[2019] UKFTT 608 (TC)

TC07391

CUSTOMS DUTY – Anti Dumping Duty – Countervailing Duty – Import VAT - Importation of Solar Panels from China – Binding Tariff Information – Customs Code – ADD and CVD Regulations - Classification to commodity code 85013100 81 for 50% of imported panels which exceeded 100 watts in output, attracting ADD and CVD – Classification to commodity code 85013100 73 for the 50% of panels which were 50 watts or less in output, not attracting ADD nor CVD – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00338

BETWEEN

FRIENDLY GREEN GIANT LTD **Appellant**

-and-

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

TRIBUNAL: JUDGE RUPERT JONES
MR SIMON BIRD

Sitting in public at Birmingham on 22 July 2019

Mr Daniel McIntyre, Director appeared for the Appellant

Mrs Priti Patel, Litigator of HM Revenue and Customs' Solicitors' Office appeared for the Respondents

DECISION

1. The Appellant company, Friendly Green Giant Ltd, appeals a decision of HMRC dated 5 September 2017 to issue it a C18 Post Clearance Demand notice (ref: C18252047) for customs duty in the sum of £129,012.00**.** The decision was upheld by HMRC on formal departmental review by letter dated 17 November 2017.

Findings of fact

2. The Tribunal heard oral evidence from Officer David Forwood on behalf of HMRC and Daniel McIntyre, its director, on behalf of the Appellant. They each supplied written witness statements and were cross examined. The Tribunal found them to be reliable and credible witnesses. It finds the following facts on the balance of probabilities.

3. Mr McIntyre is the sole shareholder and director of the Appellant whose business was the import of solar panels as accessories for the caravan and canal boat market.

4. The appeal concerns imports by the Appellant of solar panels from companies located in China made between 9 August 2015 and 13 June 2017. The Chinese consignors were: YFHex Logistics HK Co Ltd (a freight company, on behalf of a supplying company whose identity is unknown) and three suppliers identified by their invoices, Shenzen Sungold Solar Co, Blue Carbon Technology Inc and Yuhuan Sinosola. The details on the relevant import entries are as follows:

Entry Date	Entry No	Declarant no.	Commodity Code Used	Consignor Name	C88 goods description
09/08/2015	122402F		8541400 90	YFHEX LOGISTIC H K CO LTD	SPOT SOLAR PANELS
19/08/2015	044153T	B126195	85414090 90	SHENZHEN SUNGOLD SOLAR CO LTD	SOLAR PANEL
24/08/2015	055919B	B126831	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
24/09/2015	065063C	B127169	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
02/12/2015	006428T	B128180	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
11/02/2016	242862A		8501320099	C O YFHEX LOGISTICS HK CO LTD	POLY SOLAR PANELS
23/02/2016	048912L	B129684	85414090 90	SHENZHEN SUNGOLD SOLAR CO LTD	SOLAR PANEL
18/03/2016	042335H	B129929	85013100 73	BLUE CARBON	SOLAR PANELS

				TECHNOLOGY INC	
01/07/2016	001309V	B132000	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
15/07/2016	042211J	B131999	85414090 90	SHENZHEN SUNGOLD SOLAR CO LTD	SOLAR PANELS
01/08/2016	000194E	B131712	85414090 90	YUHUAN SINOSOLA SCIENCE & TECHNOLOG	Solar Panels
08/09/2016	022975N	B132514	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
19/12/2016	043442T	B133895	85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANELS
07/04/2017	001463T		85414090 90	SHENZHEN SUNGOLD SOLAR CO LTD	SOLAR PANEL
13/06/2017	033096F		85013100 73	BLUE CARBON TECHNOLOGY INC	SOLAR PANEL

5. It is accepted by HMRC that the Appellant imports the following models of solar panels, albeit that the range of models imported under the entries above is in dispute:

Model	**Watts**	**voltage**
EP-10-P	10	12 v
EP-20-P	20	12 v
EP-40-P	40	12 v
EP-50-P	50	12 v
EP 80 P	80	12 v
EP 100 P	100	12 v
EP 100 M	10	12 v
EP 100 F	100	12 v
EP 120 P	120	12 v
EP 150 P	150	12 v

6. Two invoices supplied by the Appellant refer to models SASF 100W and SGM FL 100W, these are believed by HMRC to be similar to EP 100 P and EP 100 F.

7. The proportions of each type of model imported in the entries above is a matter of dispute. For the reasons set out below, the proper customs classification of the model turns on whether the power output is greater than 50 watts (ie. the models from EP 80 to EP 150) or 50 watts or fewer (the models from EP 10 to EP 50).

8. All the solar panels set out in the relevant entries in dispute above were imported by the Appellant using commodity code 85013100 73 which attracted standard VAT (20%) and 2.70% customs duty or commodity code 85414090 which attracted 0% import duty.

9. HMRC concluded there had been a misclassification of the goods in all but one of the entries and classified the goods imported to commodity code 85013100 81 which attracts standard VAT (20%), duty at 2.70%, anti-dumping duty (applied at 53.4%) and countervailing duty (applied at 11.5%). HMRC accepted that the import on 15 July 2016 – entry 042211J - where the product was properly classified by the Appellant to code 85414090 attracting 0% import duty.

10. HMRC's C18 demand for £129,012 dated 5 September 2017 was comprised of the following duties:

- Customs duty £1,936.92
- Anti-dumping Duty £85,670.92
- Countervailing Duty £19,912.85
- Import VAT £21,491.31

The Binding Tariff Information ("BTI") ruling in 2015

11. On 27 February 2015, Mr McIntyre on behalf of the Appellant requested a BTI ruling and enclosed specification sheets for various products/solar panels sold by the Appellant.

12. On 21 April 2015 HMRC informed Mr McIntyre by letter that the Appellant needed to specify which products the BTI requested was for and that if the Appellant required multiple BTIs, new applications should be made for each product. The letter began:

'Unfortunately, the information supplied with your request is insufficient for classification. Would please provide the following information in writing within one month from the date of this letter?

- A BTI must relate to a specific product and not a range of products with different characteristics, please confirm which model you would like the BTI to relate to and submit new BTI applications if you would still like a BTI for all the models

  ……'

13. On 9 May 2015 Mr McIntyre emailed HMRC's Tariff Classification. His email began:

'I am writing in response to your request for further clarification regarding the type of product I wish the BTI to classify.

The BTI needs to cover the solar panels of same origin and type of manufacturer from 10 watt output to 140 watt output, for use as 12v solar battery chargers. This market has been around for many years in the leisure and camping market and is not tied to domestic roofing as the panels do not meet MCS specifications. We can ignore the inclusive of solar controllers.

The solar panels are poly crystalline silicon 30mm aluminium frame depth. They originate from China, supplier name 'Bluecarbon Technology Inc'.

The 10w solar panels incorporate a blocking diode, and the larger panels incorporate a bypass diode.

……..'

14. On 14 May 2015 HMRC wrote to Mr McIntyre. Their letter included the following:

'Unfortunately, as stated in my letter of 21 April 2015 a BTI shall relate to only one type of goods and one set of circumstances conferring original,….Similar products with different characteristics such as output power and different components cannot be considered one type of goods. Therefore, please confirm which model of solar battery charger you would like the BTI to relate to and what components are incorporated in the product /to be imported with it, with particular reference to any components that 'direct the current'.

15. On 28 May 2015 Mr McIntyre confirmed that the BTI should cover a 10-watt solar panel, model number EP-10-P and provided the specification details for this model**.** His email included the following:

'….please classify the 10 watt (EP-10-P) solar panel only at this time, as it is my most popular product in my target market.

The solar panel is 10 watt, 22 volt output for use with 12 volt leisure batteries. It contains poly crystalline silicon solar cells, dimensions roughly 30 x 30 x 2 cm. The frame is aluminium and the cells are protected by 3.2mm tempered glass. It incorporates a blocking diode to direct the current into the battery and keep the battery full, preventing reverse discharge….'

16. On 2 June 2015 Mr McIntyre, on behalf of the Appellant, provided Officer Birch with a specification sheet for model EP-10-P upon HMRC's request.

17. On 4 June 2015 HMRC issued BTI ruling GB502391970 which classified the model EP-10-P, Country of origin, China (Bluecarbon Technology Inc) as set out in box 8 of the form – 'the commercial denomination' - to commodity code 85013100 73. This code attracts standard VAT (20%) and import duty at a rate of 2.70% (but no antidumping duty nor countervailing duty).

18. The BTI specified that the maximum power was 10 watts (see box 7 of the form - 'description of goods'). The justification for the classification to code (TARIC) 8501310073 – was set out in box 9 – including the specification that the code applied to modules or panels with an output voltage not exceeding 50V DC and a power output not exceeding 50 W solely for direct use as battery charges in systems with the same voltage and power characteristics.

HMRC's visit in 2017

19. On 4 April 2017 HMRC informed Mr McIntyre of their intention to visit the Appellant on 12 April 2017 to review information relating to non-EU imports made in the previous three years. The letter enclosed a schedule of selected imports and asked the Appellant to make available the requested information for these imports.

20. On 12 April 2017 HMRC officers visited the Appellant's office. Officer Forwood stated in his witness statement stated that he met Mr McIntyre and inspected the premises. His record of that visit is not in dispute. The goods in the warehouse consisted of plastic brackets for the fixing of solar panels to caravans or boats. Other items included damaged solar panels waiting to be returned. These panels were 100-150 watt models, found to be lightweight with a fitted aluminium frame. On the back of these models were plastic attachments containing a diode and two connector leads. Mr McIntyre confirmed that all panels imported were similar in make-up.

21. Officer Forwood also saw 5/10-watt solar panels which had fittings of a diode and car battery leads for trickle charging. Mr McIntyre confirmed the Appellant's business was the sale of solar panels and accessories for caravans, boats and the like. Mr McIntyre confirmed the company turnover as around £300,000 with a £4,000 profit after his salary and all other expenses. Mr McIntyre said that in view of the small turnover, the Appellant was unable to order and large amounts of stock.

22. Following the visit to the Appellant on 12 April 2017, HMRC obtained some records for the imports and later contacted the Appellant's shipping agent, PNC Global Logistics ("PNC"), to request further documents (documents including bills of landing, commercial invoices and C88 import entries which were later supplied).

23. On 19 April 2017 following consideration of the documents HMRC informed the Appellant of their initial findings.

24. On 21 April 2017 the Appellant referred HMRC to the BTI that was issued in 2015. On 24 April 2017 HMRC informed the Appellant they were still waiting for further documents from the Appellant's shipping agent, PNC.

25. The Appellant's agent provided further details and documentation regarding the solar panels.

26. On 16 May 2017 HMRC emailed the Appellant requesting confirmation as to which solar panel models and wattage were purchased from Blue Carbon Tech Inc. Mr McIntyre confirmed that the Appellant imported the products as per the table in paragraph 4 above except for product EP 100 F.

27. On 30 May 2017 Mr McIntyre emailed HMRC to confirm that there were blocking diodes on all models from 5 watts upwards (to 150 watts).

28. On 16 June 2017 Mr McIntyre emailed HMRC attaching three 'Export Undertaking Certificates' from the supplier Yuhuan Sinsola Co for the imports of 100-watt models on 12 December 2013, 3 April 2014 and 26 May 2016 and forwarded other documents requested.

29. The Appellant and PNC later also provided three 'Commercial Invoices Accompanying Goods subject to an undertaking' for solar panels the Appellant had imported from China. Two were from Shenzhen Sungold Solar Co ltd dated 18 June 2015 and 7 April 2017 for 100- watt models and one from Yuhuan Sinosola Science and Technology Co Ltd dated 21 March 2018 for a range of models from 5 watts to 120 watts.

30. On 31 July 2017, following consideration of the documents, HMRC informed the Appellant that errors had been uncovered from the records obtained from HMRC's visit. HMRC informed the Appellant that they believed the solar panels had been misclassified. The letter enclosed a calculation of unpaid duty believed to be due.

31. On the same date, Mr McIntyre also wrote to HMRC to state that the Appellant disagreed with the decision to issue a C18 and requested a reconsideration of the BTI ruling/commodity code.

32. A non-live liability ruling was sought by HMRC in relation to products imported by the Appellant. The ruling dated 17 August 2017 confirmed that the products were proper to commodity code 85013100 81 (attracting antidumping duty and countervailing duty).

33. On 5 September 2017 HMRC wrote to the Appellant enclosing the C18 and explaining the reasons for the decision.

34. The Appellant requested a statutory review of the decision.

35. By letter dated 17 November 2017 HMRC upheld the decision on review.

36. The Appellant submitted a notice of appeal to the Tribunal dated 11 December 2017 appealing HMRC's decision to charges the duties set out in the C18 as confirmed on review.

Mr McIntyre's evidence on behalf of the Appellant

37. Mr McIntyre in oral evidence stated the Appellant business imports and retails solar panel of different output power (wattage) for the caravan and canal boating market through ebay and its website.

38. Mr McIntyre in his witness statement addressed the visit of HMRC officers Clementson and Fisher to the Appellant in January 2015 prior to the BTI ruling. The officers had examined each in his range of solar panels from 10 watts up to the largest model - 150 watts. He stated in oral evidence that half of the products they would have examined were 50 watts or under as this was the ratio of the goods he imported because the profit was higher on these models.

39. He then explained how he went about obtaining the BTI in 2015 and believed it would apply to all solar panel models that he imported, indiscriminate of size. He believed that this was the meaning of the correspondence with HMRC set out above.

40. He believed the reference to requiring different BTI for different products applied to different products such as brackets and charge controllers rather than solar panels. If the term 'product' had meant to apply to different models of solar panels it did not say so. He believed that only the requirement of solar panels needing a separate BTI to controllers was mentioned by HMRC. If HMRC's later interpretation in 2017 was correct then he would have needed to submit 12 different BTIs or each model which seemed ambiguous and over burdensome.

41. In a letter in July 2015 Mr McIntyre stated that HMRC advised that the BTI ref GB502391970 would be applied to all solar modules that the Appellant import using 8501 3100 73. He states that the letter meant that all imports, indiscriminate of size, would be taxed at 2.7% duty. HMRC provided a schedule which he promptly paid.

42. While the Tribunal accepts that this was Mr McIntyre's honest belief, it was a mistaken belief. The Tribunal is satisfied that there was no reasonable basis for this belief and the terms of the correspondence were clear that he required a separate BTI for each model of solar panel and the 2015 BTI only applied to the EP-10, 10-watt model.

43. Mr McIntyre stated in oral evidence that he felt that HMRC had misled and pressured him by their change of approach in 2017. At the visit in 2017 he had no stock on the premises other than returns but this did not demonstrate the range of products he imported. He considered that HMRC retrospectively re-interpreted the legislation and BTI and changed the goal posts from their decision and visit of 2015. If he had known that HMRC would do so he would have obtained separate BTIs for each model or changed to suppliers on the approved lists with export Undertaking Certificates.

44. Mr McIntyre noted that the EU no longer applies Anti-Dumping duties to solar panels since September 2018. It never made sense to apply these extra duties since the margins and profitability on these products was so low and the business was unmarketable / unaffordable if full tariffs applied. Mr McIntyre stated the Appellant no longer imported solar panels and had not traded since summer 2018. He himself was in receipt of Universal Credit.

The law

Anti-dumping duty and Countervailing duty

45. Anti-dumping duty ("ADD") is a customs duty on imports, it provides protection against the dumping of goods in the EU at prices substantially less than the normal value. Countervailing duty ("CVD") is a customs duty imposed on goods which have received government subsidies in the originating or exporting country.

46. Council Implementing Regulation (EU) No 1238/2013 ("the ADD Regulations") and Council Implementing Regulation (EU) No 1239/2013 ("the CVD Regulations") imposed antidumping duty and countervailing duty on imported solar modules (crystalline silicon photovoltaic modules and key components) originating from China.

47. The ADD/CVD Regulations followed on from Regulation (EU) No 513/2013 ("the Provisional Regulation") imposing provisional anti-dumping duty on such imports. The Provisional Regulation included a list of cooperating suppliers which were exempt from anti-dumping duty providing conditions were met. Commission Regulation 748/2013 amended the Provisional regulation to include further cooperating suppliers. Yuhuan Sinosola and Shenzen Sungold Solar Co are listed as cooperating suppliers in the two Regulations.

Burden of proof

48. Pursuant to section 16(6) Finance Act 1994 ("FA 1994"), the burden of proof is upon the Appellant to satisfy the First-Tier Tribunal that it has established the grounds on which it relies.

Customs debt

49. The decision in this case to issue a post-clearance demand (a C18) charging duty is a relevant decision pursuant to s.13A(2)(a)(i) & (ii) of the FA 1994.

'13A— Meaning of "relevant decision"

(1) This section applies for the purposes of the following provisions of this Chapter.

(2) A reference to a relevant decision is a reference to any of the following decisions—

(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the [European Union] 2 , as to—

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;

(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled;

……..'

50. The decision of HMRC to uphold the duty charged, following a review taking place under section 15 of the FA 1994, is an appealable decision under per section 16(1) of the FA 1994. Section 16(5) sets out the Tribunal powers on an appeal:

'(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.'

51. The limitation period for charging the customs debt is three years as set out in Article 103(1) of the Union Customs Code, Council Regulation (EU) No.952/2013.

'Article 103 Limitation of the customs debt

1.No customs debt shall be notified to the debtor after the expiry of a period of three years from the date on which the customs debt was incurred.

……..'

52. Under the old Customs Code, the limitation period was the same (Article 221(3) Council Regulation 2913/92).

53. For imports prior to 1 May 2016 the appropriate provision, Article 201, contained in the Council Regulation (EEC) 2913/92 (the Community Customs Code) sets out that the misclassification of imported good to free circulation incurs a debt.

54. For imports after 1 May 2016 the appropriate provision, Article 77, contained in the Union Customs Code ("UCC") Commission Regulation (EU) no. 952/2013 sets out that the misclassification of imported goods to free circulation incurs a debt.

The Combined Nomenclature ('CNEN')

55. The Combined Nomenclature Regulation (Reg EEC) No 2658/87 of 23 July 1987 provides the legal basis for the Community's Tariff. An annual amendment to this Regulation contains the Combined Nomenclature that is reproduced in the UK Tariff. The Combined Nomenclature provides systematic classification of all goods in international trade and is

designed to ensure, with the aid of the six General Interpretative Rules (GIRs) that any product falls to be classified in one place and one place only.

56. The legal procedure for tariff classification is contained in Volume 2 Part 1 Section 3 of the UK Tariff. The first paragraph explains that the appropriate 4-digit heading must first be established. The GIRs have legal force and are intended to be applied to determine the appropriate commodity code.

57. Rule 1 states (in so far as relevant) that classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes.

58. Rule 2: (a) extends the scope of the heading to cover incomplete or unfinished articles provided that they have the character of the complete or finished article; (b) covers mixtures or combinations of materials or substances.

59. Rule 3 is for goods that are on the face of it classifiable under two or more headings. The rule is in three parts, which apply sequentially:

(a) directs that the heading which provides the most specific description is to take precedence over one which provides only a general description;

(b) relates to mixtures, composite goods consisting of different materials or components and goods put up 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;

(c) provides that where goods cannot be classified by applying Rules 3 (a) or 3 (b), they are to be classified in the heading which occurs last in numerical order among those which equally merit consideration.

60. Rule 4 provides that goods that cannot be classified an accordance with Rules 1-3 shall be classified under the heading appropriate to the goods to which they are most akin.

61. Rule 5 allows for cases, boxes and packing material to be classified together with the goods they contain.

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

63. There are also Explanatory Notes to the Harmonised System (HSENS) and to the Combined Nomenclature (CNENS).

64. Although the HSENS are not legally binding they have consistently been held by the European Court of Justice to be highly persuasive and in a previous judgement (*Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart -West (Case C-35/93)*) stated that these notes "constitute an important means of ensuring the uniform application of the common customs tariff by the Customs Authorities of the Member States and, as such, may be considered a valid aid to the interpretation of the tariff." Reference to the HSENS and CNENS is made at paragraph 3.3 of Volume 2 Part 1 of the UK Tariff.

65. The commodity codes referred to in this appeal are as follows:

Chapter 85 Electrical machinery and equipment and parts thereof; sound recorders and reproducer, television image and sound recorders and reproducers, and parts and accessories of such articles.

8501 Electric motors and generators (excluding generating sets)

- Other DC motors; DC generators 9

- - of an output not exceeding 750 W

….....

85 01 31 00 73 - - - solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries; thin film photovoltaic products; crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s); modules or panels with a output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics

Other - - -

- - - - Crystalline silicon photovoltaic modules or panels

….....

85 01 31 00 81 - - - - - consigned from the People's Republic of China, unless the products are in transit in the sense of Article V GATT

(http://www.wto.org/english/docs_e/legal/_e/gatt47_01_e.htm)

….....

8541 Diodes, transistors and similar semiconductor devices; photosensitive semiconductor devices, including photovoltaic cells whether or not assembled in modules or made up into panels; light-emitting diodes (LED); mounted piezoelectric crystals

85 41 40 90 90 - - - - other

66. The HS Explanatory note (B) to heading 8541 includes the following:

"Special categories of photovoltaic cells are;

(i) **Solar cells**, silicon photovoltaic cells which convert sunlight directly into electric energy. They are usually used in groups as sources of electric power, e.g. in rockets or satellites employed in space research, for mountain rescue transmitters.

The heading also covers solar cells, whether or not assembled in modules or made up into panels. However, the heading **does not cover** panels or modules equipped with elements, however simple, (for example diodes to control the direction of the current), which supply the power directly to, for example, a motor, an electrolyser (**heading 85.01**)"

67. Commission Regulation (EEC) No 2545/93, Article 6(2) provides that an application for binding tariff information shall relate to only one type of goods.

Anti-Dumping and Countervailing provisions

68. Commission Regulation (EU) No 513/2013 of 4 June 2013 imposed provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China.

69. Commission Decision 2013/423/EU of 2 August 2013 accepted an undertaking offered in connection with anti-dumping proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China.

70. Council Implementing Regulation (EU) No 1238/2013 of 2 December 2013 imposed a definitive anti-dumping duty and collected definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components originating in or consigned from the People's Republic of China.

71. Council Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposed a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components originating in or consigned from the People's Republic of China.

72. Commission Implementing Decision 2013/707/EU of 4 December 2013 confirmed the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components originating in or consigned from the People's Republic of China for the period of application of definitive measures.

The Appellant's grounds of appeal

73. The Appellant's grounds of appeal were as follows:

a. The BTI dated 2015, states "a solar panel containing 36 (4 x 9) polycrystalline silicon cells". This is contrary to the instructions from HMRC Officer Forwood and Officer Robinson that only panels less than 6 cell arrangements were covered by the code in the BTI. Therefore, at the time of writing the BTI, Officer Birch was fully aware of the silicon cell arrangement that only covered the smaller panels since model EP10P was arranged as 6 x 6 cells but any panels from 20 watt to 150 watt were arranged as 4 x 9 cells. All of them were connected through a diode or charge controller into a leisure battery. It was therefore interpreted that due to the type of end user, the BTI would cover the Appellant's full range of 12-volt panels and that separate BTI need only be sought for peripheral items.

b. The review decision refers to EP10P as having a 4 x 9 cell layout in the table which is incorrect. Sample pictures of the product contradict the C18 investigation and Officer Birch was fully aware that EP10P was not a 4 x 9 cell configuration but wrote it anyway seemingly in the face of the code advice that only less than 6 cells are covered. Therefore, it is reasonable to assume that the inclusion of 4 x 9 cell arrangement, a very fundamental characteristic to the enforcement of this code, was to cover all 12 volt solar panels up to 150 watt output which are a 4 x 9 arrangement since they charge in the same way and with the same end user as model EP10P.

c. A portion of the of the C18 refers to the type of product which is specifically constructed that makes it a scientific impossibility to be connected together for more than 12-volt output. This is because they are plastic laminated and flexible backing making them lightweight to string down the side of tents, and are popular with boat users and those looking for discrete low profile panels to prevent interest from thieves. Officer Robinson acknowledged that the two suppliers that make up this part of the C18, Yuhuan Sinosola and Shenzen Sungold Solar Co. were fully registered with the EU to provide Export Undertaking Certificates yet the officers have included the amount of the Anti-Dumping incurred in order to ask for the paperwork. This can be obtained if necessary however it would make sense that full EU exemption and their manufacturing composite is ample evidence they are not to incur Anti-Dumping Duty. The sample included demonstrate the panels are not for homes and cannot withstand grid voltages of 240 volts. As submitted these certificates could be provided by the suppliers and the main concern for this appeal is the BTI covering Blue Carbon Technology Inc. that supply fixed frame panels which glue onto motorhomes and clip onto car batteries.

d. There was no economic benefit in the Appellant company in trying to deceive HMRC using the BTI provided as Export Undertaking Certificates are so easily obtainable to exempt from

Anti-Dumping Duty. This is because the EU bodies actively know that some solar panels from China are not built for home and EU manufacturers have no fear from such products. This is due to their physical size of 150 watts or less not benefitting from the economies of scale and efficiency savings found when meeting the demand of a mass market supply chain to meet FITs (Feed-in Tariffs) uptake of the domestic 250-300 watt panels for household roofing.

e. Officer's Forwood's decision seemed to be scrutinising the context and insight of Officer Birch's inspection of the Appellant's market rather than being on point as to the proper use of the BTI which were, in the Appellant's submission, not fair grounds for the issue of the C18. It very clearly demonstrates, as Officer Robinson did in his follow up appeal review, complete disregard for the original mutual understanding between the Appellant and Officer Birch. Officer Forwood's decision was solely based on his latent understanding of the Appellant's products which distorts the relationship the Appellant had with Officer Birch during the original inspection in 2015. Officer Birch had applied her judgement according to the Appellant's market, which EU Export Undertaking Certificates show the EU itself is fully aware of requiring a distinction, whereas Officer Forwood had picked holes in this from a strictly regulatory view which was similar to entrapment.

f. In a letter in July 2015 HMRC advised that the BTI ref GB502391970 would be applied to all solar modules that the Appellant import using commodity code 8501 3100 73. The Appellant submits that the letter states that all imports, indiscriminate of size, would be taxed at 2.7% duty and provided a schedule which he promptly paid.

The Appellant's submissions

74. Mr McIntyre, on behalf of the Appellant, relied on his written skeleton argument in making submissions in support of the appeal. He submitted the following.

75. He argued that the C18 demand for duties arises a result of a second visit by HMRC Officer David Forwood in 2017 following the first visit in January 2015 by Officer Sharron Birch. Officer Birch in 2015, in contrast to the second inspection in 2017, properly took the time to review the context of the Appellant's product line and clearly understood it as separate to the market segment which the Anti-Dumping tariffs were supposed to protect.

76. Mr McIntyre submitted that in 2015 the Appellant company was awarded a BTI reference GB502391970 to cover entry under commodity code 8501310073. This charged duty at the rate of 2.7% In the very first line of the BTI the description of goods, states 'A solar panel containing 36 (4 x 9) polycrystalline silicon solar cells'. This contradicts Officer David Forwood's latest view that only 6 solar cell arrangements i.e. 6 x 6, were covered at this lower rate of duty.

77. He reiterated that Officer Forwood misunderstood the market the Appellant's product line was aimed at which in no way contravenes EU Anti-dumping rules designed to protect the market for household rooftop solar panels imported from China. He submitted it was unreasonable to homogenise a market - a tariff enforcement must fully grasp the type of consumer involved. Officer Birch's description of goods being assessed for code ending 73 in the BTI Document does clearly state a cell alignment of 4 x 9 cells, not the 6-cell alignment. The Appellant imported 80-watt up to 150-watt panels which all have 4 x 9 cell structure, which 5-watt and 10-watt panels did not.

78. Mr McIntyre submitted that the decision was therefore rightly made in 2015 that the full range of panels are for batteries in caravans with a nominal 12-volt leisure battery and not in competition with EU manufacturers which operate at 250-600 volts. By contrast and comparison, via an investment appraisal approach, the Appellant's imported solar panels, which were not MCS certified would enable a claim to the government Feed-In-Tariff Scheme

which was necessary for purchasers to claim back their investment on their home roofs. This means that any customer installing the Appellant's imported panels would not receive the benefits of the Feed-In-Tariff Scheme (FITS) and therefore would lose any saving they potentially had by using Chinese caravan panels on their house.

79. The EU Anti-Dumping law was intended to raise the price of Chinese panels in parity with EU producers; the function of the Anti-Dumping was not to prevent them from being MCS certified. The Appellant's panels were not MCS certified because they are not household panels, it was not due to price.

80. Furthermore, Mr McIntyre submitted that the economic viability case for undercutting the market if the duty is not imposed does not stack up. 250-Watt panels are far cheaper from the EU and approved UK distributors than two 120-Watt panels from the Appellant company, even without Chinese tariffs and at extremely low margins. 80-Watt to 150-Watt 12-Volt panels, even directly from China without anti-dumping levies, do not undercut EU manufacturers**.** In practice a consumer would never install several odd sized small modules and make their home roof look cluttered to match grid inverters rather than simply installing four to eight full sized EU panels. A consumer for example who ordered three 80-Watt panels from the Appellant would pay around £180 for 240-Watt panel, but they could go to a wholesaler such as Segen Ltd and pay £110 for a full-scale EU MCS registered 250-Watt panel, so on top of the lower supply cost they would recover their investment from the government FITS.

81. Mr McIntyre submitted that in Officer Birch's BTI she had clearly chosen to consider subheading 85013100 81 as Officer Forwood had, but then by extension she had chosen to apply 85013100 73 for the larger panels on the basis of a cell configuration of 4 x 9 which she understood only the larger panels had soldered in. It was cross referenced with the smaller panels since they are for the same use as leisure batteries and the Appellant was charged tax on all model numbers at this rate.

82. Therefore, Mr McIntyre sought to appeal relying on the difference between Officer Birch's and Officer Forwood's decisions. There was a real difference in terms of the effect on holding the Appellant, a small business, liable to the EU's anti-dumping regime in a market segment to which it was not applicable. The Appellant had been operating misinformed for the past two years while unknowingly accruing a crippling customs debt. He argued that both the Appellant and its freight agents had abided with confidence in the decision of 2015 made by HMRC's colleagues in the Customs Directorate Tariff Classification Service department. He was using the same supplier from China and the same models under the commodity code ending 73. None of the Appellant's product model numbers had altered at all since 2015 in performance or specification.

83. Mr McIntyre expressed deep concern for the approach taken by HMRC to issue the Appellant a colossal backdated import charge from the date of the BTI. He submitted that this was troubling that after the first inspection when met with an exact replication of presentation during the second inspection. He submitted HMRC's second visit tried to apply excessive Anti-Dumping rates with no real explanation as to why Officer Forwood totally ignored or at least overlooked the BTI agreement or technical evidence in place. The tax bill puts a potential end to the Appellant's business which would otherwise continue to trade and pay far more tax to HMRC over the coming years. No cost benefit analysis had been considered by HMRC.

84. Mr McIntyre submitted that he was a young businessman and a sole employee and director in a lonely role and this level of debt was unbelievably stressful especially in times of widespread job insecurity in the UK. The Appellant had been operating with full confidence that the first 2015 inspection at the premises would allow its business plan to proceed with long

term with peace of mind. The business was designed to help people live sustainably and to provide jobs as it developed. Mr McIntyre's only support network was his grandparents who were getting old, one has kidney failure and the other recently had a stroke.

85. If Mr McIntyre had known in 2015 of the tariff classification Officer Forwood later imposed he would have taken immediate corrective action. He would have moved to cheaper suppliers or those on the Export Undertaking List with Chinese Chamber of Commerce, lowered his profits (however at the tariff heading 85013100 81 there would not any sustainable profit left for the caravan market) or increased his prices or ceased trading to avoid further loss. For the home market the Appellant only went through the approved UK wholesalers Segen Ltd and Midsummer Wholesale Ltd and did not use Chinese brands. The majority of the Appellant's customer base were caravan and motorhome owners, festival goers and car owners.

86. Mr McIntyre submitted there were other flaws in the logic of Officer Forwood's decision as follows:

- Shenzhen Sungold Co. and Yuhuan Sinosola who supply EP100F were on the list of approved suppliers to provide Export Undertaking Certificates when required. Registering with the EU cleared them to avoid Anti-dumping tariff through customs. This was notwithstanding the fact that the panel construction required was a scientific impossibility to be used for the domestic market into the grid. The thin laminate means they cannot be used in series strings at a voltage greater than 17-volts to avoid overheating - this voltage has no use for a house. One could connect ten of these panels together and they would still only produce 17 volts in the whole circuit. Officer Forwood seemed to have ignored both the technical makeup of this type of flexible panel and the suppliers being able to provide Export Undertaking Certificates. The certificates gives the suppliers' production facilities EU approval to import into the EU at nominal rates without the threat of dumping materials in a perverse manner.
- Officer Forwood states that the panels must not exceed 50-Volts DC which is odd because not even the large household EU panels exceed 50-Volts DC, they are all 36-Volts. Officer Forwood has tried to rely on a system voltage of 600-volts/1000-volts but the commodity code was not concerned with system voltage, it clearly states panel or module output voltage. The Appellant's panels, from 5-watts to 150-watts, are 17-volt nominal for 12-volt leisure batteries.
- Small scale solar panels up to 150-Watts have been sold in caravan, agriculture and leisure retailers for decades, proving the establishment of this market segment as mature and self-sustainable. It has different consumer-buying behaviour and remote energy needs compared to the home market with grid backup where energy security is paramount in contrast to leisure batteries.
- Public consumption is moving towards sustainable off-grid integration and this should reflect more intelligently in the use of tariff classifications since small modules up to 150-Watts will be ubiquitous in all aspects of living as part of the Digital Infrastructure Framework assessed by the House of Lords. This will be relevant to the UK's flagship EU exit industrial strategy during the transition.

87. By way of summary, Mr McIntyre submitted there had been a retrospective change of BTI in relation to his products, there was a disproportionate charge to customs duty (disproportionate to the size of his business, his company's trading profits and economic viability), he had a legitimate expectation that the 2015 BTI would apply, he had been misled by HMRC and had imported from Export Undertaking Approved Suppliers in China.

Discussion and decision

88. In giving reasons for its decision, the Tribunal accepts and adopts HMRC's submissions as set out below except to the extent that it indicates otherwise.

89. The Tribunal is satisfied that the solar panel models imported by the Appellant between 2015 and 2017 (set out in paragraph 4 above) were properly classified to commodity code 85013100 81 so long as they had power outputs of greater than 50 watts.

90. However, for the reasons set out below, the Tribunal is satisfied that only 50% of the models imported into the UK set out in paragraph 4 above were solar panels with power output in excess of 50 watts or greater. Thus, 50% of the models were properly classified to commodity code 85013100 81 and attracted anti-dumping and countervailing duty in the rates charged by HMRC.

91. Contrary to HMRC's submission, 50% of the models imported had power output equal to or less than 50 watts so should have been classified to commodity code 85013100 73. They should not therefore be liable to the anti-dumping nor countervailing duties.

92. The Tribunal relies on the following reasons.

Commodity code

93. The commodity codes are found in the Combined Nomenclature (found in Annex 1 to Council Regulation (EEC) 2658/87) are eight digits long, of which:

a. The first four digits (e.g. 8501) are the World Customs Organisation's Harmonised System heading;

b. The fifth and sixth digits are the Harmonised System subheading (e.g. 850131);

c. The seventh and eighth digits are the Combined Nomenclature subheading code (e.g.85013100).

94. General Interpretative Rule ("GIR") 1 provides that classification shall be determined according to the terms of the heading and any relative Section or Chapter Notes of the Combined Nomenclature. This is the primary rule. GIR 6 deals with subheadings that may apply to the main heading. This enables comparison of two or more subheadings that have similar status within the classification system.

95. The Tribunal is satisfied that the Appellant's products exceeding 50-Watts in power output were: EP-80-P, EP-100-P, EP-120-P, EP-150-P, EP-100-M, EP-100-F, SGM FL 100W and SASF 100W. These models are not proper to commodity code 85013100 73 as:

a. they are not thin-film photovoltaic products**,** nor are they

b. permanently integrated into electrical goods, nor are they

c. modules or panels where the power output is not exceeding 50W.

96. The products EP-80-P, EP-100-P, EP-120-P, EP-150-P, EP-100-M and EP-100-F, SGM FL 100W and SASF 100W are also not proper to heading 8541 (or commodity code 85414090 90). Whilst heading 8541 allows for bypass diodes, the HSEN sets out that it does not allow for devices which direct the current. Although the HSENS are not legally binding they have consistently been held by the European Court of Justice to be highly persuasive.

97. The Tribunal is satisfied that the Appellant was importing products incorporating blocking diodes to prevent reverse discharge back into the panel and the Appellant confirmed this in correspondence as set out above. In any event 85 41 40 90 10 applies only to the same four exceptions as 85012100 73, including that it requires the output power of solar chargers not to exceed 50 watts.

98. The Tribunal is satisfied that the products EP-80-P, EP-100-P, EP-120-P, EP-150-P, EP-100-M and EP-100-F, SGM FL 100W and SASF 100W are proper to commodity code 85013100 81 which classifies the product (crystalline silicon photovoltaic modules or panels as being consigned from the People's Republic of China). The output of the products exceeded 50 Watts and the products are crystalline silicon photovoltaic modules or panels.

99. The Tribunal is satisfied that the Appellant incorrectly applied commodity code 85013100 73 and 85414090 90 to the models listed above imported by the Appellant of over 50 watts (80 – 150 watts) output. They should have been classified to commodity code 85013100 81 which attracts ADD and CVD.

Anti-Dumping Duty ('ADD') / Countervailing Duty ('CVD')

100. In addition to customs duty and import VAT, commodity code 85013100 81 attracts ADD and CVD as per the ADD Regulation and CVD Regulation.

101. In respect of ADD, Article 1 of the Council implementing Regulation 1238/2013 ('the ADD Regulation') states the following:

"1. A definitive anti-dumping duty is hereby imposed on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels (the cells have a thickness not exceeding 400 micrometres), currently falling within CN codes ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90 (TARIC codes **8501 31 00 81**, 8501 31 00 89, 8501 32 00 41, 8501 32 00 49, 8501 33 00 61, 8501 33 00 69, 8501 34 00 41, 8501 34 00 49, 8501 61 20 41, 8501 61 20 49, 8501 61 80 41, 8501 61 80 49, 8501 62 00 61, 8501 62 00 69, 8501 63 00 41, 8501 63 00 49, 8501 64 00 41, 8501 64 00 49, 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 29 0239) and originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT. **[Emphasis Added]**

The following product types are excluded from the definition of the product concerned: — solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries, — thin film photovoltaic products, — crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s), — modules or panels with an output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics."

102. In respect of CVD, Article 1 of the Council Regulation 1239/2013 ('The CVD Regulation') provides:

"A definitive countervailing duty is hereby imposed on imports of crystalline silicon photovoltaic modules or panels and cells of the type used in crystalline silicon photovoltaic modules or panels (the cells have a thickness not exceeding 400 micrometres), currently falling within CN codes ex 8501 31 00, ex 8501 32 00, ex 8501 33 00, ex 8501 34 00, ex 8501 61 20, ex 8501 61 80, ex 8501 62 00, ex 8501 63 00, ex 8501 64 00 and ex 8541 40 90 (TARIC codes **8501 31 00 81**, 8501 31 00 89, 8501 32 00 41, 8501 32 00 49, 8501 33 00 61, 8501 33 00 69, 8501 34 00 41, 8501 34 00 49, 8501 61 20 41, 8501 61 20 49, 8501 61 80 41, 8501 61 80 49, 8501 62 00 61, 8501 62 00 69, 8501 63 00 41, 8501 63 00 49, 8501 64 00 41, 8501 64 00 49, 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) and originating in or consigned from the People's Republic of China, unless they are in transit in the sense of Article V GATT. [**Emphasis added**]

The following product types are excluded from the definition of the product concerned:

— solar chargers that consist of less than six cells, are portable and supply electricity to devices or charge batteries,

— thin film photovoltaic products, — crystalline silicon photovoltaic products that are permanently integrated into electrical goods, where the function of the electrical goods is other than power generation, and where these electrical goods consume the electricity generated by the integrated crystalline silicon photovoltaic cell(s),

— modules or panels with a output voltage not exceeding 50 V DC and a power output not exceeding 50 W solely for direct use as battery chargers in systems with the same voltage and power characteristics."

103. Price undertakings were accepted by the EU from cooperating producers offered in connection with anti-dumping of solar modules from China together with the CCCME, however, undertakings are only applicable to the commodity code listed in the ADD and CVD regulations:

104. Article 3 of The ADD Regulations states:

"Imports declared for release into free circulation for products currently falling within CN code ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU, shall be exempt from the antidumping duty imposed by Article 1, on condition that:

> (a) a company listed in the Annex to Implementing Decision 2013/707/EU manufactured, shipped and invoiced directly the products referred to above…;
>
> (b) Such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex III of this Regulation;
>
> (c) Such imports are accompanied by an Export Undertaking Certificate according to Annex IV of this Regulation; and
>
> (d) The goods declared and presented to customs correspond precisely to the descript on the undertaking invoice. "

105. Article 2 of the CVD Regulations states:

"Imports declared for release into free circulation for products currently falling within CN code ex 8541 40 90 (TARIC codes 8541 40 90 21, 8541 40 90 29, 8541 40 90 31 and 8541 40 90 39) which are invoiced by companies from which undertakings are accepted by the Commission and whose names are listed in the Annex to Implementing Decision 2013/707/EU, shall be exempt from the anti-subsidy duty imposed by Article 1, on condition that:

> (a) a company listed in the Annex to Implementing Decision 2013/707/EU manufactured, shipped and invoiced directly the products referred to above…;
>
> (b) Such imports are accompanied by an undertaking invoice which is a commercial invoice containing at least the elements and the declaration stipulated in Annex III of this Regulation;
>
> (c) Such imports are accompanied by an Export Undertaking Certificate according to Annex IV of this Regulation; and
>
> (d) The goods declared and presented to customs correspond precisely to the descript on the undertaking invoice. "

106. Even though one of the Appellant's suppliers, Yuhuan Sinosola Science & Technology Co. Ltd is a company listed in Commission Implementing Decision 2013/707/EU, undertakings are not applicable in this case as the products fall under commodity code 8501 31 00 81. Documents relating to undertakings were considered in HMRC's original decision and the review decision but they only apply to products under 8541 40 90 and would not be relevant to products falling in heading 8501.

107. Shenzhen Sungold Solar Co Ltd, another one of the Appellant's suppliers, is listed in the Commission Regulation 748/2013. However, for the same reasons, undertakings are not applicable. The products are not properly classified to 8541 40 90 because they have output power in excess of 50 watts.

108. Further, the Tribunal is satisfied that even if it was found that the products were proper to heading 8541 40 90 (which the Tribunal does not accept for the reasons set out above) the documents provided would not satisfy the certificate and undertaking requirements of Article 3(b) & (c) of the ADD regulations and Article 2 (b) & (c) of the CVD regulations in any event. HMRC were provided with incomplete documents by the Appellant. HMRC were not provided with, and the Appellant did not possess, both an Export Undertaking Certificate and an undertaking invoice (an accompanying commercial invoice) for each of the relevant imports from both of the suppliers.

109. The Appellant provided only three Export Undertaking Certificate for Yuhuan Sinosola but only one was for one of the relevant imports set out at paragraph 4 above (two were for imports in 2013 and 2014). The Appellant provided one commercial invoice accompanying goods subject to anti-dumping and countervailing duties for an import from Yuhuan Sinosola but this was for an import in 2018 (not one of the relevant imports). The Appellant therefore did not provide and did not possess any commercial invoices accompanying goods for the relevant imports as required.

110. The Appellant provided two commercial invoices accompanying goods subject to anti-dumping and countervailing duties for an import from Shenzhen Sungold Solar Co: one for a relevant import on 18 June 2015 and one for 7 April 2017. However, the Appellant did not possess and did not provide to HMRC any Export Undertaking Certificate for Shenzhen Sungold Solar Co for any of the relevant imports.

111. The Appellant states that Undertaking Certificates can be obtained if necessary but that the manufacturing composite is ample evidence that the products are not to incur ADD. The Tribunal is satisfied that end use of the product is irrelevant. The ADD and CVD Regulations make it clear that ADD/CVD duty is to be imposed on imports of crystalline silicon modules from China (except for those that satisfy the conditions as set out in commodity code 8513100 73). Furthermore, even if the Appellant were able to obtain undertaking certificates, they would not be applicable for the reasons set out above.

112. In respect of the Appellant's supplier Blue Carbon Technology Inc, this supplier is not stated to be a co-operating company in the ADD or CVD Regulations as such products supplied by Blue Carbon Technology are subject to the maximum amount of ADD at a rate of 53.4% and the maximum amount of CVD at 11.5% as per additional code B999 (other companies), Article 1 of the ADD Regulations and of the CVD Regulations.

What percentage of the Appellant's imports exceeded 50 Watts?

113. The C88 import entry forms merely refer to the goods a being either a "Solar Panel" or "Poly Solar Panels". Therefore, HMRC submit it was not possible to apportion the amount of ADD/CVD rates (e.g. for those imports that may not be subject to ADD/CVD like model EP-10-P). Due to the lack of documents and information for the ADD and CVD import duties, HMRC charged them on all imports. No further evidence was received from the Appellant to establish the exact models of products imported in the imports set out at paragraph 4 above.

114. HMRC submitted that due to the fact that that the majority of the invoices provided by the Appellant did not specify the model details, they properly classified all the imports (except import 042211J where there was proper evidence of wattage) to commodity code 85013100

81. HMRC submitted that without a breakdown on the invoice of the model being imported they could not determine exactly which models had been imported.

115. In respect of import entry no 042211J, HMRC accepted this product was proper to commodity code 85013100 73 as the product listed on the invoice is not a module or panel where the power output exceeds 50-Watts. This import does not attract ADD or CVD.

116. The Tribunal is satisfied that HMRC properly classified the imports of solar panels exceeding 50 watts in power output to commodity code 85013100 81 for the reasons set out above. These imports are therefore properly liable to ADD and CVD.

117. However, the Tribunal is not satisfied that all of the Appellant's solar panels imported in the entries set out at paragraph 4 were in fact exceeding 50 Watts in power output.

118. Having heard the evidence, the Appellant has discharged its burden of proof and satisfied the Tribunal that only 50% of the models imported during the relevant period exceeded 50 Watts. It has established that 50% of the relevant imports were 50 Watts or under in power output. Therefore 50% of the models imported should have been classified to commodity code 85013100 73 and should not attract ADD nor CVD.

119. The reasons for these findings are that the Tribunal accepts Mr McIntyre's oral evidence that 50% of the Appellant's imports were 50 Watts or under in power output.

120. The Tribunal relies on three reasons in coming to these conclusions: a) Mr McIntyre stated that he imported the range of power in the solar panel models because this was the demand of his market – for canal boat and camping solar panels, models less than 50 Watts were the most popular; b) there is a contemporaneous email dated 28 May 2015 from Mr McIntyre indicating that the 10 Watt solar panel (EP-10) was his most popular model; c) there was documentary evidence, being an invoice for an import from Shenzhen Sungold Solar Co Ltd on 2 February 2015 (before the relevant period), which evidences that the Appellant imported two hundred 5-watt panels, three hundred 100-watt panels and one order of 3 x 35-watt models.

121. Therefore, the Tribunal is satisfied that HMRC were wrong to apply the assumption that where there was no specification or detail of the product in the invoice or other accompanying documents, all models imported by the Appellant during the period were over 50 Watts in power output.

122. The Tribunal has considered HMRC's submission that the Appellant failed to provide any other paperwork to prove the output power of the models was 50 Watts or under. However, the Tribunal accepts Mr McIntyre's evidence that his Chinese suppliers did not always provide much detail in their invoices and this was common to his dealing with emerging markets. This much is apparent from the invoices in the bundle.

123. Mr McIntyre stated he was not in a position to obtain more detailed invoices and certificates from these suppliers as he had ceased trade with them and it was not easy to contact Chinese suppliers. When he had contacted them, they stated they were also not able to access old databases nor retrospectively produce certificates and undertakings.

124. While the Tribunal is of the view that Mr McIntyre might have done more to provide evidence of the specification of the Appellant's imports and might have provided alternative evidence of their output (such as sales invoices or other documentary descriptions rather than purchase invoices), the Tribunal does not draw any adverse inferences from their absence.

125. The Appellant had a high turnover of products and did not retain stock. Mr McIntyre was not asked to retain paperwork by HMRC during the relevant period as this issue had not been raised between the parties in correspondence. He mistakenly believed (as the Tribunal

has found) that all his imports between 2015 and 2017 were in order due to the BTI he had obtained. Therefore, while it was not ideal that there were very few supporting invoices from the Chinese suppliers specifying the output of the models described, the Tribunal nonetheless accepts Mr McIntyre's evidence.

The Appellant's argument as to six cells

126. The Tribunal is satisfied that Mr McIntyre's arguments concerning the six-cell configuration of his models (whether they are 6 x 6 arrangements of cells or 9 x 4) do not assist the Appellant. Mr McIntyre contends that all his imported 9 x 4 models were included in the BTI obtained in 2015 covering 6 x 6 models. As set out above, the BTI in 2015 only applied to the EP-10 model and no other models.

127. Further and in any event, whatever the arrangement of cells, a model containing 36 cells would not satisfy that criterion of commodity code 85013100 73 which requires products to contains less than 6 cells (ie. five cells are fewer).

128. The Appellant submits that the BTI incorrectly states the model EP-10-P as having a 4 x 9 cell arrangement when it has a 6 x 6 arrangement. HMRC submit that the product specification sheet provided by the Appellant for model EP-10-P at the time the BTI decision was issued referred to the model as having a 4 x 9 arrangement (and not 6 x 6), however, as explained above the cell arrangement was not the reason the model was classified to 85012100.

129. The BTI obtained in 2015 for 36 cell models was obtained on the basis of their power output, not their cell arrangement. Although the commodity code 85013100 73 applies to products of less than 6 cells, that is not the only basis on which a product can be classified. Only one of the four criteria set out in commodity code 85013100 73 needs to be met (the use of the semi colon in the code separates the criteria and the ADD and CVC Regulations also lists the products as four separate categories).

130. As set out above, in 2015 the BTI correctly classified model EP-10-P to the commodity code 85013100 73 due to the fact that it met the criteria relating to the voltage and wattage (modules or panels with an output voltage not exceeding 50 Volts DC and a power output not exceeding 50 Watts solely for direct use as battery chargers in systems with the same voltage and power characteristics).

The Appellant's ground of appeal that the BTI obtained in 2015 applied to all his products and that he was misled / there was a legitimate expectation it would apply / that there was a retrospective variation or application of tax by HMRC

131. The Appellant further submits that HMRC have misled him in that their letter in July 2015 stated that the BTI was to be used for all of the Appellant's solar imports regardless of size and a C18 was raised for all previous imports using the commodity code in the BTI.

132. The Tribunal is satisfied that the Appellant is challenging whether HMRC in some way acted unlawfully and therefore should not be allowed to collect the tax which is legally due. However, the Tribunal does not have jurisdiction to consider this. Any challenge regarding whether the Appellant had a legitimate expectation, was misled or whether there was retrospective application or variation of the duties levied should be made by way of application for judicial review at the High Court.

133. The Tribunal's jurisdiction was confirmed by the Upper Tribunal in *HMRC v Hok Limited [2012] UKUT 363*. The Upper Tribunal concluded:

a. The Tribunal is a statutory body, and neither the statute creating it, nor the statutes it is required to apply, give it jurisdiction to apply public law principles [36];

b. The Tribunal does not have any judicial review jurisdiction. The decision of the House of Lords in *CEC v. JH Corbitt (Numismatists) Ltd [1980] STC 231* makes that clear [41]; and

c. The Tribunal has only that jurisdiction which has been conferred on it by statute and can go no further (that includes the application of common law principles) [56].

134. The Upper Tribunal in *HMRC v Noor [2013] UKUT 071* further confirmed that the First-tier Tribunal does not have jurisdiction to deal with legitimate expectation claims.

135. Nonetheless, the Tribunal is of the view that there is no merit to the Appellant's arguments even if it had jurisdiction to consider them.

136. The Tribunal is satisfied that BTI GB50239191970 that HMRC issued in 2015 related only to the Appellant's solar module EP-10-P. This was made reasonably and obviously clear to the Appellant by the correspondence which is set out above and by the BTI itself.

137. While the Tribunal accepts Mr McIntyre's evidence that he genuinely believed the BTI had general application to all his products and the Appellant was not fully aware that the BTI applied only the 10-Watt model, it is satisfied he was not misled by HMRC. Likewise, there could be no reasonable or legitimate expectation that the BTI had wider application nor was there any retrospective application or variation of tax levied by HMRC. HMRC issued their demand for payment within the lawful limitation period of three years.

138. Mr McIntyre's mistaken belief was not reasonable. He should not reasonably have been under any misapprehension as to the scope of the BTI – the correspondence from HMRC was clear that it only applied to one model, being the EP10 and he should request a separate BTI for each model.

139. Mr McIntyre (on behalf of The Appellant) was advised by HMRC on two occasions (on 21 April 2015 and on 14 May 2015) that a BTI must relate to a specific product and cannot relate to a range of different products. Article 6(2) of Commission Regulation (EEC) No 2545/93 provides that an application for binding tariff information shall relate to only one type of goods. In response, the Appellant on 28 May 2015 confirmed that HMRC should classify the EP-10-P model as it was the most popular model in the Appellant's target market.

140. Furthermore, the Tribunal is satisfied that the description in the BTI itself makes it clear that the BTI relates to the EP-10-P model.

The Appellant's other grounds of appeal

141. The ADD and CVD Regulations have direct effect and HMRC are obliged to apply them. The Tribunal is satisfied that the Regulations are proportionate and the duties charged under them are proportionate. The Regulations and duties charged under them fulfil legitimate objectives, are rationally connected to the aims they seek to meet and no less intrusive measure are justified.

142. The Tribunal is not satisfied that the Appellant's argument as to the application of ADD or CVD undermining the economic rationale of the market and his business has any relevance to the determination of this appeal.

Conclusion

143. The Tribunal is satisfied that the ADD and CVD duties were lawfully due under the relevant legislation for 50% of the solar panels imported by the Appellant in the relevant importations due and that part of the C18 assessment is upheld.

144. The appeal is allowed in part. HMRC's demand for duty should be reduced on the basis that 50% of the ADD and CVD charged is no longer due. The Tribunal estimates this to result

in a reduction from £105,583.77 to £52,791.89 in ADD and CVD. However, the final and precise amount of duty to be charged is to be calculated by HMRC.

145. The Tribunal is aware that this result will be deeply disappointing to Mr McIntyre and that he considers he has been misled and unfairly treated by HMRC. The Tribunal is aware that the outcome of this appeal will have serious implications for the economic viability of the Appellant company and its ability to trade and meet its past debts. Mr McIntyre has made it plain that the Appellant had ceased trading in solar panels in summer 2018 and that from September 2018 the products in question would not have attracted CVD and ADD. Nonetheless, and despite considerable personal sympathy for Mr McIntyre, the Tribunal does not find there is any lawful basis on which it can interfere with HMRC's decision beyond the manner in which it has reduced the duties charged.

146. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 30 SEPTEMBER 2019