



Neutral Citation: [2023] UKFTT 00969 (TC)

Case Number: TC08990

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Manchester

Appeal reference: TC/2021/11105

EXCISE DUTY – antidumping duty – countervailing duty – classification of goods – whether appellant has discharged the burden of proof – no – appeal dismissed

Heard on: 20 April 2023

Judgment date: 06 November 2023

Before

**TRIBUNAL JUDGE ANNE FAIRPO
SUSAN STOTT**

Between

M & S PROPERTY SERVICES (NW) LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Spencer, director

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

DECISION

Introduction

1. This is an appeal against two C18 Post-Clearance Demand Notices issued to the appellant on 4 October 2021. The aggregate amount of the notices was £18,924.98. This was made up of £483.59 in customs duty, £11,628.22 in anti-dumping duty, £2,904.40 in countervailing duty and £3,908.77 in VAT. The notices were issued because HMRC had concluded that there were valuation and classification errors in six imports made by the appellant.

Background

2. One of the appellant's imports was checked in early 2021 at HMRC's Inland Pre-Clearance Centre and found to have classification errors.

3. The officer noted that the goods had been imported under commodity code 8711609090, which applies to "Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars: with electric motor for propulsion".

4. The officer found that the box contained two models of electronic bicycle (G9 and GS9) which had electric motors and pedals. He concluded that the more appropriate commodity code for the items would be 8711609010 which applies to "Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side cars: with electric motor for propulsion – other- cycles **with pedal assistance** with an auxiliary motor" (emphasis added).

5. In correspondence, the appellant acknowledged that the commodity code was incorrect and explained that he had taken advice from others as he was new to importing goods.

6. HMRC subsequently reviewed a number of other imports made by the appellant to check whether these had been correctly declared on import. Following correspondence, HMRC raised the appealed notices for six imports on the basis that they considered that there had been classification errors and valuation errors for customs purposes in those imports.

Relevant law

Valuation errors

7. The relevant legislation, for imports prior to 31/12/20, was:

(1) Article 70 (1) of Regulation (EU) no 952/2013 of the European Parliament and of the Council ("UCC") – the primary basis for the customs value of goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the customs territory of the Union.

(2) Article 71(1)(a)(iii) of the UCC – the cost of packing should be included in the Customs Value

(3) Article 71 (1)(e)(i) of the UCC – the cost of transport should be included in the Customs Value.

8. For imports after 1/1/21, the principles remain the same but the relevant legislation is now:

(1) Part 1, Section 16 (3) of the Taxation (Cross-border Trade) Act 2018 (TCTA); and

(2) Regulation 111 (1) of the Customs (Import Duty) (EU Exit) Regulations 2018 (CIDEER)

Commodity codes

9. For imports prior to 31/12/2020, under Articles 56 and 57 of the UCC, goods are to be classified using the Common Customs Tariff of the European Union. For imports after 1/1/21 under Sections 7 and 8 of the TCTA, goods are to be classified using the UK Global Tariff.

10. In practice, the disputed commodity codes are the same under both the Common Customs Tariff and the UK Global Tariff. The codes in dispute are 8711609090 (contended for by the appellant) and 8711609010 (contended for by HMRC).

11. The procedure for tariff classification, following the General Interpretive Rules, was not disputed. Firstly, the appropriate heading should be established. In this case, that was agreed to be heading 8711. This applies to “Motorcycles (including mopeds) and cycles fitted with an auxiliary motor, with or without side-cars; side-cars”. The classification is then determined according to the terms of the headings and any relative section or chapter notes (Rule 1). Where more than one heading may apply, the heading which provides the most specific description is to take precedence over one which provides only a general description (Rule 3(1)).

12. Code 8711609090, contended for by the appellant, applies to “other”, being such vehicles as do not better fit into one of the specific categories within heading 8711. The categories relate principally to characteristics of the motor attached to the vehicle. The duty for this code is 6%.

13. Code 8711609010, contended for by HMRC, applies to such vehicles which have pedal assistance in addition to the motor. The duty for this code is 6%, with anti-dumping duty of 62.1% and countervailing duty of 17.2% also due.

14. In the context of this appeal, the distinction between the two codes contended for is whether or not the goods have “pedal assistance”. If they do, then anti-dumping duty and countervailing duty are payable in addition to the customs duty of 6% which applies to both codes.

15. It was not in dispute that the goods imported were some form of two-wheeled motorised vehicle. Given the General Interpretative Rules, we find that if the goods imported have pedals, then the appropriate commodity code for the imports would be 8711609010 as this would more closely describe the goods than the “Other” category.

16. The question for the Tribunal was whether the appellant, who has the burden of proof in showing that the code used by him was correct (s16(6) Finance Act 1994), had demonstrated on the balance of probabilities that the goods imported did not have pedal assistance.

Discussion

17. The Tribunal had a bundle of correspondence exchanged between the parties during the enquiry, together with documents relating to the imports. The appellant director, Mr Spencer, and Officer Stevenson gave evidence in the hearing.

18. Mr Spencer stated in correspondence and in his witness statement that he had started to import goods during the coronavirus pandemic as his usual business, as a locksmith, had suffered due to lockdown. Mr Spencer explained that he had used the incorrect code for the seized import in early 2021 as he was “new to this import game” and had taken advice from others as to which code to use. In the hearing, Mr Spencer stated that the goods seized had been imported by a friend of his, although his witness statement states that the seized goods were “a shipment of mine”.

19. Mr Spencer's evidence was that all the goods imported in these six imports were motorcycles without pedals. He stated that they had been ordered directly from Chinese suppliers who did not provide a make and model. Mr Spencer stated that he placed orders on the basis of pictures which he had seen. He did not provide any details of any catalogue or website from which he had ordered, nor any evidence of the original orders which he had placed. Mr Spencer's additional evidence regarding the specific imports under appeal is set out below.

20. Officer Stevenson stated that she had considered the import information provided by Mr Spencer, and that provided by the freight agents involved with the imports. She had checked the websites for the suppliers and noted that three of the four suppliers involved sold only pedal assist bicycles. The fourth appeared to sell electric bikes without pedals as well.

21. On 18 June 2021, Officer Stevenson asked Mr Spencer to provide more information about the goods imported on each of the imports being checked, and asked "Were all the imports bicycles with pedal assistance and auxiliary electric engine? Did you import any goods that were more like mopeds/motorcycles i.e. just powered by engines with no pedal assistance?"

22. On 21 June 2021, Mr Spencer replied by email. The entire text of his reply was "just pedal bikes some pedal assist bikes". In a later telephone call with HMRC on 8 April 2022, Mr Spencer stated that he had not understood the significance of making that statement. In the hearing he stated that the comment had just been 'for instance' and he had not realised that HMRC would take it to apply to all the imports.

Import 1 - ref 005472M - entry date 6 August 2020 – valuation errors

23. This was an import of unmotorised cycles. There was no dispute as to the classification for customs purposes.

24. The freight cost declared was £308.47. The evidence from the shipping agent was that the actual freight cost was £1,300. In the hearing the appellant agreed that there had been an error and explained that the error had arisen because he had completed the form before he had obtained the full information from the shipping agent. He agreed that the correct cost was £1,300 and that the demand notice was correct in respect of this entry.

25. There was also an incorrect customs value declaration arising from a currency error on the form. The total invoiced for the import was £7,716.24 (including £500 for batteries). This amount was stated on the import form to be US\$7,716.24. As this was then converted to sterling, an under-declaration arose.

26. Mr Spencer agreed in the hearing that this was an error made by the freight agent and that the additional amount should have been included when calculating the amounts payable on import.

Import 2 - ref 033826R - entry date 10 September 2020 – classification error

27. This was an import of 20 packages. The consignor on the import form was Guangzhou Pasalec in China. The goods were described on the import form as "Motorcycles (including mopeds) and cycles fitted w" (the goods description is truncated on the form). The commodity code used was 8711609090.

28. HMRC contended that the correct code was 8711609010.

29. The bill of lading provided by Mr Spencer for this import describes the goods as being 20 cartons of "Bicycle". The pro forma invoice, dated 17 June 2020, states that the goods are "Bike". The commercial invoice, dated the same date, also refers to "Bike". Mr Spencer stated that this description was provided by the Chinese supplier, not him.

30. When asked for further evidence to support his contention that the goods did not have pedals, Mr Spencer provided a further copy of the commercial invoice with a photograph of a pedal-less moped added to the top of the page. The copy invoice provided by the freight agent for this shipment did not include any photograph.

31. Mr Spencer stated in the hearing that he did not have control over the information placed on the bill of lading or the invoices. He did not answer when asked how the photograph of the moped had been attached to the invoice although he then suggested that maybe only half the invoice had been provided initially.

32. The photograph placed on the invoice shows a moped on a white background and carries no clear markings other than the word “MOTO” under the seat with some apparently Chinese characters on the seat. The aggregate weight of the shipment of these 20 items was 506kgs, which equates to approximately 25kg per item. We consider that the moped depicted in the photograph would weigh considerably more than 25 kg.

33. Mr Spencer then stated in the hearing that this invoice in fact related to the import that was seized, which prompted the investigation. Given that the seizure involved opening the imported packages and found those packages to contain bicycles with pedals, and this was not disputed by Mr Spencer, it seemed an unusual statement to make when the invoice had been re-supplied with a picture of a moped attached.

34. The Tribunal noted that the date of this invoice was 17 June 2020 and that it was provided by the appellant in relation to HMRC’s request for evidence in respect of this import rather than the seized import. The information on the invoice is consistent with the information on the bill of lading which states that it was “shipped on board 2020 8 7”. The goods on this import arrived in the UK on 10 September 2020. The goods seized arrived in the UK on 25 November 2020, and the bill of lading in respect of those goods states that they were “shipped on board 2020.10.02”.

35. Given this information and the fact that the invoice was provided a second time by the appellant with a photograph of a moped attached to it, we conclude that the invoice dated 17 June 2020 relates to this import (033826R) and not to the later import which was seized and found to contain bicycles with pedals.

36. On balance, we prefer the information on the bill of lading and the invoices and we conclude that the photograph of a moped was added later. We do not consider that the appellant’s evidence satisfies the burden of proof on the appellant to show that the goods imported did not have pedals and conclude that the goods in this import were electric bicycles with pedals and therefore within 8711609010.

Import 3 - ref 034272M - entry date 11 September 2020 – classification error

37. This was an import of 5 packages. The consignor shown on the import form was Guangzhou Pasalec in China. The goods were described on the import form as “Motorcycles (including mopeds) and cycles fitted w” (as above, the goods description is truncated on the form). The commodity code used was 8711609090.

38. HMRC contended that the correct code was 8711609010.

39. Mr Spencer did not initially provide any records for this shipment. The bill of lading and invoice provided by the freight agent for this import to HMRC on 5 July 2021 each state that the shipper was Changzou Evomax in China. No explanation was provided to explain why the import form had a different consignor.

40. The bill of lading states that the shipment contains 5 cartons, and the goods are described as “bike”. The invoice similarly describes the goods as “bike” and gives the

quantity as 5. The weight and value declared on the import form matches the weight and value (including shipping) stated on the invoice. The freight agent also provided a clearance form which describes the goods as “bikes” and gives the quantity as 5. The total weight of the shipment is 225kgs.

41. Mr Spencer subsequently provided a copy bill of lading and copy invoice in respect of this shipment to the Tribunal on 26 September 2022. The bill of lading has the word “bike” replaced by the term “e scooter”. This is in a different font to the rest of the bill of lading. Both the bill of lading provided by the freight agent and that provided by Mr Spencer show the same part of shadows from a scan or photocopy, suggesting that this version provided by Mr Spencer is an amended version of the specific copy provided by the freight agent.

42. The word “bike” in the invoice provided by the freight agent has been replaced by the term “electric scooter” in the invoice provided by Mr Spencer. Mr Spencer also provided a picture of an electric scooter (the type usually stood upon, rather than a form of moped) against a white background, without any identification as to the origin of the photograph. The per item weight of the shipment was 45 kgs; we consider that the scooter shown in the photograph was very unlikely to weigh as much as 45kgs.

43. When asked in the hearing about the description discrepancy in the invoices, Mr Spencer stated initially that “You wanted a description, so I sent you a proper description”. He then said that he had asked the Chinese supplier to send a better description and so they had sent it. He did not provide any copy correspondence with the supplier or other information to support this statement.

44. On balance, we prefer the information on the original bill of lading and the invoices provided by the freight agent. We do not consider that the appellant’s evidence satisfies the burden of proof on the appellant to show that the goods imported did not have pedals and conclude that the goods in this import were electric bicycles with pedals and therefore within 8711609010.

Import 4 - ref 064656B - entry date 23 September 2020

45. This was an import of 10 packages. The consignor was “Shanghai Ion Supply Chain Managemen” (the name is truncated on the import form) in China. The goods were described on the form as “Moped”, and the “Marks” section states “www. sur-ron.com”. The commodity code used was 8711609090.

46. HMRC contended that the correct code was 8711609010.

47. Mr Spencer provided a bill of lading, invoice and packing list in respect of this import to HMRC on 3 June 2021. The bill of lading and packing list show the shipper as “Foshan Haojun Motorcycle Co Ltd”; the invoice shows the shipper as “Forshan Haojun Motorcycle co ltd”. The bill of lading is for 10 cartons, the goods being described as “bike”. The ‘marks’ section of the bill of lading states “www.sur-ron.com”. The invoice refers to “moped bike” and states “n/m” in the ‘marks’ section. The packing list also refers to the goods as “bike” and has “n/m” in the ‘marks’ section. The packing list and bill of lading each show the total weight of the shipment as 790 kgs.

48. Mr Spencer provided another copy of the bill of lading for this shipment on the same date. This copy contains the same reference number and date. The only difference from the other copy provided on the same date is that the description of the goods is “electric bike” and on the second line below that in the description section is “8711600010”.

49. Mr Spencer also provided another copy of the invoice and further copy of the bill of lading to the Tribunal on 26 September 2022, together with a picture of motorised bicycle without pedals which appeared to have been copied from a website. The further copy of the

bill of lading describes the goods as “e-bike” only. The copy invoice describes the goods as “sur ron ebike” and has no entry in the ‘marks’ section. The font used for the description, quantity, unit price and total amount is different to that in the copy invoice provided to HMRC. No information as to the source of the photograph was provided but it appears to have been saved from a website as the photograph shows only the moped on a white background. There was no information as to the origin of the photograph.

50. In the hearing Mr Spencer stated that Sur-ron was a Chinese motor bike and these were not genuine Sur-rons as those were expensive. He stated that it wasn’t possible to get pedal Sur-rons when HMRC contended that the supplier website showed that they also sold pedal bicycles, although he provided no further evidence in support of this. He further pointed out that the supplier company had the word “motorcycle” in its name.

51. The per item weight of the goods in this shipment (79 kgs) is rather heavier than that for the other disputed imports. However, we note HMRC’s evidence that the manufacturer also produced electric bicycles with pedals and particularly also note that the customs code included by the manufacturer in the goods description on one version of the bill of lading provided by Mr Spencer was 8711600010. Although this number was not specifically explained on that bill of lading, it is a form which is consistent with it being a commodity code number. There is in fact no commodity code 8711600010 and the Tribunal considers it more likely than not that the manufacturer intended to put the commodity code 8711609010 (the code for motorised bicycles with pedal assistance), with a typographical error exchanging the 9 for a 0. This appears more likely than the two typographical errors that would be required for the number to have been intended to be 8711609090, as that would require not only the error of a 0 for the 9 (being neighbouring keys on a numerical keyboard) but also the error of a 1 for a 9, which we consider is less likely to occur.

52. Whilst we accept that the items imported may well have been some version of an electric bicycle which was probably in some form similar to a Sur-ron bicycle, we do not consider that the appellant has discharged the burden of proof on it to show that the items imported did not nevertheless have pedals in addition to a motor. We prefer in particular the evidence of the manufacturer’s attempt at providing a commodity code and conclude that the goods in this import were electric bicycles with pedals and therefore within 8711609010.

53. There was, additionally, an issue with the value of the import. HMRC contended the value declared was less than the sum actually paid. The amount declared on the import form was £7,167.77. The corresponding payment made was £8,205.24. Mr Spencer did not specifically dispute this and confirmed in the hearing that the difference was due to additional packing and shipping costs. He did not dispute that this should have been included when calculating the amounts payable on import.

Import 5 - ref 065415G - entry date 20 January 2021 – valuation error

54. The classification code in this import was not in dispute, although Mr Spencer provided evidence which suggested that he thought it might have been albeit that the evidence was inconsistent with the code actually used on import, as set out below.

55. This was an import of 10 packages with the commodity code given on the form as 87116010. The Tariff describes this code as being for “Bicycles, tricycles and quadricycles, with pedal assistance, with an auxiliary electric motor with a continuous rated power not exceeding 250 watts”. The supplier is “Changzhou Steamoon Intelligent”. The description on the import form is not a model of clarity, as it states “Cartons STC Moped Freight Prepaid Telex Release”.

56. The packing list and invoice provided by Mr Spencer to HMRC on 3 June 2021 describe the goods as “bicycle” and each states that the HS code is 8711609010. These documents are dated 29 September 2020. The bill of lading provided by Mr Spencer on the same date is dated 7 December 2020 and describes the goods as “moped”. The aggregate gross weight for the 10 items on the bill of lading is 350kgs, or 35 kg per item, which we consider is not consistent with the items shipped being mopeds.

57. The same bill of lading and invoice were supplied to the Tribunal by Mr Spencer on 29 September 2022. In addition, on the same email, Mr Spencer attached a photograph of a moped with a watermark across it stating “www.steamoon.com”.

58. Mr Spencer did not make any particular submissions as to this import and so did not say why, when the code used on this import was for bicycles with pedal assist and was not disputed by HMRC, he chose to provide a photograph of a moped without pedals in connection with this import. We note from correspondence that Mr Spencer did make an application to HMRC for a refund of duty in respect of this import. That application was refused. The refusal was not appealed.

59. HMRC contended that the value declared for import was less than the sum actually paid. The customs value shown on the import form was £2,753.90, which is the amount on the invoice. The appellant bank statement showed a payment of £3,373.97 in respect of this shipment. HMRC therefore concluded that there had been an under declaration of £520.07.

60. In the hearing Mr Spencer did not dispute the difference, explaining that the difference between the invoice value and the price paid was the cost of additional packing and priority shipping. He did not dispute that this should have been included when calculating the amounts payable on import.

Import 6 - ref 105235W - entry date 23 April 2021 classification and valuation errors

61. This was an import of 10 packages. The consignor was CNEBIKES Co Ltd in China. The goods were described on the form as “Electric bike”. The commodity code used was 8711609090.

62. HMRC contended that the correct code was 8711609010.

63. The packing list copy provided by Mr Spencer to HMRC on 3 June 2021 in respect of this shipment is dated 25 February 2021 and includes a description of the goods as “electric bike” and the ‘mark’ described as UK2520102704. The quantity of goods shipped is 10 cartons.

64. One of the documents provided by Mr Spencer to the Tribunal by email on 26 September 2022 was a commercial invoice from CNEBIKES CO., LTD for 10 electric bikes. This invoice is addressed to the appellant and dated 26 October 2018, although Mr Spencer had stated in his witness statement that he only began importing these goods because of the downturn in his locksmith business as a result of the coronavirus pandemic lockdown from March 2020.

65. The same email to the Tribunal from Mr Spencer included a bill of lading dated 6 March 2021 for a shipment of 10 “motorcycle” from the same company (previously also provided to HMRC) and a photograph of a motorcycle. The photograph is not detailed enough to show any manufacturer or model name; all that can be distinguished on it is the numbers “125”, presumably referring to the engine capacity. No information as to the source of this photograph was provided but it appears to have been saved from a website as the photograph shows only the moped on a white background.

66. The bill of lading states the gross weight of the consignment as 350kgs; this is confirmed by the packing list which additionally shows the gross weight per carton as 35 kgs. We consider that it is not likely that a motorcycle of the type shown in the photograph would only weigh 35 kgs.

67. Considering all the evidence, we conclude that the goods in this import were electric bicycles with pedals and therefore within commodity code 8711609010.

68. There was, additionally, an issue as to the customs value. HMRC contended the value declared was less than the sum actually paid. The declared customs value was £2,368.63. The bank statement information provided by Mr Spencer showed payments in respect of this shipment of £25 and £2,984, totalling £3,009. Mr Spencer did not dispute this in hearing and confirmed that the difference was a payment for additional packing and shipping costs. He did not dispute that this should have been included when calculating the amounts payable on import.

Submissions

69. For the appellant, Mr Spencer contended that the imports were all of motorcycles or mopeds, without pedals and that HMRC had provided no evidence to show that the imports were anything else. As noted above, the burden of proof is on the appellant to show that the commodity codes were correct and not on HMRC to show that the codes were incorrect.

70. HMRC contended that the appellant had not satisfied the burden of proof on it to show that the commodity code was correct. There was no correspondence between the appellant and supplier, no catalogue or website information provided to support the description of the goods ordered, nor copy orders showing the goods ordered. The photographs provided by the appellant were offered with no explanation as to their source nor any link to the make or model of goods imported.

71. HMRC submitted that the only clear evidence was that of Mr Spencer's email of 21 June 2021 which provided the reply "just pedal bikes some pedal assist bikes", in response to the question of whether he imported any goods that were more like mopeds or motorcycles, without pedal assistance. HMRC state that they did not agree with Mr Spencer's comment in the hearing that this email was a "for instance".

72. Taking into account all of the evidence, including the evidence of the appellant in correspondence that the power of the motors in the bicycles exceeded 250 watts, HMRC contended that the General Interpretation Rules meant that, as the chapter and heading were agreed, the appropriate tariff should be that which most closely describes the goods, being 8711609010. HMRC contended that, in this case, the code referring to pedal assistance was a better description than the more general description of 'Other' contended for by the appellant.

Decision

Valuation

73. The assessments with regard to currency valuation and the omission of packing and shipping costs were not disputed in the hearing and so we find that the notices in respect of those elements were correctly raised.

Commodity Codes

74. Having considered all of the evidence, as set out in the discussions as to each of the disputed imports, we do not accept that the appellant's description of the goods imported as being "just pedal bikes some pedal assist bikes" was intended only as an example. The context of the email, noting the question asked and the lack of any further information in that email means that we find that the appellant intended that answer to cover all of the imports.

75. As we find that the appellant described the goods imported as having pedal assistance and find that this is also supported by the documentary evidence provided and discussed above, we find that the appellant has not discharged the burden of proof upon it to show that the commodity codes used on import in the disputed imports were correct.

76. We therefore uphold the demand notices in full and the appeal is dismissed.

Right to apply for permission to appeal

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

**ANNE FAIRPO
TRIBUNAL JUDGE**

Release date: 06th NOVEMBER 2023