

C00124

CUSTOMS DUTIES -Community Customs Code and its implementing provisions - tariff classification of ladies indoor slippers - appropriate heading in combined nomenclature - looking at sole and textile covering - textile covering held to be an accessory - appeal dismissed.

MANCHESTER TRIBUNAL CENTRE

D JACOBSON & SONS LTD Appellants

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MRS E GILLILAND(Chairman)
MRS M CROMPTON

Sitting in public in Manchester on the 6th June 2000

Mr H Jacobson Managing Director of the Appellants for the Appellants

Mr H Keith 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 D. Jacobson & Sons Limited (the Appellants) against a decision of the Commissioners given by letter of 27 January 1999 on the completion of a departmental review by Mrs Linda May Chandler a Customs Officer employed in the Commissioners Tariff and Statistical Office based at its Southend Headquarters.
2. By a Direction of another Tribunal Chairman on 10 November 1999 it was directed (inter alia) that the appeal be heard de novo and thus the appeal comes before this Tribunal today. Mr H Jacobson the Managing Director of the Appellants has presented the appeal. Mr H Keith of Counsel has appeared for the Commissioners.
3. The Appellants are long-established footwear importers and distributors whose business operates from premises at Bacup Road Cloughfold Rawtenstall Lancashire BB4 7PA. The issue involves the tariff classification and thus the duty rate of an item of footwear. On 7 September 1998 the Appellants made an application for a European Community - Binding Tariff Information (BTI) in respect of a product described by them as: "Ladies Slipper with uppers and soles of textile material". This was known as "Cosy Skin" and under the heading of Classification the Appellants had indicated the community code contained in the

integrated Tariff of the United Kingdom which they considered appropriate as:
6405 20 91 00.

4. The BTI issued by the Commissioners on 6 October 1998 classified the product in the customs nomenclature as 6404 19 10 00. The description in the BTI is of: "Ladies mule slipper. Uppers of a light green textile (towelling) material with four triangular designs sewn into the toe vamp. Soles of plastic with the central area covered in a thin layer of textile. This textile sole area has raised plastic dots for grip". Section 9 under the heading Justification of the classification of the goods stated: "Classification is determined by the provisions of GIRs 1 and 6 as well as the text of headings 6064 (sic, corrected later to 6404) and 6404 11."

5. The Appellants requested a review which as we have indicated was undertaken by Mrs Linda May Chandler who has given evidence to the Tribunal. She upheld the decision on classification (6404 19 10 00) in the BTI issued by the Commissioners on 6 October 1998. The Appellants appealed to the Tribunal and in the Notice of Appeal submitted on their behalf on 25 February 1999 contended that the footwear's proper classification was 6405 20 91 00 in accordance with "the legal text of Note 4(b) to Chapter 64".

6. The effect of moving the heading from 6405 to 6404 is to increase the duty from 4.2% to 17.6% and also in connection with goods classified under 6404 an import licence is required.

7. The legal origin of the European Community Customs Tariff is in the Treaty of Rome, Article 9. A Community Customs Code (the Code) within the European Union was established by a Council Regulation of 12 October 1992 ((EEC) No 2913/92). The implementing provisions were laid down in a Commission Regulation of 2 July 1993 ((EEC) No 2454/93) (the Implementing Provisions). A Council Regulation of 23 July 1987 ((EEC) No 2658/87) dealt with the tariff and statistical nomenclature and with the Common Customs Tariff. In effect there is a uniform classification of goods entering the European Union (the Combined Nomenclature or CN) and this is updated annually through the (Combined Nomenclature) Annex I by an amendment of the said Council Regulation ((EEC) No 2658/87). The European combined nomenclature is based on an international harmonised system. There are various interpretative provisions applicable as set out in the Annex and elsewhere.

8. BTIs are made under the provisions of, first, Article 12 of the Code and, secondly, Title II of the Implementing Provisions. Article 12.1 of the Code states: "The customs authorities shall issue binding tariff information ... on written request, acting in accordance with the committee procedure".

9. The heading to Chapter 64 is "Footwear, Gaiters and the Like; Parts of Such Articles". The structure of the relevant goods classification is that there is a specific description in 6404 and a general description in 6405 of "Other footwear". Therefore, prima facie, if an item does not fall within the specific description in 6404 it will fall within the residual description of "Other footwear" in 6405.

10. It is common ground in the instant case that the item is an item of indoor footwear and the issue is whether it falls within 6404 19 10 or 6405 20 91. It is agreed also between the parties that the item has uppers of textile material. The question of the correct classification thus depends upon the nature of the sole. 6404 applies to: "Footwear with outer soles of rubber, plastics, leather or composition leather ...". If the soles of the slippers properly can be said to consist

of "rubber, plastics, leather or composition leather" the correct classification will be 6404 19 10. If not the classification will be 6405 20 91.

11. In determining what is the constituent material of the outer sole regard has to be taken of Note 4(b) to Chapter 64 which states as follows:

"Subject to note 3 to this chapter:

"...

(b) the constituent material of the outer sole shall be taken to be the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements such as spikes, bars, nails, protectors or similar attachments."

12. Samples of the item have been produced to the Tribunal. We are satisfied and find that the outer sole consists of two distinct elements: first, an outer edge or rim of plastic about 125 mm wide and a little over 50 mm thick, and, secondly, an inset within the outer rim of plastic or rubber which is covered with a thin layer of textile. The textile has on it a regular scattering of plastic or rubberised dots or pimples which are clearly intended to provide additional grip. The outer rim also has a textured surface again clearly intended to assist grip on indoor use.

13. We are satisfied that if the textile covering is disregarded there can be no doubt that the outer sole would consist entirely of rubber or plastics and that the slipper would be properly categorised under 6404 19 10.

14. In our judgment the question to be considered is whether the textile covering the inset is to be regarded as an "accessory" within Note 4(b). There is no doubt in our view that the inset which is covered by the textile does have a greater surface area than the plastic rim. There does not appear to be any dispute on this. There is a distinct physical discontinuity between the inner edge of the plastic rim and the outer edge of the inset. The inset is set marginally within the outer rim and when covered by the textile it is substantially level with the plastic rim.

15. Mr Jacobson submitted on the Appellants' behalf that the textile was not an accessory but an integral part of the sole. We do not accept that that is correct as a matter of fact. The textile covers the inset and is attached to or stuck to the sides of the inset and possibly to the inside edge of the plastic outer rim. It is in fact a covering for the inset and not itself a part of the inset. It is not stuck to the base of the inset.

16. It was stated on behalf of the Commissioners that the textile covering (with its dots) had no reasonable function and should thus be disregarded. Again we cannot accept that that is correct. It does have a function. It covers the inset and together with the dots will assist in providing grip.

17. In our judgment an accessory as a matter of ordinary language is something which is added to or attached to the article to which it is an accessory. Mr Jacobson described an accessory as an "extra thing that goes with" an item such as tassels on a shoe or a bow on a slipper. However, it is not in our view restricted to such matters as tassels or bows. An inset of suede or of leather or of textile into another material can also be an accessory. If the item is serviceable and can be used for its purpose without a particular inset or addition it is in our view permissible to regard the inset or addition as an accessory to the item.

18. We have looked at the item in question and have seen the inset beneath the textile and we are satisfied that the slippers without the textile covering would be perfectly serviceable as indoor slippers. They are intended, as Mr Jacobson confirmed, to be sold as a cheap product at the lower end of the market and in our view the textile covering adds little if anything to the durability of the slipper. We consider that the textile covering is in truth and reality an accessory and not an integral part of the product. In our judgment the textile is simply a trim covering the inset.

19. The Commissioners accepted that Commission Regulation (EC) No 1165/95 was not directly applicable as relating to a different product. Under Regulation (EC) 1165/95 there was categorised as falling within 6404 19 10:

"2. Slippers consisting of a textile upper and an outer sole of plastic (approximately) one centimetre thick, the outside of which is entirely covered by a very thin layer of textile material, with poor wearing properties, stuck along the edges."

In our judgment this provision is not a persuasive comparison in the instant case because the description is of a different type of item in more than minor regards, namely, an outer sole of plastic approximately 1cm thick entirely covered by a layer of textile of poor wearing quality. The soles of the slippers in the instant case are not entirely covered with a layer of textile and we are not satisfied that the plastic sole is approximately 1cm thick. The plastic sole in the present case is only about 60mm thick.

20. Reference was made also to Commission Regulation (EC) No 2518/98 as being on similar facts and which applies 6404 19 90 to:

"4. Footwear with uppers of textile material with outer soles of plastics, covered with a layer of woven textile material approximately 1mm thick which has poor wearing qualities.

This woven material makes contact with the ground."

The Reason alongside the CN Code states inter alia:

"These goods are therefore not classifiable within CN Code 6405."

21. This Regulation however was not promulgated until 23 November 1998 and did not come into effect until twenty one days after its publication in the Official Journal of the European Communities on 25 November 1998. The BTI decision from which this appeal is brought was made on 6 October 1998, prior to the coming into force of the Regulation and the Regulation does not have retrospective effect.

22. Counsel for the Commissioners referred us also to Commission Regulation ((EC) No 1372/1999 where there is a change to Chapter 64 Note 4(b):
"Within the meaning of Note 4(b), one or more layers of textile material which do not possess the characteristics usually required for normal use of an outer sole (for example durability, strength etc.) are not to be taken into consideration for classification purposes."

This Regulation clearly has not been in force at the time of the hearing let alone at the time of the BTI. It has been argued that it is a confirmation of the existing law. We have however to consider the law in force at the time of the tariff decision. We have considered when reaching our decision the information given in a witness statement by Catherine Margaret Sutton an officer with H M Customs and Excise who is a UK delegate to the Committee of the Tariff and Statistical

Nomenclature Section (Textiles). She said that it is proposed that a Regulation will shortly be drafted putting the classification of this slipper within 6404 19 10 00 and thus placing the matter beyond doubt. While it is noted that it is said that this is the approach of experts on the issue before the Tribunal we must look at the objective classification of the goods in question at the time of the BTI. The slipper either falls within the description in 6404 19 10 or it does not. We do not find proposals to refine the description in 6404 19 10 helpful when considering what is the proper construction of the description.

23. Evidence was led by the Commissioners of a test of the wearing properties of the textile. There is no UK standard but the effect of the evidence was that at a test (carried out at the Shoe and Allied Trades Research Association (SATRA) Footwear Technology Centre) known as the Martindale Abrasion Test, dry, after 25,600 revolutions the damage was "Complete wear (at a number of sites) of textile base," whereas SATRA would expect a performance of no worse than moderate wear after a greater number of revolutions. The test report prepared by Keith John Parker, who also gave evidence to the Tribunal, stated (inter alia):

"The textile material is of poor durability and the centre soling will wear prematurely when used for indoor wear."

24. Mr Jacobson submitted that this standard was too severe as these slippers were being sold at a price substantially below the prices at which the higher revolutions standard would be appropriate. They would be priced at £3 though most of the Appellants' customers would sell them at £1.99 per pair. Mr Jacobson also produced to the Tribunal a copy of a report he had obtained from Intertek Testing Services of a "Ladies Red Multi Mule Slipper". The result of that report using a test method of Martindale Abrasion (BS5690) (revs) was:

"Moderate wear of the red fabric coating after 12800 revs dry" and further:

"We therefore feel that these soles should be suitable for use as indoor footwear".

25. The Commissioners evidence was led for the purpose of showing that the textile had "poor wearing properties". The test report obtained by Mr Jacobson we have found of little assistance in that it was not a test of the same slipper and no one has had an opportunity to see the "Ladies Red Multi Mule Slipper" tested or examine the person supervising the test. However, for the reasons we have already indicated we do not consider that Commission Regulation (EC) 1165/95 nor Commission Regulation (EC) No 2518/98 which refer to textiles with poor wearing properties are relevant to the question whether the textile is an accessory or not. As we have already stated the textile is simply a trim covering the inset.

26. Insofar as it may be relevant we do find that the textile covering does, looked at objectively, have poor wearing properties but that is not the foundation of our decision that the slipper is properly classified under 6404.

27. General Rules 1 and 6 which are General Rules for the interpretation of the combined nomenclature make clear that for legal purposes the classification of goods in the sub-headings of a heading is to be determined according to the terms of the sub-headings and related sub-heading notes. The relative section and chapter notes also apply (unless the context requires otherwise). The titles of sections chapters and sub-chapters are for reference only. We have directed our attention accordingly.

28. Mr Jacobson referred the Tribunal also to a letter dated 18 December 1998 indicating that the Dutch Customs had issued a BTI in respect of a similar slipper with an identical sole to that in the instant case and this was classified by the Dutch Customs under 6405 20 91. While we have noted this decision we do not accept that it is correct.

29. In our judgment for the reasons we have stated the correct classification is 6404 19 10 00.

30. Accordingly the appeal is dismissed.

31. The Commissioners have not sought costs so I make no direction as to costs.

Mrs E Gilliland
Chairman

Release Date: 16th August 2000