

C00135

CUSTOMS DUTY – tarpaulin – whether plastic coating could be seen with the naked eye (Chapter 59 Note 2a(3)) – no -- whether tarpaulin (6306) or other made-up articles (6307) – tarpaulin – appeal dismissed

LONDON TRIBUNAL CENTRE

LLOYD PASCAL & COMPANY LIMITED	Appellant
- and -	
THE COMMISSIONERS OF CUSTOMS AND EXCISE	Respondents

Tribunal: DR JOHN F AVERY JONES CBE (Chairman)
MOHAMMED FAROOQ

Sitting in public in Birmingham on 1 March 2001

Mike Hodge of Mike Hodge Associates for the Appellant
Owain Thomas 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 Lloyd Pascal and Company Limited against a binding tariff information issued by the Commissioners on 23 March 2000 and reviewed by them on 9 June 2000 categorising the product under commodity code 630612 00 00 as a tarpaulin. The Appellant was represented by Mr Mike Hodge, and the Commissioners by Mr Owain Thomas.
2. The product is a light green sheet 3m by 4m consisting of woven polyethylene strips about 2 to 3mm across so that one sees the pattern as squares where the warp and weft cross. In the application for the BTI the Appellant described it as a flat garden cover. It is included in the Argos catalogue under the heading "Tarpaulin Style Sheet" and described as a

"groundsheet or cover for vehicles and luggage. Tearproof, laminated weather resistant, woven polyethylene. Reinforced roped edges and metal grommets. Washable."

There is a picture of it covering a trailer. We were shown advertising material listing its uses as "roof rack, boat cover, children's pool or sandpit cover, trailer cover, picnics-camping etc, backyard shelter, haystack covers."

3. Mr Hodge, for the Appellant, contends that the product should be categorised in Chapter 39 as a textile material. Mr Thomas, for the Commissioners, maintains the decision that it is a tarpaulin under 6306.
4. It is common ground that the fabric itself is within 5407 but as it is coated with plastic it is within 5903 unless it is excluded by the following note to Chapter 59, which in accordance with Rule 1 of the General Rules of Interpretation is legally binding:

"2. Heading No.5903 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)."

5. If therefore the coating can be seen with the naked eye, it is classified as textile material within Chapter 39; if it cannot, it is within Chapter 63. Mr Hodge contended that everyone knew that it was coated, but this is not the correct test, which is: can the coating be seen with the naked eye? The European Court of Justice has explained the naked eye test in *Howe & Bainbridge BV v Oberfinanzdirektion 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.
6. We heard evidence from Mrs Catherine Sutton, the officer who performed the naked eye test originally, and Mrs Linda Chalker, who performed the test in the review. Mrs Sutton has been doing this type of work for the last two years and has performed about 50 naked-eye tests, 20 of them on similar products. Both witnesses gave evidence that they had performed the test in the manner laid down by the European Court. Both of them came to the same conclusion, that the coating could not be seen with the naked eye.
7. If the Appellant loses under this test, it contends that the product is not tarpaulin within 6306 but other made-up articles within 6307. The HSEN, which is not legally binding but which is a useful aid to interpretation, describes tarpaulin as follows:

"Tarpaulins. These are used to protect goods stored in the open or loaded on ships, wagons, lorries, etc, against bad weather. They are generally made of coated or uncoated man-made fibre fabrics, or heavy to fairly heavy canvas (of hemp, jute, flax or cotton). They are waterproof. Those made of canvas are usually rendered waterproof or rotproof by treatment with tar or chemicals. Tarpaulins are generally in the form of rectangular sheets, hemmed along the sides, and may be fitted with eyelets, cords, straps, etc. Tarpaulins which are specially shaped (e.g., for covering

hayricks, decks of small vessels, lorries, etc.) also fall in this heading provided they are flat.

Tarpaulins should not be confused with loose covers for motor-cars, machines, etc., made of tarpaulin material to the shape of these articles, nor with flat protective sheets of lightweight material made up in a similar manner to tarpaulins (heading 63.07)"

(The second paragraph is in smaller type in the original.)

8. Mr Hodge contended that the product was within the second paragraph above because it was lightweight compared to the normal type of tarpaulin one sees covering goods on lorries. Mr Thomas contended that the product fell clearly within the first paragraph. The fact that it was lightweight was not the sole distinguishing feature because, as Mrs Sutton said, man-made fabrics which are within the first paragraph also tended to be lightweight.

Reasons for our decision

9. We remind ourselves that the issue is not whether the product is coated with plastic but whether one can see that it is by applying the naked eye test. Neither of the officers of the Commissioners who are both experienced in these matters could see the coating. We examined the product closely ourselves and have come to the same conclusion. We drew the attention of the parties to some imperfections in the material to see whether (as was the case in NDC (UK) Limited v Customs and Excise Comrs (2000) Decision No.C00120) there was a place where no fabric could be seen and so one must be seeing only the coating. This could not be seen. We therefore uphold the Commissioners' decision on this point.
10. We must add our sympathy for Mr Hodge's point that the naked eye is a rough and ready test which is really not suited to situations like this where everyone knows that there is in fact a coating but the naked eye test cannot identify it. It is particularly odd that the coating could be seen in the product in NDC (UK) Limited, which was similar in appearance to this one, but obviously of a worse quality because there were places in the product in that case where one could see no fabric. That was not the case with the better quality product here.
11. On the basis that the coating cannot be seen, the next issue is whether the material falls within 6306 as tarpaulins, as contended by the Commissioners, or 6307 as other made-up articles, as contended by the Appellant. The second paragraph of the HSEN quoted above is somewhat mysterious because we agree with Mr Thomas that the first paragraph would include coated or uncoated man-made fibres, which Mrs Sutton said tend to be lightweight, and so the weight of the material cannot be the sole determining factor. The second paragraph may be to exclude items made up like tarpaulin, for example with eyelets and cords, but which are unsuitable for protecting goods stored in the open against bad weather perhaps because they are not waterproof. It might possibly be aimed at something that would be suitable for use for sitting on for a picnic in dry weather but not strong enough or waterproof enough to protect goods against bad weather. In any event, it is not necessary to decide what the second paragraph refers to because if the item is a tarpaulin it must fall within that heading rather than the following "other" heading. We consider that it is a tarpaulin. It is advertised for use as covering goods stored in

the open, such as a boat or a haystack, and for covering goods in a trailer in the Argos catalogue against bad weather; it is made of coated or uncoated man-made fibre; it is in the form of rectangular sheets; and it is fitted with eyelets and cords. It complies with every item in the description of tarpaulin in the HSEN and so we find that it is a tarpaulin and we do not consider that it should be placed in the "other" category.

12. Accordingly, we dismiss the appeal.

J F AVERY JONES
CHAIRMAN

RELEASED : 8th March 2001

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