the goods in question to one code and the taxpayer appealed contending that the goods should have been classified to a different code. HMRC then withdrew the disputed decision and invited the FTT to allow the appeal. The taxpayer was concerned that merely allowing the appeal and quashing the decision would leave the correct classification in the air with the taxpayer having to restart the BTI process with no indication of what the outcome would be. It wanted the FTT to proceed with the hearing and make a correct determination on the facts. It was in this context that the FTT made the remarks cited above, declining to entertain a free-standing reference and holding that the appeal should simply be allowed. But it went on to hold that the powers of the FTT on an appeal included the power to quash or vary a decision and substitute its own decision; and that in the circumstances HMRC by inviting the FTT to allow the appeal must be taken to have accepted that the FTT should vary the decision as sought in the notice of appeal. The practical effect therefore was that the FTT did substitute the alternative classification asked for.

107. In the present case one must therefore look with care at what the decision was that was being appealed and what the FTT was being asked to do. There were in fact three appeals, but one of them (the BTI appeal) only concerns smocks and shirts, and no question of chapter 65 arises. The other two appeals are the repayment appeal and the C18 appeal. In relation to the repayment appeal, the actual decision of HMRC that was appealed was the FDR carried out by Ms Barbouti. Her decision was to uphold the decision by Ms Cureton-Burgess and therefore reject the claim for repayment. In doing so she expressly said that the FDR would not give an opinion or point of view where the products should be classified. Ms Cureton-Burgess had herself said that the garments, which CWS had confirmed varied from trousers, shorts, jackets and coveralls to hats, had been classified to Heading 6211 which (apart from the coveralls) was incorrect; but she did not state where they should have been classified.

108. In these circumstances the decision that was appealed against was a decision by HMRC that the claim for repayment should be rejected because (save as to the coveralls) the goods were not correctly classifiable under CN 6211. The relief sought on the repayment appeal was that the claim for repayment should be allowed because, inter alia, the goods were properly classifiable under CN 6211. The jurisdiction of the FTT was therefore jurisdiction to decide whether the goods were properly classifiable under CN 6211; and it seems to me that this includes the question whether there were any other competing classification that fitted the goods better. If there were, the goods were not properly classifiable under CN 6211. As a matter of jurisdiction therefore it did not matter that HMRC had not classified any of the goods under chapter 65: HMRC had not in fact classified any of the goods at all, beyond concluding that classification under CN 6211 was incorrect. I agree with Mr Thomas that the appeal against this decision necessarily conferred on the FTT jurisdiction to consider any other competing classification which HMRC put forward as a more appropriate classification than 6211.

109. Similar points apply to the C18 appeal. Here the decision appealed against was the FDR carried out by Mr Peacock. His decision was to uphold the decision to issue the C18, which was made by Ms Crawford. The grounds on which she did so, as set out in her letter of 5 May 2010, were that the authorisation which CWS held only gave them exemption from CN 6211 goods, that the items other than coveralls had been misclassified under CN 6211, and that they therefore did not qualify for end-use relief. Again it seems to me that the question for the FTT was whether the goods had indeed been misclassified to CN 6211; and that as a matter of jurisdiction the FTT were entitled, if not obliged, to consider any other competing classification put forward by HMRC to show that the goods were not in fact classifiable under CN 6211. I do not think this is affected by the fact that Mr Peacock wrongly thought that one of the goods in issue was a combat helmet, and described the competing headings by reference to the non-live liability rulings: the issue before the FTT was whether the C18 was properly issued. As a matter of fact, as shown by the schedules accompanying her letter, Ms Crawford had correctly understood that the goods in issue did not include helmets but did include caps, hats and helmet covers and had suggested chapter 65 codes for all of these (see paragraph 47 above), although her letter made it clear that the commodity codes on the schedules were ones she had selected but were not actual rulings, which could only be obtained by seeking BTIs. As a matter of jurisdiction again it seems to me that this left it open to HMRC to put forward other codes on appeal in order to demonstrate that the goods were indeed misclassified to CN 6211 and hence that the C18 was properly issued.

110. I therefore reject the submission that the FTT had no jurisdiction to consider whether the goods were properly classifiable to chapter 65 codes.

111. Mr Beal's next point is that if the chapter 65 point was to be raised it should have been taken earlier. He relies on *Johnson v Gore-Wood* [2002] 2 AC 1 at 31 where Lord Bingham refers to a "broad merits-based judgment ... focusing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before." This does not seem to me to be in point: Lord Bingham was discussing the principle, known (perhaps inaccurately) as the rule in *Henderson v Henderson*, that it can be an abuse of process for a party to litigate in a second action a point which could and should have been raised in an earlier action. He was not dealing with the question whether it is open to a party to take a new point on appeal, or in closing submissions after the evidence has been called. In each case it seems to me the principle is the same: is there any prejudice to the other party in allowing the point to be taken at that stage of the proceedings ? That is likely to depend on whether, if the point had been taken earlier in the proceedings, the evidence would have been different, and whether such evidence might have had a bearing on the point.

112. Mr Beal says that if the point had been taken earlier he would have adduced evidence (i) to support the contention that the goods were properly classifiable

under CN 6217 as accessories to the military combat uniform; (ii) to explore whether the combat hats were actually peaked caps; and (iii) to contend that the helmet cover was properly classifiable as part of a helmet rather than a cover in its own right and hence classifiable with the helmet under CN 6506.

113. As to (i), I will assume that Mr Beal could have adduced evidence that the hats, caps and helmet covers were an essential part of the IRR clothing in the sense that there is no point in soldiers wearing IRR jackets and trousers if their heads are not similarly protected. Indeed I would readily accept this without any further evidence. But I do not see that this could realistically lead to the conclusion that they should be classified under CN 6217. CN 6217 refers to "Other made-up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212 [which refers to such items as brassieres, girdles, corsets]." But in order to come within chapter 62 at all rather than chapter 65, goods must be "Articles of apparel and clothing accessories" rather than "Headgear and parts thereof". Where the CN distinguishes between clothing and headgear in this way, it seems to me an inescapable conclusion that hats, caps and helmet covers, even if ancillary to other IRR items, should be classified as headgear rather than clothing. The HSENs to code 6217 (which as explained above are an important aid to the interpretation of the scope of the various tariff headings, although not legally binding) include a note that "This heading covers made up textile clothing accessories...not specified or included in other headings of this Chapter or elsewhere in the Nomenclature"; and the HSENs to chapter 65 include a note that with certain exceptions, none of which is material, the Chapter covers hats and headgear of all kinds "irrespective of the materials of which they are made and of their intended use." This to my mind makes it clear that the hats, caps and helmet covers are properly classifiable under chapter 65 rather than chapter 62; and these items are therefore neither classifiable under CN 6211 nor CN 6217.

114. As to (ii) and (iii), once it is concluded, as I have, that these items fall within chapter 65 rather than chapter 62, it is not I think necessary for the purposes of HMRC's appeal to consider where in chapter 65 they fall. I can see that there might be room for argument whether the various items were hats and other headgear within CN 6505, safety headgear within CN 6506 or (in the case of the helmet covers) covers for headgear within CN 6507. But the question before the FTT on both the repayment appeal and the C18 appeal was whether the items were within CN 6211; and if these particular items are within chapter 65 that is in itself a reason for concluding that they are not within CN 6211 regardless of where in chapter 65 they should be classified.

115. In my judgment therefore the fact that the point was only raised at such a late stage in the proceedings did not mean that CWS were prejudiced by not being able to call evidence that might have had a bearing on the issue. I therefore reject the submission that it was too late to raise the point.

116. The third objection raised by Mr Beal was that it was fundamentally unfair for

HMRC to proceed in this way. His point was that if HMRC had suggested that these items were within chapter 65 at the time the MoD issued the Certificate, the Certificate could have been amended to include the items under CN 6506, which is covered by the MEU Regulation. This seems to me to elide two different questions which should be kept distinct. One is whether HMRC's failure to refer to chapter 65 at the time of the Authorisation gave any rights to CWS: this has some similarities to the question raised by CWS's cross-appeal and I will consider it in that context. The other is whether HMRC's failure to rely on chapter 65 at an earlier stage in these proceedings made it unfair for them to do so in reply submissions before the FTT. I have already said that (leaving aside the point that Ms Crawford had in fact suggested chapter 65 codes in her schedules) this question seems to me to turn on whether, if the point had been taken earlier, different evidence might have been called which might have affected the argument, and for reasons already given I do not see that it would.

117. In these circumstances it was in my judgment open to HMRC to raise the chapter 65 point before the FTT, and since they did so, the FTT should have dealt with it. Had they done so, they should have concluded that the items in question (hats, caps and helmet covers) were not garments within chapter 62 at all but headgear within chapter 65, and for this reason they were not classifiable under CN 6211.

118. In summary therefore on HMRC's appeal I conclude:

(1) The FTT erred in classifying the IRR items as 'other garments'.

(2) Those that were garments (jackets, trousers, shorts, shirt and smock) were properly classifiable under the other headings in chapter 62 which covered the particular items concerned.

(3) Those that were headgear rather than garments (caps, hats and helmet covers) were properly classifiable under chapter 65.

CWS's cross-appeal: (1) Effect of the MoD Certificate

119. CWS has two separate grounds in its cross-appeal. The first is that the declaration of the CN Code in the Certificate issued by the MoD determines the proper classification of the goods in question, and so long as the Certificate remained in that form had the effect of suspending the duties payable on the items in question.

120. This is primarily a question of construction of the MEU Regulation. I have annexed the text of the Regulation to this judgment. I draw attention to the following points:

(1) Recital (2) makes it clear that the Regulation does not exempt all military equipment, but only "certain" weapons and equipment. The reasons for this are not spelt out, but it appears from the *travaux*

préparatoires which Mr Beal showed me (referred to below) that the Regulation represents a compromise between the interests of the Member States in procuring the most technologically advanced equipment available for their armed forces, even if that meant sourcing them from outside the EU; and the desire not to prejudice the development of strong defence industries within the EU.

(2) Recital (3) shows that the list of codes in Annex 1 was drawn up so as to ensure consistent treatment. Certain Member States had regarded the Treaty as entitling them to waive customs duties on some military imports (an interpretation contested by the Commission), but the extent of duty waivers varied considerably and some did not allow any relief at all. The final sentence of Recital (3) makes it clear that items not falling within the listed codes are subject to the normal customs duties.

(3) Recital (4) justifies Article 2.3 under which goods imported under the MEU exemption are made subject to the end use conditions provided for in the Customs Code for a period of 3 years.

(4) Recital (5) explains the purpose of the certificate from the competent authority provided for by Article 3.1. It was to provide a guarantee that "these conditions" are fulfilled. I will have to come back to the question of what "these conditions" refers to. It is notable that the recital says that the certificate "could also be used as a customs declaration as required by the Customs Code".

(5) Article 2.1 is the substantive provision which provides for a total suspension of the customs duties. Imports of the goods listed in Annex 1 are free from customs duties when they are used by or on behalf of the military forces of a Member State for certain purposes (defending the territorial integrity of the Member State, participating in international peace keeping, or other military operations, or (by Article 2.4) training purposes or civil emergencies). In other words, Article 2 only applies to imports of goods listed in Annex 1; if there is such an import, it lays down the conditions for the suspension of duties.

(6) Article 3.1 imposes the requirement for a certificate from the competent authority as set out in Annex III. This is to be submitted with the imported goods to the customs authorities. As foreshadowed by recital (5) it provides that the certificate "may" replace the customs declaration required by the Customs Code.

(7) Article 3.2 envisages that for reasons of military confidentiality the certificate and imported goods may be submitted to other authorities designated for this purpose, that is other than the customs authorities.

(8) Mr Beal also placed reliance on Article 5 which I consider below.

121. Mr Beal relies on recital (5) and Articles 2 and 3 for his submission that the

declaration of the CN code in the certificate determines the proper classification of the goods in question and definitively suspends the duties payable on the items in question. The FTT rejected this submission. They accepted that the Certificate was conclusive as to the military end use of goods being imported into the EU, but did not accept that it was also conclusive as to the proper classification of those goods: paragraph [137] of the Decision.

122. I agree with the FTT. Article 2 only applies to imports of the goods listed in Annex 1. If there is an import of such goods, it qualifies for suspension of customs duties if the conditions of Article 2 are fulfilled (namely that the goods are used for military end use). Article 2 by itself says nothing about how these two matters are to be demonstrated. Article 3.1 imposes a requirement for a certificate from the competent authority. Article 3.1 does not itself say what the certificate is certifying but it requires the certificate to be in the form set out in Annex III. The form set out in Annex III contains in Box 11 a statement that

> "This is to certify that the goods described above are for the use of the military forces of (Member State)."

On its face therefore the form of certificate required by Article 3.1 is only a certificate that the goods have a military end use. It does not contain any words certifying that the goods have been properly classified to the CN code listed in box 6.

123. Recital (5) indicates that the purpose of the certificate is to constitute an appropriate guarantee that "these conditions are fulfilled". The conditions referred to are those which lead to a suspension of duties. Reading this together with Articles 2 and 3, I consider that this is a reference to the conditions in Article 2 requiring that the goods concerned be used by or on behalf of the military forces for the purposes there set out. I do not read this as also guaranteeing that the goods imported are of the types listed in Annex 1.

124. This is I think the natural meaning of the language of recital (5) and Articles 2 and 3 read together. It is also supported by other considerations. The 'competent authority' is the authority which is competent to certify the military end use of the goods. It will therefore no doubt be, as it is in the UK, a military authority. It would I think be somewhat surprising if military authorities were also intended to be responsible for the correct tariff classification of goods imported which, as the decided cases illustrate, is a technical matter which can be of some complexity. Had it been intended that military authorities were to take on this role one would have expected some clear statement to this effect.

125. Not only does the Regulation not say this, but it says twice (both in recital (5) and in Article 2.1) that the certificate can also be used as a customs declaration. The evidence before the FTT was that in the UK certificates are not in fact used as customs declarations (at paragraph [137] of the Decision),

but what seems to me significant is that even if a certificate is used as a declaration, neither recital (5) nor Article 2.1 suggests that it has any special status over and above that of an ordinary customs declaration. An ordinary customs declaration is not conclusive as to the correct classification of goods: it is just a declaration by or on behalf of the importer, and is subject to post clearance verification by the customs authorities. In providing that certificates can be used as customs declarations, therefore, the Regulation, far from suggesting that certificates are conclusive as to classification, to my mind suggests the opposite, namely that imports of goods with the benefit of such certificates are subject to the normal operation of the Customs Code.

126. Mr Beal referred to a number of matters in support of his submissions. First he relied on the *travaux préparatoires* in the form of the initial proposal from the Commission dated 15 September 1988 with an explanatory memorandum. The proposed regulation at that date was not in the same form as that ultimately adopted, and in particular was limited to a small number of classes of goods, namely tanks, helicopters, aircraft, and weapons such as bombs and missiles. Mr Beal drew attention in particular to paragraphs [13] and [16] of the explanatory memorandum. Paragraph [13] explained that it was not possible to follow the normal practice under which proposals for duty suspensions on industrial products were expressed in very precise and detailed terms so as to enable Community producers to contest them on the grounds that they could produce such goods; due to the generally secret nature of military specifications, the use of detailed descriptions of the products, and the practice of committee discussion of the capacity of Community firms to produce them, were excluded. Paragraph [16] said that as the list had been defined in general terms, a customs control system would be required to ensure that the conditions for duty relief would be met; the proposed arrangements were based on a system of certification by the competent authority which had been kept as simple as possible.

127. As I understand this explanation, the point that was being made was this. Instead of specifying the goods on which duty would be suspended in technical detail, the list of goods was in general terms. For example, one of the items on the list was "CN code 8802 11 90: helicopters, of an unladen weight not exceeding 2000kg". Helicopters coming within this category could obviously be intended for military use or for purely civilian use; but the exemption was only intended to be for military equipment procured by the Member States for the use of their armed forces. Hence the need for a certificate confirming for example that helicopters imported under this code were for military use: the form of certificate then proposed was similar (although not identical) to that ultimately adopted and contained the rubric:

> "This is to certify that the goods described above are for the exclusive use of the armed forces of (Member State)."

128. I accept therefore that the certification procedure was put in place because of the sensitive nature of the goods and to avoid the need for customs authorities

to investigate for example whether helicopters were indeed for military or civilian use. But it does not follow that it was also intended to deprive the customs authorities of the right to verify that the goods imported were in fact helicopters and correctly classified to the right code. I do not see anything in the explanatory memorandum which suggests that this was a consideration which the Commission had in mind. I do not therefore find any support for Mr Beal's submission in this document.

129. Mr Beal referred to *Commission v Greece* [2009] ECR 1-11859 at [47]-[48] and *Commission v Portugal* [2010] ECR 1-1569 at [53]-[57], [59]-[60]. Each case concerned the historic practice of certain Member States of treating military imports as exempt, and related to the period before 1 January 2003 when the MEU Regulation came into force. In *Commission v Greece*, [47] explains that there was no express exemption from customs duties for military equipment before the MEU Regulation and [48] makes the point that it could be inferred from the fact that the MEU Regulation was passed that the legislature started from an assumption that an obligation to pay previously existed. In *Commission v Portgual*, [53]-[57] recite arguments on behalf of Portugal as to why military imports were exempt before the MEU Regulation; [59]-[60] are a repeat of the points made in *Commission v Greece* at [47]-[48]. Neither case seems to me to be of any assistance on the present question. The most that can be said that is that it was argued for Portugal that the need for military confidentiality had been recognised by recital (5) of the MEU Regulation. So it had, as is apparent from the terms of the recital itself. But the question is what provision the MEU Regulation makes as a result.

130. The MEU Regulation in fact makes two provisions which are expressed to be for reasons of military confidentiality. First, it provides in recital (5) and Article 3.1 for the certificate from the competent authority. Second, it provides in Article 3.2 liberty for the goods and certificate to be submitted to authorities other than the customs authorities. This provision (which was not in the original proposal of 1988 which simply provided for the goods and certificate to be submitted to the customs authorities) enables a Member State that does not wish, for reasons of military secrecy, to submit its military imports to the scrutiny of the customs authorities, to designate alternative authorities for this purpose. It tends to suggest that if this course is not adopted the goods will be subject to the normal customs procedures including post clearance verification.

131. Mr Beal also referred me to Public Notice 770. This is dated July 2003 and was issued by HM Customs & Excise. It explains how end-use relief could be used to enable goods to be imported or received at a reduced or nil rate of duty. Section 7 deals with special procedures for military equipment, and summarises the effect of the MEU Regulation. Mr Beal relied on [7.2] which specifies the conditions for using the scheme (namely that the importer must be importing goods for use by or on behalf of the military forces of a Member State; that he must be authorised for end-use; and that he must hold a certificate from a competent authority); and an accompanying flowchart.

Neither says anything about the type of goods that are covered by the scheme, but this is dealt with by [7.3] which explains that

> "The scheme suspends Customs duty on imports of goods covered by the four digit HS Headings indicated in list (a) below..."

and then lists the CN codes from Annex 1 to the MEU Regulation. Neither here nor anywhere else in Public Notice 770 is there a statement that suggests that it is for the MoD not only to certify the use to which the goods will be put but also to specify the appropriate CN code, and that its certificate will be conclusive as to the classification of the goods.

132. Mr Beal also relied on [7.4] which deals with an application for end-use authorisation, and informs the importer that there is no need to fill in the full 10-digit commodity code in box 5 of form C1317, it being sufficient to enter the 4-digit code entered on the certificate. This, he says, is what CWS did. The FTT said (at paragraph [145] of the Decision) that the Notice does not confirm that an importer can rely on the CN code in the certificate as being the correct classification; it simply removes the need to quote the full 10 digit code in an application for authorisation. I agree.

133. Mr Beal also relied on Article 5 of the Regulation. Article 5.2 envisages that goods may be entered for free circulation into a Member State other than that in which the certificate was issued. In the present case therefore the goods might have been shipped to Rotterdam and entered there. Mr Beal said that in such circumstances the certificate of the MoD would be conclusive so the Dutch customs authorities would not be able to go behind it, security considerations being paramount so that the certificate would be determinative. I can see that the Regulation might have so provided and that there might have been reason to do so (although one would perhaps expect a Member State to ensure that wherever possible highly sensitive goods were imported directly rather than via another Member State); but I do not find in Article 5.2 any indication that this is what the Regulation does provide, or was intended to achieve.

134. For these reasons I agree with the FTT that the MoD's certificate was not conclusive as to the correctness of the classification of the goods.

135. Mr Beal also relied on a number of principles of EU law: the principle of legitimate expectation (*Mulder v Minister van Landbouw en Visserij* Case 120/86); the principle of legal certainty (*Administration des Douanes v Gondrand and Garancini* Case 169/80); the principle of non-retroactivity (*Diversinte SA v Administración Principal de Aduanas de la Junquera* C-260/91); and the principle of good administration (*R (Alliance for Natural Health) v Secretary of State for Health* C-154/04). I do not think it is necessary for me to consider each of these principles (none of which is disputed) in turn. They do not, it seems to me, permit the MEU Regulation to be given any different interpretation from that which I consider to be its proper

meaning; or require the MoD's certificate to be treated as conclusive as to the classification of the goods if that is not its effect under the Regulation.

CWS's cross-appeal: (2) Remission of duty

136. The other point taken by CWS in its cross-appeal is that if the goods were not in fact exempt, the FTT was wrong to refuse CWS's claim for relief from payment of the duty. Before the FTT, these arguments had been deployed both in relation to the repayment appeal (where the relief sought was repayment of duty) and in relation to the C18 appeal (where the relief sought was remission of duty); but CWS have accepted the FTT's decision on the repayment appeal and Mr Beal has only sought before me to rely on this point in relation to the C18 appeal.

137. Two provisions of the Customs Code are relied on, namely Article 236 (which provides for repayment or remission of duty in certain particular cases); and Article 239 (which provides for repayment or remission of duty in other situations).

Article 236

138. Article 236 provides so far as material:

> "Import duties or export duties shall be remitted in so far as it is established that when they were entered in the accounts the amount of such duties was not legally owed or that the amount has been entered in the accounts contrary to Article 220(2)."

139. In the present case the duty claimed by the C18 demand was, on the basis of my decisions above, legally owed so CWS have to rely on the entry in the accounts being contrary to Article 220(2). This provides, so far as material:

> "...subsequent entry in the accounts shall not occur where
>
> (b) the amount of duty legally owed failed to be entered in the accounts as the result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration."

140. The questions that arise on Article 220(2)(b) are therefore these:

(1) Was there an error by the customs authorities ?

CWS relied on errors both by the MoD (in issuing the Certificate) and by HMRC (in issuing the Authorisation). The FTT held that there was no error by HMRC; but there was an error by the MoD which was for

this purpose a customs authority.

(2) Was the failure to enter the amount of duty in the accounts caused ("as a result of") that error ?

The FTT held that it was not.

(3) Did CWS act in good faith ?

The FTT held that Mr McMahon acted in good faith, but it was not reasonable for CWS to rely on the Certificate and Authorisation for the purposes of tariff classification.

(4) Was the error one which could not reasonably have been detected by CWS ?

The FTT held that the error could reasonably have been detected by CWS.

141. Mr Beal accepts that these are findings of fact, and that he can only overturn them on appeal on the basis that the findings are ones that no reasonable Tribunal could reach, or that they involve an error of law.

142. So far as error on the part of the customs authorities is concerned, Mr Beal challenged the conclusion that HMRC made no error in granting the Authorisation. The FTT held that there was no error as the Authorisation was on terms that the goods imported to MEU relief should be properly classified to CN 6211 (paragraph [198] of the Decision). This was a conclusion which I consider the FTT was entitled to reach. HMRC did have a copy of the Certificate which described the goods. But the Authorisation on its face authorised CWS to import the goods "indicated in box 5 of the C1317". The goods indicated in box 5 of the C1317 form, which had been filled in by Mr McMahon, were described as "military clothing" with a CN code of 6211. The Authorisation therefore authorised CWS to import military clothing which had a CN code of 6211. It did not purport to tell CWS that HMRC had agreed that this was the correct classification for all the goods listed in the Certificate; and given the FTT's finding that Ms Crawford had discussed with Mr McMahon when she visited on 29 April 2009 that it was CWS's responsibility to ensure the correct classification of the goods (see paragraph 30 above), it could not reasonably be read as confirming the classification.

143. So far as error by the MoD is concerned, Mr Thomas challenged the conclusion of the FTT that the MoD was a customs authority. I will come back to this point below. As to the finding of error, what the FTT said (at paragraph [197] of the Decision) was that

> "We accept that there was an error by the MoD if Ms McCollum considered, wrongly, that the IRR clothing could properly be the subject of MEU relief."

Mr Thomas suggests that this finding is equivocal because it is introduced by "if", but I do not think this is right. The FTT had found as a fact that Mrs McCollum did consider that the IRR items could properly be classified to code 6211 (paragraph 27 above) and as I read it, the FTT only used the word "if" here because in their view Mrs McCollum was in fact right to think that the goods could be classified under code 6211 so she was only in error if they were themselves wrong about this.

144. However even though the FTT found that the MoD, in the person of Mrs McCollum, made an error, they concluded that this was not the cause of the duty not being entered into the accounts. Since Mr Beal challenges this as an irrational finding, I should set out their finding in their own words (at paragraph [196] of the Decision):

> "The real cause of the duty not being entered in the accounts was a failure by [CWS] to obtain advice from HMRC tariff classification service as to the proper classification of the goods. They had been advised to do so in 2005 by both the MoD and HMRC. Notwithstanding Ms McCollum wrongly thought that the goods were entitled to MEU relief she did not cause [CWS's] misunderstanding. Nor was she responsible for any legitimate expectation on the part of [CWS] that it would be entitled to relief."

145. In my judgment this was a finding that it was open to the FTT to make. The background was that CWS was by 2009 an experienced trader which had been importing these particular garments since 2005, classified (correctly, as I have found) to codes other than 6211. CWS had been told in 2005 in writing by the MoD (i) that the importer was legally responsible for the correct tariff classification of the goods; and (ii) that if they were unclear what the commodity codes for the goods were then the TCS was able to help. Shortly before its agent Puma had queried with HMRC whether goods being imported under code 6203 could be imported under code 6211, and was told the same, namely that it was up to them to classify the codes correctly and that they should speak to the TCS to establish the correct code.

146. When in 2009 Mr Trimble wrote to the MoD, he had the 2005 correspondence before him. He did not ask the MoD (let alone HMRC) to confirm the correct codes; rather, as Mr Thomas pointed out, he asserted that the garments in question fell into categories (including 6211) on which import duties were suspended, and relied on the specialised nature of the goods to ask for a certificate.

147. It is against this background that the FTT made the following findings of fact which underpin its conclusion on this issue:

(1) Paragraph [30]:

> "[CWS], including its finance director Mr McMahon, appears

to have taken this letter [Mrs McCollum's letter of 28 January 2009] as confirmation that MEU relief would be available. The original enquiry from Mr Trimble was seeking a certificate from the MoD. However the response does appear to go further and at least suggests that not only will a certificate be granted, but that MEU relief will be available. However we do not accept that [CWS] could reasonably take this letter as confirmation that it would be entitled to MEU relief. Mr Trimble had not furnished either Ms McCollum or HMRC with details of the specific products which he realised it would be necessary to do at the time of his request for a certificate in January 2009. More importantly [CWS] was also aware that both the MoD and HMRC (see below) in 2005 had emphasised that it was for the importer to identify the correct tariff classification of goods and in case of uncertainty the importer should contact the HMRC tariff classification service."

(2) Paragraph [45]:

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

(3) Paragraph [75]:

"Whilst the terms of Ms McCollum's letter to Mr Trimble dated 28 January 2009 may have contributed to some extent to [CWS's] misunderstanding it is not fair to say that she caused that misunderstanding. In the context of [CWS's] dealings with the MoD and, through Puma Cargo with HMRC in 2005, it was a failure on the part of [CWS] to take up the issue with HMRC directly which was the real cause of

> [CWS's] misunderstanding. [CWS] and their customs agent ought to have known that the importer was responsible for identifying the correct commodity code and to contact the tariff classification service directly in case of doubt."

148. The FTT also went on to find (at paragraph [199]):

> "Mr McMahon's evidence was that [CWS] had relied on the Certificate and the end use Authorisation to justify classifying the goods to CN 6211. We accept that he did so rely, and also that he acted in good faith. For the reason we have given we are not satisfied that it was reasonable for [CWS] to rely on those documents for that purposes of tariff classification."

149. This is a consistent series of findings that it seems to me were open to the FTT. In effect they found that CWS, although told in 2005 that it was for them to identify the correct codes, and although previously importing the goods under other codes, assumed that the goods could be imported under codes that qualified for end use relief. This was a misunderstanding, but it was not caused by the MoD. The essential cause was CWS's own failure to do what they had been advised to do, which was to check with the TCS.

150. Mr Beal says that this was an irrational conclusion for the FTT to reach where CWS had gone to the MoD to query the availability of MEU relief, and been told that the MoD had confirmed its availability with HMRC. On the contrary it seems to me that the FTT took care to distinguish between (i) the question whether the goods were sufficiently specialised to qualify for a Certificate – which only the MoD could give and which was what Mr Trimble asked for – and (ii) the different question under which codes the garments should be classified. CWS did not expressly ask this later question, and had been consistently told (and were told again by Ms Crawford in April 2009) that this was a matter for them. I do not regard the FTT's conclusion – that in effect it was their own failure to ask for help in classification which was the real cause of their erroneous understanding that the goods could be imported under code 6211, and that although they regarded this as confirmed by the form of Certificate and Authorisation it was not reasonable to do so – as one which it was not open to the FTT to come to.

151. Mr Beal also says that the conclusion involved an error of law, as it in effect imposed an obligation on CWS to contact the TCS. But, he says, there is no legal obligation to seek a BTI, let alone informal help from the service; and no reliance could be placed on the service's view in any event.

152. He relies on *Hewlett Packard France v Directeur Général des Douanes* C-250/91. In this case Hewlett Packard France imported computer keyboards into France, declaring them to a tariff heading which enjoyed suspension of customs duties. It did so in reliance on a decision of the Munich Revenue office, given to Hewlett Packard's German subsidiary, classifying the goods to

that heading. It was in this context that the Court of Justice, in considering whether Hewlett Packard France had shown the requisite degree of care to satisfy the condition that it could not have reasonably have detected the error, held as follows (at [25]):

> "In that context, the Commission's view that, in order to satisfy the conditions concerned, the trader must, in a case such as the present one, obtain confirmation of the information from the competent customs authorities or follow the procedure for obtaining a classification opinion in the Member State of importation is untenable. Such a requirement would not be compatible with the aim of the classification opinion procedure, which is to enable traders to ascertain the duties payable on goods which they intend importing. It is a procedure to which a trader may have recourse when he has doubts as to the tariff classification of goods, not one of which he must avail in order to prove that he has exercised diligence in submitting his customs declaration."

Mr Beal submitted that this established that using the tariff classification service was never obligatory, and hence in finding in effect that it was, the FTT had made an error of law.

153. But this passage must be read in the context of the facts of that case, as the immediately preceding paragraph [24] makes clear:

> "As regards the degree of care shown, if the trader concerned has doubts as to the correctness of the tariff classification of the goods in question he must make inquiries and seek the greatest clarification possible in order to ascertain whether or not his doubts are well founded ... That requirement may be considered satisfied where the trader concerned had no doubts, in view of the information supplied to a company belonging to the same group as the company liable by the customs authorities of a Member State, as to the correctness of the tariff classification of the goods in question."

Far from laying down a general principle that it is not necessary for an importer to seek clarification as to tariff classification, it seems to me that this judgment proceeds on the basis that in general a trader in any doubt should seek the greatest clarification possible. It was only the particular circumstances of that case, where a company in the same group had already obtained such clarification, that led the Court of Justice to conclude that this was enough to remove the doubts.

154. Mr Beal also said that it was unreasonable to expect traders to avail themselves of informal advice from the TCS because no reliance could be placed on the service's view in any event. He relied on *Viva Mexico v Commissioners of Customs & Excise* [2001] UKVAT C001030, a decision of the VAT and Duties Tribunal (Theodore Wallace, Chairman). In this case a

trader importing certain types of confectionery for the first time had a five minute telephone conversation with a customs office in Croydon as a result of which he was faxed a sheet with four codes circled, which were then used. The Tribunal's conclusion at [41]-[42] was as follows:

> "41 ...I am quite unable to accept that he gave sufficiently detailed information to the lady on the telephone for it to be possible properly to categorise her action in circling codes as an error, even assuming that the conversation lasted longer than the 5 minutes which he stated. If her attempt to assist him was to be described as "official error", it would be a major disincentive to Customs to give guidance without receiving very detailed information in writing....
>
> 42 ...In the present case if any error was not easily detectable to an attentive reader of the Official Journal, it is impossible to see how Customs could have been expected to give an answer on such limited information on the telephone in only 5 minutes."

This does not seem to me to lay down any general rule that no reliance can be placed on information given by HMRC. It is an illustration of the fact that where limited information is given to HMRC over the telephone, it may not be possible to regard advice given by HMRC on the basis of that limited information as an "error". It does not follow that it would be unreasonable to expect a trader who has been importing goods for a number of years under one code, and is contemplating switching to another code, to contact HMRC's TCS directly for advice.

155. Mr Beal also referred me to Public Notice 600. This is a notice issued by HMRC on tariff classification. Paragraph 1.6 under the heading "Who can I contact for help in classification ?" says:

> "You can apply to the Tariff Classification Service for a Binding Tariff Information (BTI) decision on the correct commodity code for your goods – see Section 3. The Tariff Classification Service also provides verbal advice but this is for assistance only and is not legally binding (see paragraph 2.2)."

Paragraph 2.2 says:

> "If after studying the Tariff and seeking guidance from other sources such as a Trade Association or a Chamber of Commerce, there is still an uncertainty about the correct Tariff classification of specific goods, you can ask the Tariff Classification Service. Please note that this is limited to 3 enquiries per call.
>
> However you should be aware that whilst every care is taken to provide accurate advice, verbal advice is not legally binding. If there remains any element of doubt we recommend that you apply for a

BTI."

156. This advice is no doubt correct that informal advice from the TCS, unlike a BTI, is not legally binding. But I do not think it follows that it is unreasonable to expect traders to avail themselves of this service, especially when they are considering changing from codes which do not attract relief to those which do.

157. Mr Beal said that to accept the FTT's findings in this case would effectively nullify Article 220(2)(b) in the case of mis-classifications as it is always open to a trader to request a classification from the TCS. This I think is to overstate the position: the FTT's decision in the present case was based on the facts particular to CWS, not least the advice both it and Puma had received in 2005.

158. In my judgment the FTT made no error of law in concluding that the real cause of the duty not being entered in the accounts was that CWS decided to change the codes for the importation of the IRR items from codes that did not qualify for MEU exemption to code 6211 which did, without taking advice from the TCS as to the correct classification of the goods. This seems to me a finding which it was open to them to make and hence one which it is not possible for the Upper Tribunal to disturb.

159. That means that the claim under Article 236 was correctly dismissed by the FTT and makes it strictly unnecessary to deal with the other points that arise on that Article. I will therefore just briefly record my views that:

(1) There is a question whether the MoD are properly to be regarded as a customs authority for the purpose of Article 236. The MoD clearly have a role to play, as they are responsible for the Certificate; but whether this make them customs authorities at all, and, if so, whether they are customs authorities for any purpose other than issuing the Certificate, are matters of some difficulty. Since I do not have to answer these questions and since they may be important in other cases, I prefer not to do so.

(2) Mr Beal criticises the finding of the FTT that it was not reasonable for CWS to rely on the Certificate and Authorisation for tariff classification purposes. In my judgment this was a view which was open to them.

(3) Mr Beal also criticises the FTT for its conclusion that HMRC's error was reasonably detectable by CWS. This raises much the same issue as already discussed as to whether it was reasonable to expect CWS to take advice from the TCS; and for similar reasons to those already given, I do not think the FTT made any error of law in concluding that it was.

160. In the result therefore I do not consider that the FTT's decision on Article 236 can be overturned.

Article 239

161. Article 239.1 of the Customs Code provides

> "Import duties or export duties may be repaid or remitted in situations other than those referred to in Articles 236, 237, and 238:
>
> - to be determined in accordance with the procedure of the Committee
>
> - resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned. The situations in which this provision may be applied and the procedures to be followed to that end shall be defined in accordance with the Committee procedure. Repayment or remission may be made subject to special conditions."

162. The FTT set out (at paragraphs [111] to [125] of the Decision) the relevant provisions of the Implementing Regulation and the decided cases which bear on Article 239. There is no criticism of their statement of the law, and it is not necessary to repeat it all. The salient points for present purposes are:

(1) It is for the importer to ensure that it enters the correct customs code on any customs declaration at the time of importation (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 the charges to customs duty.

(2) HMRC are obliged to enter the correct classification for goods imported into the UK. If they discover an error in the tariff classification in a customs declaration, they must in principle recalculate the amount of customs duties.

(3) This is subject to Article 220(2)(b) (considered above); and Article 239. The Court of Justice gave guidance on what is now Article 239 in *Covita* C-370/96 at [29] to [32]. They said that repayment or remission under that article was subject to two cumulative conditions, namely the "existence of a special situation" and the "absence of deception or obvious negligence on the part of the trader" (at [29]).

(4) In order to assess whether a trader is in a "special situation", it is necessary to consider whether he is in an exceptional situation as compared with other operators engaged in the same business.

163. The FTT found that (i) HMRC did not approve the use of code 6211 for CWS's imports; (ii) the MoD did not lead CWS to believe that code 6211 had been approved by HMRC; (iii) CWS did not in the circumstances have any legitimate expectation that MEU relief would be available; (iv) they were not in the circumstances satisfied that there was any special situation for the

purposes of Article 239; (v) they were also not satisfied that CWS had been placed in any exceptional situation compared with other operators in the same business; and (vi) if it were necessary to do so they would find obvious negligence on the part of CWS in failing to follow the advice given to it by the MoD, and to Puma by HMRC, in 2005 (paragraphs [203] to [204] of the Decision).

164. Mr Beal criticises these findings as in effect contrary to the evidence. The critical ones are the first two, and they depend on the same findings of primary fact as the FTT had already relied on in connection with the claim under Article 236. For reasons already given, I consider that the FTT was entitled to conclude that in giving the Authorisation, HMRC did not agree that the goods listed in the Certificate were correctly classified to code 6211; and that although Mrs McCollum did consider that all the IRR items could be classified to code 6211, this was not the real cause of CWS's misunderstanding.

165. On the basis of these findings of fact, which I consider cannot be overturned, the FTT found that HMRC and the MoD had not created a legitimate expectation and hence that there was no special situation. The assessment whether there is a 'special situation' is an example of the kind of multi-factorial assessment, based on a number of primary facts, that was referred to by Jacob LJ in *HMRC v Procter & Gamble*; and given the findings of primary fact that the FTT had reached, I do not think it is open to me to reverse that assessment.

166. Mr Beal criticises the FTT for concluding that CWS were not placed in an exceptional situation compared with other operators engaged in the same business, on the ground that there are no other such operators, CWS being the only trader with this particular procurement contract. Assuming he is right that there are no other operators engaged in the same business, I do not think it means that the FTT's conclusion is flawed. First, the finding that CWS had not been placed in an exceptional situation compared with other operators is introduced by the words "We are also not satisfied..." which indicates that even without this consideration the FTT would have concluded that CWS was not in a special situation. Second, and in any event, it cannot be the case that a trader who is in effect the only trader engaged in a particular business can on that ground alone establish that he is in a special situation for the purposes of Article 239. If there are no other comparable operators it must be appropriate to look at the circumstances of the trader to see whether a legitimate expectation had been created which attracted the operation of Article 239. This is what the FTT did.

167. The conclusion that there was no special situation makes it unnecessary to consider Mr Beal's other criticisms which were to the effect that the FTT's conclusion that CWS had acted with obvious negligence was (i) one that could not be supported as it involved the proposition that CWS were obliged to contact HMRC's TCS for advice on tariff classification; (ii) inconsistent with the conclusion that HMRC must have reached when granting CWS

retrospective authorisation; and (iii) inconsistent with the FTT's own finding in paragraph [199] that Mr McMahon acted in good faith. I am not satisfied that these criticisms are well-founded but it is not necessary to set out my reasons at length.

168. My conclusion that the FTT was entitled to find that there was no special situation means that CWS's cross-appeal based on Article 239 fails.

Postscript

169. In discussing Ground 2 of HMRC's appeal, I left open one point which is whether the failure of HMRC to refer to chapter 65 at the time of the Authorisation meant that it was unfair to allow them to do so now. I said (paragraph 116 above) that this depended on whether HMRC's failure to refer to chapter 65 at the time of the Authorisation gave any rights to CWS.

170. In the light of the FTT's findings that HMRC did not make any error in granting the Authorisation, did not approve the use of code 6211 for CWS's imports and did not create any legitimate expectation in CWS, which I have accepted were findings that were open to them on the facts, it seems to me that it must follow that the fact that HMRC did not refer to chapter 65 at the time cannot have given rise to any relevant rights in CWS such as to make it unfair for the chapter 65 points to be raised in these proceedings.

Conclusions

171. It may be helpful if I summarise my conclusions:

(1) On HMRC's appeal, I have found that the FTT was in error in classifying the IRR items to code 6211. Some of the items were properly classifiable to other codes in chapter 62 (6201 and 6203); others were properly classifiable to codes in chapter 65.

(2) On CWS's cross-appeal, I have found first that the FTT was right to hold that the Certificate from the MoD was not conclusive as to the CN code under which goods could be imported.

(3) I have secondly found that the FTT was entitled to come to the factual conclusions that it did in rejecting CWS's claims under Articles 236 and 239 of the Customs Code.

172. I will therefore allow HMRC's appeal and dismiss CWS's cross-appeal.

MR JUSTICE NUGEE

RELEASE DATE: 24 January 2014

Annex

Council Regulation (EC) No 150/2003

5

I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 150/2003
of 21 January 2003
suspending import duties on certain weapons and military equipment

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community and, in particular Article 26 thereof,

Having regard to the proposal from the Commission [1],

Whereas:

(1) The Community is based upon a customs union, which requires the consistent application of the Common Customs Tariff on imports of products from third countries by all Member States unless specific Community measures provide otherwise.

(2) It is in the interests of the Community as a whole that Member States are able to procure for their military forces the most technologically advanced and suitable weapons and military equipment. In view of the rapid technological developments in this industrial sector worldwide it is normal practice of the Member States authorities in charge of national defence to procure weapons and military materials from producers or other suppliers located in third countries. Given the security interest of the Member States it is compatible with the interests of the Community that certain of these weapons and equipment may be imported free of import duties.

(3) In order to ensure consistent application of such duty suspension it is appropriate to establish a common list of weapons and military equipment eligible for the duty suspension. It is also appropriate in view of the specific nature of the products concerned that parts, components or subassemblies for incorporation in or fitting to goods included in the list or for the repair, refurbishment or maintenance of such goods as well as goods for use in training or testing of goods included in this list could be imported free of customs duties. Imports of military equipment, which are not covered by this Regulation, are subject to the appropriate duties in the Common Customs Tariff.

(4) Given the different organisational structures of the competent authorities in the Member States it is necessary solely for customs-related purposes to define end uses for the imported materials in accordance with the provisions of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [2] and its implementing regulations (herein after called the 'Customs Code'). In order to limit the administrative burden for the authorities concerned it is appropriate to set a time limit for the end use customs supervisions.

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

(6) It is necessary to lay down rules for the Member States in order to provide information on the quantity, the value and the number of certificates issued and the procedures for the implementation of this Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation lays down the conditions for the autonomous suspension of import duties on certain weapons and military equipment imported by or on behalf of the authorities in charge of the military defence of the Member States from third countries.

[1] OJ C 265, 12.10.1988, p. 9.

[2] OJ L 302, 19.10.1992, p. 1. Regulation as last amended by Regulation (EC) No 2700/2000 of the European Parliament and the Council (OJ L 311, 12.12.2000, p. 17).

Article 2

1. The duties of the Common Customs Tariff applicable to imports of the goods listed in Annex I shall be totally suspended when they are used by, or on behalf of the military forces of a Member State, individually or in cooperation with other States, for defending the territorial integrity of the Member State or in participating in international peace keeping or support operations or for other military purposes like the protection of nationals of the European Union from social or military unrest.

2. Such duties shall also be totally suspended for:

(a) parts, components or subassemblies imported for incorporation in or fitting to goods included in the list in Annex I and II or parts, components or subassemblies thereof, or for the repair, refurbishment or maintenance of such goods;

(b) goods imported for training or testing of goods included in the list at Annex I and II.

3. The imported goods as defined in Annex I and in paragraph 2 of this Article shall be subject to end use conditions laid down in Articles 21 and 82 of Regulation (EEC) No 2913/92 and its implementing legislation. Customs supervision of the end use shall end three years after the date of release for free circulation.

4. The use of the goods listed in Annex I for training purposes or the temporary use of these goods in the customs territory of the Community by the military forces or other forces for civil purposes due to unforeseen or natural disasters shall not constitute a violation of the end use determined in paragraph 1.

Article 3

1. The request for entry for free circulation of goods for which the benefit of a duty suspension under the provisions of Article 2 is claimed shall be accompanied by a certificate issued by the competent authority of the Member State for whose military forces the goods are destined. The certificate as set out in Annex III shall be submitted to the customs authorities of the importing Member State together with the goods to which it refers. It may replace the customs declaration required by Articles 59 to 76 of Regulation (EEC) No 2913/92.

2. Notwithstanding paragraph 1, for reasons of military confidentiality, the certificate and the imported goods may be submitted to other authorities designated by the importing Member State for this purpose. In such cases the competent authority issuing the certificate shall send before 31 January and 31 July of each year a summary report to the customs authorities of its Member State on such imports. The report shall cover a period of 6 months immediately preceding the month on which the report has to be submitted. It shall contain the number and issuing date of the certificates, the date of importation and the total value and gross weight of the products imported with the certificates.

3. For the issuing and the presentation of the certificate to the customs authorities or to other authorities in charge of customs clearance data processing technique may be used in accordance with Article 292(3) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 [1].

4. This Article applies *mutatis mutandis* to imported goods listed in Annex II.

Article 4

Except in cases of Article 2(4) any diversion of goods listed in Annex I and Article 2(2) from the use specified in Article 2(1) within the period of customs supervision shall be notified by the competent authority issuing the certificate or using the goods to the customs authorities of its Member State in accordance with Article 21 and 87 of Regulation (EEC) No 2913/92.

Article 5

1. Each Member State shall communicate to the Commission the names of the authorities, which are competent to issue the certificate referred to in Article 3(1) together with a specimen of the stamp used by the said authorities. Each Member State shall also forward to the Commission the name of the authority, which can release the imported goods in cases referred to in Article 3(2). The Commission shall forward this information to the customs authorities of the other Member States.

2. Where the goods are entered for free circulation in a Member State other than that in which the certificate was issued, a copy of the certificate shall be forwarded by the customs authorities of the importing Member State to the customs administration of the Member State whose competent authority issued the certificate.

Where goods have been released by other authorities in accordance with Article 3(2) in a Member State other than that in which the certificate was issued, a copy of the certificate shall be forwarded directly by these authorities to the authority issuing the certificate.

3. The authority of each Member State authorised to issue the certificate referred to in Article 3(1) shall keep a copy of the certificates issued and the documentary evidence necessary to demonstrate the correct application of the suspension for a period of three years following the date of expiry of the customs supervision of the goods.

[1] OJ L 253, 11.10.1993, p. 1. Regulation as last amended by Commission Regulation (EC) No 993/2001 (OJ L 141, 28.5.2001, p. 1).

Article 6

The Commission shall inform Member States of any request lodged by a Member State in view of presenting a proposal to amend the lists in Annexes I and II.

Article 7

1. Each Member State shall inform the Commission about the administrative implementation of this Regulation within six months after its entry into force.

2. They shall also transmit to the Commission no later than three months after the end of each calendar year information on the total number of certificates issued together with the total value and gross weight of goods imported under the provisions of this Regulation.

Article 8

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Communities*.

It shall apply as from 1 January 2003.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 21 January 2003.

For the Council

The President

N. CHRISTODOULAKIS

ANNEX I

LIST OF WEAPONS AND MILITARY EQUIPMENT ON WHICH IMPORT DUTIES ARE SUSPENDED (1)

2804	8527
2825	8528
3601	8531
3602	8535
3603	8536
3604	8539
3606	8543
3701	8544
3702	8701
3703	8703
3705	8704
3707	8705
3824	8709
3926	8710
4202	8711
4911	8716
5608	8801
6116	8802
6210	8804
6211	8805
6217	8901
6305	8903
6307	8906
6506	8907
7308	9004
7311	9005
7314	9006
7326	9008
7610	9013
8413	9014
8414	9015
8415	9020
8418	9022
8419	9025
8421	9027
8424	9030
8427	9031
8472	9302
8479	9303
8502	9304
8516	9306
8518	9307
8521	9404
8525	9406
8526	

(1) CN codes applicable on 1 January 2003, adopted by Commission Regulation (EC) No 1832/2002 of 1 August 2002 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff (OJ L 290, 28.10.2002, p. 1).

ANNEX II

LIST OF WEAPONS AND MILITARY EQUIPMENT WITH A CONVENTIONAL RATE OF DUTY 'FREE' FOR WHICH IMPORT PROCEDURES OF ARTICLE 3 CAN BE APPLIED (1)

4901
8426
8428
8429
8430
8470
8471
8517
8524
9018
9019
9021
9026
9301

(1) CN codes applicable on 1 January 2003, adopted by Commission Regulation (EC) No 1832/2002 of 1 August 2002 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and the Common Customs Tariff (OJ L 290, 28.10.2002, p. 1).

ANNEX III

CERTIFICATE FROM COMPETENT AUTHORITY

EUROPEAN COMMUNITY

1. Number and date of procurement contract	**CERTIFICATE FOR MILITARY EQUIPMENT** No ORIGINAL
2.1. Importer (Full name and address including Member State)	3. ISSUING AUTHORITY (pre-printed)
2.1. Consignee (Full name and address including Member State)	

NOTES

A. The original and a copy of this certificate must be presented in support of the entry for free circulation the goods

B. The Customs office concerned or the other authorised office must keep a copy of this certificate, endorse the original and send it back to the issuing authority

5. Marks and numbers — Number and kind of packages — Product number of procurement contract	6. CN code (4 digits) 7. Gross weight (kg)
5. Marks and numbers — Number and kind of packages — Product number of procurement contract	6. CN code (4 digits) 7. Gross weight (kg)
5. Marks and numbers — Number and kind of packages — Product number of procurement contract	6. CN-code (4 digits) 7. Gross weight (kg)
5. Marks and numbers — Number and kind of packages — Product number of procurement contract	6. CN code (4 digits) 7. Gross weight (kg)

8. Total Value (in EUR):

10. Last day of validity	Day	Month	Year

9. ENDORSEMENT OF CUSTOMS OR OTHER AUTHORITY

Number and date of entry for free circulation:

Name of Customs office:

Place and date:

Signature of the Customs officer:

Stamp

11. This is to certify that the goods described above are for the use of the military forces of

(Member State)

Place and date:

Signature of authorised person:

Stamp