

C00120

CUSTOMS DUTY—classification of tarpaulin coloured blue on one side and green of the other—whether this is the result of coating and whether the coating can be seen with the naked eye test in Note 2 to Chapter 59—yes—appeal allowed

LONDON TRIBUNAL CENTRE

NDC (UK) LIMITED Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: DR J F AVERY JONES CBE (Chairman)

MRS CAROL DEBELL

MRS HEATHER KELLY

Sitting in public in London on 27 June 2000

Mr Ian McIver, director of the Appellant company, for the Appellant

Miss Sarah Moore of counsel instructed by the Solicitor for the Customs and Excise for the Respondents

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DECISION

1. This is an appeal by NDC (UK) Limited against a decision contained in a letter dated 14 October 1999 to reclassify an import entry no.071-0516E dated 19 August 1999 for customs duty. The Appellant was represented by Mr Ian McIver, a director of the Appellant, and the Commissioners by Miss Sarah Moore of Counsel.
2. The goods consist of multitarp polyuethylene tarpaulin. It is made from polyethylene tape or strip of a width not exceeding 5 mm. The goods are 5 by 4 metres in total. The Commissioners' description says that it is possibly laminated on both sides with a coating of non-cellular plastic which is not visible to the naked eye. They say it is dyed blue on one side and green of the other. The commodity code under which the goods were entered was 3926 90 91 90, and the reclassification by the Commissioners was under 6396 12 00 00. It is common ground that which of these is right depends on the result of the following test contained in Note 2 to Chapter 59:

"Heading No.59.03 applies to:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square metre and whatever the nature of the plastic material (compact or cellular) other than:...

(3) Products in which the textile fabric is either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39)."

3. The Appellant contends that by applying the naked eye test the coating can be seen, with the result that the goods are classified under Chapter 39, and the Commissioners contend that the coating cannot be seen, with the result that they are classified under 6396, which is agreed to be correct if the Commissioners are right about the result of the test. The European Court of Justice has explained the meaning of the naked eye test in *Howe & Bainbridge BV v Oberffinanzdirektion Frankfurt am Main* (Case 317/81) that the purpose of the test is to allow speedy checking on customs clearance, that it must be possible to observe the coating directly and not to infer it from other properties, such as the stiffness of the fabric. The Court also decided that it was for the member states to designate the authorities and persons required to undertake the tariff classification and to decide their training in order to enable them properly to fulfil their tasks.
4. We heard evidence from Mr Nicholas O'Brien who carried out the naked eye test for the Commissioners. He has been dealing with classification matters since 1993 and he specialises in fabrics, garments and plastics. He has carried out the test on over 100 similar products. He said that the sample should be looked at in normal daylight conditions using normal vision (corrected if necessary with spectacles) and that the person must be able to see clear visual evidence alone of a coating on both sides of the fabric. A change in colour cannot be taken into account, nor can a shine or sheen to the material as the effect of passing such fabric through heated rollers can cause this. Feeling or picking at the surfaces of the material is not permitted. Based on his observations he found no clear evidence of a coating being applied to either side. Any coating was not patchy in appearance, nor were there any pools at the intersections of the warp and weft threads which would indicate that the coating had filled in the gaps in the material. He agreed that the Commissioners' description that the goods had been dyed green on one side and blue on the other was impossible.
5. Mr McIver for the Appellant contended that the coating could be deduced from the visual examination. He said that one could deduce from looking at the sample that there was woven material between two covers of different colours. Miss Moore contended that the Tribunal should be cautious before coming to a different conclusion from an experienced officer like Mr O'Brien, although she accepted that we had the power to do so.
6. We shall describe the results of the Tribunal's visual examination. The sample is green on one side and blue on the other. Looking from the green side one can see squares about 3 mm across where the fabric is even. There are many imperfections in the fabric, all of which seem to be in the same direction, and one can see cases where a piece of fabric has become twisted, which shows as a lighter colour green, and cases where there is no fabric at all, resulting in a blue colour. It is clear from the twisted strips

that the fabric is not green on one side and blue on the other because when the strip is clearly twisted it still appears to be green, although a lighter colour green. Where there is no fabric because the strips have become displaced the sample does not have any holes in it; the sample is flat on both sides. Seen from the blue side the imperfections appear less, presumably because the blue is darker than the green. However, where there is no fabric the part appears darker. We deduce from this that where there is no fabric one is looking at the coating on the other side which accounts for the blue colour seen from the green side, or the darker colour seen from the blue side which results from seeing the darker surface on which the material is sitting. If there had been a coating on one side only one would expect to see the ups and downs of the weave whereas the surface is flat even in places where there is no fabric. We accept that the lack of such ups and downs in the fabric could be the result of passing it through heated rollers, but this would not account for the flat surface on both sides where one can see that there is no fabric. From this we deduce that there is a green coating on one side which accounts for the green colour when seen from that side and a blue coating on the other side which one can see directly in the places where there is no material. The reason why the places where there is no material appear dark from the blue side is that the blue is darker than the green and so one is in effect seeing through both resulting in a darker blue. Mr McIver told us that we were in fact looking at a colourless material sandwiched between a blue and green coating, which is what we deduced from our visual examination.

7. We have hesitated before coming to a different conclusion from as experienced an officer as Mr O'Brien. We agree that it is not possible to see the coating directly but his method allows one to deduce its existence from imperfections in the coating such as a patchy appearance. We have deduced the existence of coating on both sides from a purely visual inspection and we consider that we are applying the same approach as he did. We are fortified in our decision by the fact that a Tribunal came to a similar conclusion in relation to a similar product in *Tarpaflex v Customs and Excise Comrs* (1998) Customs Decision No.C84.
8. Accordingly, we allow the appeal.

J F AVERY JONES

CHAIRMAN

Released : 7th July 2000

LON/99/7138