



Neutral Citation: [2022] UKFTT 223 (TC)

Case Number: TC08545

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/04080

CUSTOMS DUTY — Commodity Codes - Shuttering panels – Classification – plywood or not? - appeal allowed

Heard on: 23 June 2022

Judgment date: 15 July 2022

Before

**TRIBUNAL JUDGE MANUELL
Mr SIMON BIRD**

Between

INTERNATIONAL (PLYWOOD) IMPORTERS LTD

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr D Bedenham, Counsel, instructed by CTM Tax Litigation Limited

For the Respondents: Mr G Barth of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by remote video link using the Tribunal video platform. The Tribunal decided a remote hearing was appropriate. The documents to which the Tribunal were referred consisted of the agreed bundle as prepared by HMRC in electronic form, together with various additional documents which will be identified as necessary below. There was also an agreed bundle of authorities which included statutory materials.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. The Appellant is a specialist wood products importer, as its name indicates. The appeal concerns the correct classification for customs duty purposes of Plastform 333 Concrete Shuttering Panels (“the Panels”), manufactured in Brazil by Madeireira Thomasi SA (“Thomasi”), batches of which were imported into the United Kingdom by the Appellant between 8 December 2015 and 17 July 2017. The Appellant declared the Panels under commodity code 44 18 40 00 (“shuttering for concrete construction work”). The rate of customs duty under that code is 0%.

4. On 16 March 2018, HMRC informed the Appellant that they were undertaking an “International Trade audit on the classification of imports of Formwork panels (for concrete construction) and Plywood panels”. Between March 2018 and January 2019, the Appellant and HMRC liaised in relation to the classification issue. On 21 February 2019, HMRC wrote to the Appellant stating that the Panels were properly classified to commodity code 44 12 94 10. The rate of customs duty under that code is 7%. On 26 March 2019, HMRC issued to the Appellant a C18 Post Clearance Demand (reference C18285851) in the sum of £303,649.39. Following a statutory review which recognised that part of the C18 demand was out of time, on 9 May 2019 the C18 Post Clearance Demand was reduced to £231,609.02 customs duty and £46,321.81 Import VAT, in total £277,930.83. A penalty of £1,250 was imposed by notice dated 17 April 2019. The review decision and penalty notice are the subject of the appeal.

PRELIMINARY MATTER

5. HMRC applied to submit late evidence in the form of a witness statement dated 21 June 2022 made by Mr Ben Key, with exhibits, web screen shots and a catalogue from the Appellant. The application was opposed by Mr Bedenham for the Appellant. It was late without good reason and unfair to the Appellant. He declined the opportunity of an adjournment as that would cause wasted costs to the Appellant.

6. With reluctance, the Tribunal granted the application. The issues raised in the catalogue and the screenshots (the description of the disputed product) could be put to the Appellant’s witness in any event, so it was preferable for the document to be available.

THE CENTRAL ISSUES

7. The central issues were:

- (a) Were the Panels shuttering?
- (b) Were the Panels plywood?

- (c) Were the Panels excluded from Code 44 18 40 00 by the EC Classification, meaning that the correct code is 44 12 94 10?

THE LAW

8. The applicable law was not in dispute between the parties. At [2-17] of *MSA Britain Ltd v HMRC* [2019] UKFTT 0693 (TC) and [6-10] of *Orlight Ltd v HMRC* [2013] UKFTT 732 (TC), the Tribunal helpfully summarised the law and approach to interpretation in classification appeals, as follows

(a) Annex 1 of Regulation 2658/87 contains a combined nomenclature (“the CN”) which classifies goods using an eight-digit identification system. The first two digits represent the chapter heading, the next two digits represent headings in the chapter, the fifth and sixth digits represent sub-headings (which mirror those used in the WTO’s nomenclature) and the final two digits represent the EU’s further subdivisions.

(b) Annex 1 also contains six general rules for the interpretation of the CN (“the GIRs”). The GIRs that are potentially relevant to the present appeal are:

(i) GIR 1 which provides that the titles of sections, chapters and subchapters are for ease of reference only and that, for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, provided such headings or notes do not otherwise require, according to the other GIR.

(ii) GIR 3 which provides that where 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;

(b) Composite goods consisting of different materials 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) 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;

(iii) GIR 4 which provides that goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin;

[GIR 5 was not considered and is not relevant to the present appeal.]

(iv) GIR 6 which provides that the classification of goods under subheadings 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;

(c) “...the decisive criteria for the classification of goods...is in general to be found in their objective characteristics and properties as defined in the wording of the relevant CN and of the notes to the sections or chapters...the intended use of a product may constitute an objective criterion in relation to a tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties...” (*Intermodal Transports BV* Case C-495/03);

(d) There are explanatory notes to the WTO's nomenclature, Harmonised System Explanatory Notes ("HSEs") and explanatory notes produced by the European Commission, Combined Nomenclature Explanatory Notes ("CNENs"). Neither have force of law but both may be important aids to interpretation;

(e) Where the EU commission has promulgated a classification regulation in relation to particular goods:

(i) the scope of that regulation must be determined by taking into account, inter alia, the reasons given in the regulation (*Hewlett-Packard* Case C-199/00);

(ii) A classification regulation can assist in classification of similar products by analogy.

BURDEN AND STANDARD OF PROOF

8. The standard of proof is the normal civil standard, the balance of probabilities. The burden of proof to show the correct classification code has been applied falls on HMRC.

EVIDENCE

9. Mr Ian Attwood ("Mr Attwood") gave evidence on behalf of the Appellant in accordance with his witness statements dated 27 September 2021 and 8 June 2022 which stood as his evidence in chief. There in summary he said that the Appellant had a large turnover and had been recognised in the timber industry with awards. The Appellant imported a wide range of products including Chinese plywood, Brazilian shuttering, chipboard, medium density fibreboard ("MDF") and blockboard. He travelled overseas to source different timber products. He considered that he was familiar with the Appellant's products.

10. The Panels were purchased through an agent by Panel Supplies Limited ("PSL"), a company which the Appellants had acquired. Mr Attwood explained the precise arrangements by which the Appellant received a commission from PSL for acting as the importer. The Appellant informed the freight agent of the commodity code: 44 18 40 00. Mr Attwood set out the documents required for each consignment imported. As much as a year's supply was imported at a time in order to reduce the price and avoid currency fluctuations.

11. The Panels were 8 feet by 4 feet, specially manufactured for formwork (also known as shuttering) to meet commodity code 44 18 40 00 (Shuttering for Concrete Construction Work) and make the pricing competitive. The Panels had no other purpose. The Panels were coated with a semi porous concrete release agent (Noxcrete), ensuring that concrete would not stick to the formwork as it dried. The result was a superior finish and allowed the formwork to be used again. The lamination ensured sufficient strength to withstand the pressure of the concrete pouring.

12. In Mr Attwood's view the Panels were not plywood, i.e., panels made up of an odd number of thin veneers, peeled or sliced from a log. In plywood the layers of timber run in one direction, whereas the Panels were cross-laminated, i.e., the timber layers alternated in direction in each layer. Unlike plywood which has thin sheets, the Panels were cut from thicker lumber, of pine, from the core of logs. The waterproof paper on the top of the Panels cost a few thousand dollars per cubic metre, compared to a plywood top which would cost a few hundred dollars.

13. Mr Attwood disagreed with HMRC's classification (44 12 94 10), which identified the Panels as "blockboard". Blockboard was an interior based product which had taken over from

MDF in the manufacture of furniture. It was not waterproof and would collapse if it came into contact with wet cement. The strips of wood lay in a single direction resulting in weak spots.

14. In his oral evidence Mr Attwood said that the catalogue which HMRC had included as additional evidence was produced in 2011. The product described was not the same as the Panels. The Panels were constructed of three layers. The thickness varied (either 21mm or 17.5mm) and both layers were thicker than 6mm. The purpose of the Noxcrete was to avoid leaving a wood grain impression on the concrete.

15. Cross examined, Mr Attwood agreed that shuttering was a form of mould. The Noxcrete touched the concrete. The Panels had to be held together to perform their function as shuttering. The construction of the Panels was cross-laminated, glued and pressed, with the MDO layer treated with Noxcrete. The Noxcrete was not invisible, it gave an oil like sheen, a varnish. It was applied at the factory as a precaution. It provided a form of waterproofing. The layers were more than 6mm thick, but that was not essential. Plywood could have different thicknesses for different purposes.

16. The product shown in the 2011 catalogue was not the Panels. The description had been changed from plywood to shuttering in 2012 or thereabouts. The letter from Thomasi was written before 2012 which was when the Appellant began to purchase the Panels. The product purchased before 2012 was plywood. The Panels were a better price because there was no duty.

17. Mr Bedenham indicated that he had no questions he wished to put to HMRC's witnesses, hence their witness statements stood unchallenged. There were witness statements from Ms Jane Martin dated 19 February 2021 and Mr Jonathan Miller dated 18 February 2021. The officers described the process by HMRC's audit took place and how HMRC reached the decision that the Panels' correct code was 44 12 94 10. There was also the late witness statement of Mr Ben Key dated 21 June 2022 which exhibited screen shots from a Google search and an undated catalogue from the Appellant.

18. Although an extensive number of copy documents had been included in the agreed bundle, it was agreed that few were of any direct relevance to the Tribunal's decision. The relevant documents will be referred to below.

SUBMISSIONS

19. Mr Bedenham for the Appellant relied on his skeleton argument. The Panels consisted of 3 layers of cross-laminated timber (with each layer exceeding 6mm thickness) with a cement resistant Medium Density Overlay ("MDO") with a coating of Noxcrete (chemically active release agent). The Panels were intended for use solely as concrete shuttering. This intended use is an objective criterion for the purposes of tariff classification because that use is inherent in and capable of being assessed on the basis of the product's objective characteristics and properties (applying *Intermodal Transports BV* – see [6] above). The objective characteristics and properties that demonstrate the intended use are the presence of a cement resistant MDO and a coating of Noxcrete.

20. Applying GIR 1, the Panels are properly classified under 44 18 40 00. Specifically, the concrete shuttering clearly falls within:

- (a) "Wood/articles of wood" (so is within chapter 44);
- (b) "Builder's joinery and carpentry of wood" (so is within 44 18); and
- (c) "Shuttering for concrete constructional work (so is within 44 18 40).

21. HMRC agree that the Panels are within chapter 44 but (in the Statement of Case) assert that “the wood is correctly classified as plywood” (see [37] of HMRC’s Statement of Case) However:

(a) 44 12 10 (plywood other than bamboo) only applies where each layer does not exceed 6mm thickness. The Panel layers exceed 6mm;

(b) A comparison of the Panels to plywood panels shows a marked difference, as seen in the Appellant’s evidence;

(c) Given the layers exceeded 6mm thickness, HMRC concluded that the Panels should not be classified under 44 12 10 (plywood other than bamboo) but instead as “Blockboard, Laminboard and Battenboard” (CN code 44 12 94 10).

22. If code 44 12 10 could *prima facie* apply, CN code 44 18 40 also *prima facie* applies. If so, 44 18 40 would take precedence because:

(a) It is more specific (GIR 3(a)); and

(b) It is last in numerical order (GIR 3(c)).

23. The exclusion relied on by HMRC i.e., that the CNEN to 44 18 40 states: “shuttering of this subheading is an assembly used for all types of concrete constructional work ... plywood panels used as shuttering (to obtain smooth surfaces) are excluded from this subheading even if coated on one or both sides and their use as concrete shuttering is unmistakable (heading 4412) does not apply because the Panels are not plywood, as accepted in the review decision and by Officer Martin.

24. HMRC also refer to EC Classification Regulation 1128/2012 as excluding the Panels from 44 18 40 00, but such reliance is misplaced as the goods classified consisted of plywood (consisting of thirteen sheets of less than 2mm thick). HMRC also refer to EC Classification Regulation 309/2010 as excluding the Panels from 44 18 40 00. That regulation relates to a different product from the Panels, yet HMRC assert an analogy. *Hewlett-Packard* Case C-199/00 shows that when determining the scope and application of a Classification Regulation, the reasons given for that regulation must be taken into account. The reasons given in Classification Regulation 309/2010 were that “the product does not have any characteristics other than a coating of resin, enabling it to be identified as being for constructional purposes”. A resin coating could have been added for a variety of purposes and therefore did not objectively demonstrate that it was designed for use as concrete shuttering. However, the Panels do have characteristics that objectively demonstrate that they were designed for use as concrete shuttering – the MDO and the Noxcrete. Thus the Panels belong in 44 18 40 00 and the appeal should be allowed.

25. Mr Barth for HMRC relied on his skeleton argument and submitted that the Panels were to be classified by their objective characteristics which could be appraised by the customs authorities, with highly persuasive (but not binding) guidance from the HSEs. It was agreed that the correct chapter heading was Chapter 44, Wood and articles of wood; wood charcoal. Chapter 44.12 applied, i.e., Plywood, laminboard and battenboard. The HSEN stated that the heading covered:

26. Plywood consisting of three or more sheets of wood glued and pressed one on the other and generally disposed so that the grains of successive layers are at an angle; this gives the panels greater strength and, by compensating shrinkage, reduces warping. Each component sheet is known as a “ply” and plywood is usually formed of an odd number of plies, the middle ply being called the core...

27. Similar laminated wood. This group can be divided into two categories: Blockwood, laminboard and battenboard, in which the core is thick and composed of blocks, laths or battens of wood glued together and surfaced with the outer plies. Panels of this kind are very rigid and strong and can be used without framing or backing...
28. The products of this heading remain classified herein... whether or not they have been worked at the surface, the edge or the end, or coated or covered (e.g., with textile, fabric, plastics, paint, paper or metal) or submitted to any other operation, provided those operations do not thereby give such products the essential articles of other headings.
29. According to HSEN: "the term "joinery" applies more particularly to builders' fittings (such as doors, windows, shutters, stairs, door or window frames), whereas the term "carpentry" refers to woodwork (such as beams, rafters and roof struts) used for structural purposes or in scaffoldings, arch supports, etc., and includes assembled shuttering for concrete construction work. However, plywood panels, even if surface treated for the purpose of concrete shuttering, are classified in heading 44.12..."
30. According to the CNEN for Code 44 18 40 00: Shuttering for concrete construction work. Shuttering of this subheading is an assembly used for all types of constructional work (for example, for foundations, walls, floors, columns, pillars, props, tunnel sections, etc.) Generally, shuttering is manufactured from resinous wood (planks, beams, etc). However, plywood panels used as shuttering (to obtain smooth surfaces) are excluded from this subheading even if coated on one side and their use as concrete shuttering is unmistakable (heading 44.12)
31. Mr Barth submitted that it was not possible to identify from their objective characteristics that the Panels' intended use was for concrete shuttering. They were simply wooden panels with a coating. The coating did not alter their objective characteristics. The HSEN for 44.18 reinforced the point: "plywood panels, even if surface treated for the purposes of concrete shuttering, are classified in heading 44.12".
32. The Appellant's argument that the Panels were not plywood, and the factors offered to support that contention, were irrelevant for the purposes of classification. In any event the point was determined by Regulation 309/2010 which concerns the classification of a product which is, in all material ways, identical to the Panels. The description was a three-layered fir panel, with outer layers 8.5mm thick, the core layer perpendicular to the outer layers and 10mm thick, the outer layers and edges coated with resin. The product was classified under 44 12 94 90. Classification under 44 18 was excluded because the product did not have any characteristics other than the coating of resin enabling it to be identified as being designed for constructional purposes... the intended use as for construction shuttering was therefore not inherent to the product.
33. Similarly, Regulation 1128/2012 concerns a "waterproof plywood" consisting of 13 sheets of wood which is used for construction: "The panel is considered to be plywood as it consists of several sheets of wood glued and disposed one on the other so that the grains of successive layers are at an angle (see also the HSEN to hearing 4412, point (1))" The Panels could thus only be described as plywood.
34. The product is excluded from classification within 44.18 and included within 44.12 because: (a) Regulations 309/2010 and 1128/2012 provide for classification of the product within 44.12 and outline reasons to exclude it from classification within heading 44.18. (b) HSEN to heading 44.18 provides a clear exclusion for plywood panels: assembled shuttering is included but plywood panels (which would constitute a product that could be used in shuttering) are excluded. This approach is consistent with the approach to classification based on the objective characteristics. (c) There is no additional carpentry, joinery or similar which would indicate, based on its objective characteristics, that the product is used for shuttering.

There is no additional part, beyond the wooden panels, which would demonstrate that they are used for shuttering. (d) HSEN 44.12 clearly describes the product as plywood or similar laminated wood. The fact that it has been surface-covered or its intended use is shuttering is irrelevant.

35. As to classification within 44.12.94.10, HMRC determined that the product is blockboard, laminboard or battenboard, which are all types of plywood. Blockboard is a sub-category of plywood: its core comprises a block of solid timber glued or pressed within two outer layers. Laminboard and battenboard are plywood with cores which are laths and battens (thin strips of wood), respectively. The Panels are made up of three sheets of solid timber. As such, the product is blockboard (see also Regulation 309/2010). The outer plies are a non-coniferous wood (Eucalyptus) so the product is classified within 44.12.94.10.

36. In reply Mr Bedenham submitted that it was agreed that at least one layer of the Panels exceeded 6mm in thickness. The Noxcrete coating made the use of the Panels obvious and was an objective characteristic. The Panels were the shuttering, not any supports. The thickness was relevant. The use of the term “other” indicated a differentiation from plywood and that was the purpose. Typical plywood was excluded from shuttering. The Panels were blockboard.

DISCUSSION AND FINDINGS

37. There was no factual dispute as such, nor any suggestion that the Appellant had not acted in good faith at all times. The disputed sum was paid promptly. Mr Attwood stated frankly that the Appellant had chosen to import the Panels because the company’s understanding was that they attracted 0% customs duty. The cogent and persuasive arguments mounted by both counsel show that the correct classification of the Panels is not a straightforward matter. The intricacies of the classification system might be thought to resemble an arcane theological text. The tribunal has set out the submissions of both counsel as the rival cases set out the arguments clearly. The Tribunal was assisted in reaching its decision by the submissions by both counsel.

38. Because the hearing was by remote video link the Tribunal did not inspect a physical sample of the Panels. That would probably have been somewhat inconvenient in view of their weight and dimensions. The Tribunal is satisfied that the clear colour photographs, cross-section drawings and written description of the Panels’ composition was satisfactory for the proper determination of the issues. A physical inspection would not have been of assistance and was not proposed by either party. HMRC had seen a sample of the Panels.

39. The Tribunal finds that the objective characteristics of the Panels show that they are not “plywood” within the meaning of that term’s definition in the code: see 44.12, set out at [23], above. The Panels are of three unequal layer construction and are a form of laminboard. The Tribunal finds that the Noxcrete MDO coating gives a visible, varnish like sheen to the outer surface, which combined with the three layer construction visible at edges indicates that the Panels are a specialist product. The Panels do not look like plywood which, depending on its thickness, has a significantly greater number of layers, and thinner or finer layers, normally similar in size. That is recognised in part at least by HMRC’s description of the Panels as blockwood, which is closely akin to laminboard. Their exact use might not be immediately apparent to a lay person but their large size and the visible coating would confirm the intended use as shuttering. That intended use is in the Tribunal’s view inherent to the Panels and therefore is an objective criterion for classification. No doubt the Panels could be used for purposes other than concrete shuttering, just as shipping containers can be used for land-based storage and may never see the oceans, but that does not detract from their primary objective characteristics.

40. In accordance with *Intermodal* (above) the Tribunal has excluded from its evaluation the evidence that the Panels were the fruit of an extensive programme of research and development by Thomasi, and also the evidence as to method of assembly. The Tribunal finds that the product displayed in the Appellant’s catalogue (dated by Mr Attwood as 2011), described as “plywood” is a different product again, and is not the Panels.

41. The Tribunal has given considerable thought to HMRC’s argument that plywood panels are excluded from shuttering (HSEN for 44.18: “plywood panels, even if surface treated for the purposes of concrete shuttering, are classified in heading 44.12”). 44.12 has the heading “Plywood, veneered panels and similar laminated wood”, six codes are assigned and the terms in the heading are then defined and numbered (1), (2) and (3), as separate groups. The Tribunal’s view is that the Panels are laminboard and are not plywood within the definitions provided by the classification code. The precision of the wording in the classification and the numerous subgroups indicate that had laminboard panels been intended to be excluded, that or a similar generic term would have been added to “plywood”.

42. As to Regulation 309/2010 relied on by HMRC, that regulation includes a photograph of the product in question. In the Tribunal’s view the product described and illustrated is distinctly different from the Panels. The size of the product is less than half that of the Panels, i.e., 1000mm x 500mm (3.28 feet x 1.64 feet), compared with 8 feet x 4 feet. The layers are closely similar in size, unlike the Panels, and the resin coating is not Noxcrete, with its particular properties specifically relevant to concrete shuttering.

43. The Tribunal considers that the product described in Regulation 1128/2012, “waterproof plywood” is distinctly different from the Panels and so there is no useful analogy. There are 13 thin layers and it is obviously plywood. One of the reasons given for the code is that the product had not been treated to improve its resistance to chemical agents, in contrast to the Panels.

44. Mr Barth’s submission that “shuttering” for the purposes of the code refers to the complete assembly, i.e., panels plus props, brackets, etc., seems to the tribunal to be placing an impermissible and unnecessary gloss on the term.

45. It follows that the Tribunal accepts the submissions made by Mr Bedenham on behalf of the Appellant and that the classification appeal is allowed. It further follows that the penalty is discharged.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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.

**JOHN MANUELL
TRIBUNAL JUDGE**

Release date: 15 JULY 2022