UT Neutral citation number: **[2023] UKUT 00278 (TCC)**

UT (Tax & Chancery) Case Number: UT/2022/000112

Upper Tribunal
(Tax and Chancery Chamber)

Hearing venue: The Rolls Building
London EC4

Heard on: 19 September 2023
Judgment date: 17 November 2023

Customs Duty - Commodity Codes – classification – wooden panels – shuttering for concrete constructional work or plywood, veneered panels and similar laminated wood - appeal allowed

Before

JUDGE RUPERT JONES
JUDGE NICHOLAS PAINES KC

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

INTERNATIONAL PLYWOOD (IMPORTERS) LIMITED

Respondent

Representation:

For the Appellant: Gideon Barth, Counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondent: David Bedenham, Counsel, instructed by CTM Tax Litigation Limited

DECISION

Introduction

1. This appeal concerns the correct Customs classification of Plastform wooden panels ('the panels') imported by the Respondent, International Plywood (Importers) Limited ('IPL').

2. Following a review, HMRC had classified the panels under commodity code 4412 of the Combined Nomenclature ('CN') ('*Plywood, veneered panels and similar laminated wood'*) and the specific subcategory 4412 94 10 ('*Other – Blockboard, Laminboard and battenboard with at least one outer ply of non-coniferous wood*'). HMRC raised a demand for £277,930.83 (comprised of £231,609.02 in Customs Duty and £46,321.81 in Import VAT), based on a customs duty rate of 10%[1] and imposed a penalty of £1,250.

3. The First-tier Tribunal ('FTT'), in a decision dated 15 July 2022, released as [2022] UKFTT 223 (TC), decided that the correct customs classification is within tariff heading 4418 ('*Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes'*). The FTT upheld IPL's submissions that the panels were properly classified under subheading 4418 40 00 ('*shuttering for concrete constructional work*'), which attracted a zero rate of duty. The FTT accordingly allowed IPL's appeal against HMRC's classification decision.

4. With the permission of the Upper Tribunal ('UT'), HMRC, the Appellants, appeal against the FTT decision. They contend that the FTT erred in law in makings its decision and that it should be remade in their favour. HMRC submit that the appropriate classification is within 4412 94 10.

5. We have concluded that two of HMRC's six grounds of appeal succeed. We therefore allow the appeal.

Background

6. IPL is a specialist wood products importer, and its name specifically indicates that it imports plywood.

7. The appeal concerns the correct classification for customs duty purposes of the panels, manufactured in Brazil by Madeireira Thomasi SA, batches of which were imported into the United Kingdom by IPL between 8 December 2015 and 17 July 2017. This was at a time when the UK remained a member state of the European Union.

8. IPL declared the Panels under commodity code 4418 40 00 ("shuttering for concrete constructional work"). The rate of customs duty under that code is 0%. The panels consist of 3 layers of cross-laminated timber (with at least one layer exceeding 6mm thickness) with a cement resistant Medium Density Overlay ("MDO") with a coating of Noxcrete (a chemically active release agent)**.** According to a diagram of the panels, the outer layers (1 & 3) were of Eucalyptus – long grain and the inner layer was Taeda pine – short grain. The diagram suggested that each layer had a thickness of 6 mm but inspection of a sample of panels revealed outer layers around 8mm in thickness. The panels were 8ft by 4ft in height and width.

9. On 16 March 2018, HMRC informed IPL that they were undertaking an "International Trade audit on the classification of imports of Formwork panels (for concrete construction) and

[1] See WS of Jonathan Miller, §43 – incorrectly recorded by the FTT as 7% at §2 of the Decision.

Plywood panels". Between March 2018 and January 2019, IPL and HMRC liaised in relation to the classification issue.

10. On 21 February 2019, HMRC wrote to the Appellant stating that the Panels were properly classified to commodity code 4412 94 10. The rate of customs duty under that code is 10%. On 26 March 2019, HMRC issued to the Appellant a C18 Post Clearance Demand (reference C18285851) in the sum of £303,649.39. HMRC issued a C18 Customs Demand and penalty on the imports because they had formed the view that IPL had used the wrong commodity code when declaring imports of the product. Having initially stated that the correct commodity code was 4412 33 00 00, Jane Martin (a member of HMRC's classification team) determined that the correct commodity code was 4412 94 10 00 (for which the rate of duty is 10%). Jane Martin explained her reasoning thus:

> "…commodity code 44 12 33 00 00 only covers ply layers not exceeding 6mm thick. The Plastform sample featured ply layers which clearly exceeded 6mm thickness (each approximately 8mm). As the ply layers of the Plastform sample were clearly thicker than 6mm, commodity code 44 12 33 00 00 was excluded, and an alternative commodity code 44 12 94 10 00 for products 'other' than covered by the previous subheading is appropriate".

11. HMRC excluded the Panels from subheading 4418 40 00 on the basis of the Harmonised System explanatory note to 4418 40, which we set out below.

12. 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 were the subject of the appeal to the FTT.

The Law

Customs Legislation, Union Customs Code,

13. The Union Customs Code ('UCC') was established by EU Regulation 952/2013 to increase consistency on customs. The CN, laid down in Regulation 2658/87, is the legal basis for the tariff. The CN is amended annually and reproduced in the UK Tariff. The CN, which is directly applicable in all Member States, sets out the tariff subheadings and subdivisions for the classification of goods.

14. The six General Rules of Interpretation ("GIRs"), contained in Part 1, Section 1 of the CN, set out the principles by which the CN must be interpreted. We return to the GIRs below.

15. The CN is based on the international Harmonised Commodity and Coding System ("Harmonised System" or "HS") established by the World Customs Organisation ("WCO").

16. The Explanatory Notes to the Harmonised System ("HSENs") published by the WCO are not legally binding but are highly persuasive in determining the proper classification. There are also Explanatory Notes to the CN ("CNENs") which refer to the HSENs.

Principles of interpretation and GIRs

17. The FTT accurately summarised the principles to be applied in classification appeals in its decision at [8]:

‘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 subheadings (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 (“HSENs”) 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.

18. The parties are agreed that the correct Chapter heading for the panels is Chapter 44: *Wood and articles of wood; wood charcoal*.

19. The following are the CN headings, subheadings and commodity codescontended for, followed by the relevant parts of the corresponding HSENs and CNENs where relevant.

HMRC's case: 4412

20. HMRC submit that the appropriate classification for the panels is within heading 4412: *Plywood, veneered panels and similar laminated wood*.

21. There are a number of subheadings under 4412. The first is:

4412 10 00 - Of Bamboo

- Other plywood consisting solely of sheets of wood (other than bamboo), each ply not exceeding 6 mm thickness.

22. The "other plywood" category is further subdivided, but it is unnecessary to go into this as this subheading does not apply to the panels: they are not of bamboo and do not have plies that are all of 6mm or less in thickness. There is then a further category of 'Other' at the first level subheading (ie. not bamboo and not other plywood with each ply of 6mm in thickness or less), which includes the second level subheading:

4412 94 -- Blockboard, laminboard and battenboard

23. Within that subheading, there is a third level subheading:

4412 94 10 ---With at least one outer ply of non-coniferous wood.

24. It is here that HMRC submit that the panels belong.

25. The CNENs to heading 4412 'Plywood, veneered panels and similar laminated wood' cross-refer to the relevant HSENs. The HSENs provide:

This heading covers:

(1) **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".

(2) **Veneered panels**……

(3) **Similar laminated wood**. This group can be divided into two categories:

- Blockboard, 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…

…

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** these operations do not thereby give such products the essential character of articles of other headings.

26. There is a further potential sub-classification that HMRC accepted during the hearing may be relevant within heading 4412 and the first-level subheading of 'Other' which may apply to products which are not blockboard, laminboard and battenboard, not bamboo and not other plywood with plies of 6mm in thickness or less.

27. This is 4412 99 50 (- Other; 44 12 99 -- Other; 44 12 99 50 ---- Other). It could conceivably apply to the panels (if they are Plywood rather than laminboard, and Plywood can include plies of greater than 6mm thickness). This classification would also attract a duty of 10%.

IPL's case: 44 18

28. IPL contends that the appropriate classification for the panels is within heading 44 18: '*Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes*'. At this level of classification, IPL submits that the panels are 'carpentry of wood'.

29. Within this heading there are various subheadings including 44 18 40 00: '– *Shuttering for concrete constructional work*.' This classification is free of Customs Duty.

30. It is to this subheading that IPL submits that the product belongs.

31. The HSEN to 4418: 'Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes' provide:

This heading applies to woodwork, including that of wood marquetry or inlaid wood, used in the construction of any kind of building etc, in the form of assembled goods or as recognisable unassembled pieces (eg . prepared with tenons, mortises, dovetails or other similar joints for assembly), whether or not with their metal fittings such as hinges, locks etc.

…

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 constructional work. However, plywood panels, even if surface treated for the purposes of concrete shuttering, are classified in heading 44.12.

… [Emphasis Added]

32. The CNEN for 4418 40 00: 'Shuttering for concrete constructional work', provides:

Shuttering of this subheading is an assembly used for all types of concrete constructional work (for example, for foundations, walls, floors, columns, pillars, props, tunnel sections, etc.).

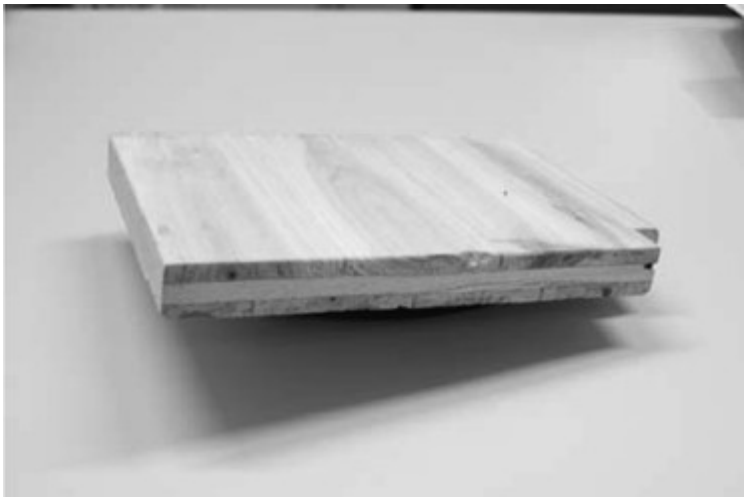
Generally, shuttering is manufactured from resinous wood (planks, beams, etc.). However, plywood panels used as shuttering (to obtain smooth surfaces) are excluded from this subheading even if coated on one or both sides and their use as concrete shuttering is unmistakable (heading 4412). [Emphasis Added]

33. The Annex to EC Classification Regulation 309/2010 provides for the classification of the following specified fir wood panel product to 4412 94 90: *--Blockboard, laminboard and battenboard---other* (not having at least one outer ply of non-coniferous wood).

ANNEX

[a] The image is purely for information.

Description of the goods	**Classification (CN code)**	**Reasons**
(1)	**(2)**	**(3)**
A three-layered fir wood panel with overall dimensions of 1 000 × 500 × 27 mm. The outer layers are 8,5 mm thick and consist of timber pieces glued edge-to-edge running parallel to one another. The core layer, perpendicularly placed to the vein of the outer layers, is 10 mm thick and consists of timber pieces (blocks/laths) glued edge-to-edge running parallel to one another. The outer layers and the edges are coated with resin. See image[a].	4412 94 90	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 4412, 4412 94 and 4412 94 90. Classification under heading 4418 as carpentry of wood, more specifically as shuttering for concrete constructional work, is excluded, as the product does not have any characteristics other than the coating of resin, enabling it to be identified as being designed for constructional purposes. See also the Harmonised System Explanatory Notes to heading 4418 (in particular the last sentence of paragraph 3). The intended use for construction shuttering is therefore not inherent to the product. Consequently, the product does not have the objective characteristics and properties to be classified under heading 4418. Given its characteristics, the product is to be classified under CN code 4412 94 90 as other blockboard, laminboard and battenboard (see also the Harmonised System Explanatory Notes to heading 4412, (3)).



The FTT Decision

34. The FTT identified the central issues in the appeal as being: (a) Were the Panels shuttering? (b) Were the Panels plywood? (c) Were the Panels excluded from Code 4418 40 00 by the EC Classification, meaning that the correct code is 4412 94 10?

35. Consistently with HMRC's decision, it was agreed between the parties to the appeal that at least one of the sheets of wood in the ply of the panels exceeded 6mm thickness such that they did not fall within 4412 10 00.

36. References within square brackets [] are references to paragraphs within the FTT's decision.

37. The FTT recorded evidence of the witnesses, in particular at [14] & [15]:

> 14. In his oral evidence Mr Attwood said … [t]he 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.

38. The FTT made relevant findings at [39], [41], [42] and [44]:

> '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.

…

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.

…

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.'

The Grounds of Appeal

39. HMRC was granted permission to pursue six grounds of appeal when submitting that the FTT erred in law in making its decision:

Ground 1: the FTT erred in not applying the definition of plywood within the Harmonized System Explanatory Notes ('HSENs');

Ground 2: the FTT relied on irrelevant considerations in concluding that the Panels were not plywood;

Ground 3: the FTT erred in concluding that the intended use of the Panels as shuttering was capable of being assessed on the basis of its objective characteristics and properties;

Ground 4: the FTT misinterpreted the HSEN and CNEN to 4418 in failing to give due weight to the importance of the whole shuttering assembly;

Ground 5: the FTT erred in not treating laminboard as a subcategory of plywood such that it should be excluded from 4418; and

Ground 6: the FTT erred in holding that the burden of proof is on HMRC.

40. We uphold grounds 4 and 5. As to ground 6, we agree that the FTT erred but the error was not material.

Overview of the parties' cases

41. The parties' arguments are addressed in more detail below.

42. Mr Barth, for HMRC, submitted that the FTT erred in making its decision in the six ways identified in the grounds of appeal. Much of his argument was directed at the FTT's failure to classify the panels as "plywood" and to apply the exclusion contained in the final sentence of the explanatory notes (HSEN & CNEN) that we cited at paragraphs 31 and above. He argued that the FTT decision should be set aside and the decision remade restoring the decision of HMRC to classify the goods under 4412 94 10.

43. Mr Bedenham, for IPL, resisted the appeal on the basis that there were no material errors of law in the FTT's decision.

Discussion and Analysis

Ground 1 - the FTT erred in not applying the definition of plywood within the Harmonized System Explanatory Notes ('HSENs')

44. Mr Barth submits that the FTT failed to follow the HSENs in its definition of plywood (see [34] of the Decision) and failed to provide reasons for not so doing.

45. The FTT recognised that the HSENs and CNENs do not have force of law but are important aids to interpretation. This point is often repeated by the Court of Justice of the European Union (CJEU).

46. In Case C-35/93 *Develop Dr Eisbein GmbH*, at [21], the Court reiterated that the Explanatory Notes:

> *…constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and, as such, may be considered a valid aid to the interpretation of the tariff. However those notes do not have legally binding force…*

47. In Case C-495/03 *Intermodal Transports BV*, at [48], the Court stated:

> *The explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see, inter alia, DFDS, cited above, paragraph 28). The content of those notes must therefore be compatible with the provisions of the CN and may not alter the meaning of those provisions (see, in particular, Case C-280/97 ROSE Electrotechnik [1999] ECR I-689, paragraph 23, and Case C-42/99 Eru Portuguesa [2000] ECR I-7691, paragraph 20).*

48. It is thus well-established that the HSENs are to be used to interpret the CN. They must be compatible with the CN and should not conflict with the CN. In the absence of conflict or some other compelling reason, the HSENs should be followed to aid consistent interpretation.

49. The HSENs to 4412 contain definitions of, among other things, plywood and laminboard, which we have set out above at paragraph 25. The definitions do not conflict or otherwise alter the meaning of the CN, so should not be disregarded.

50. There was no dispute before the FTT that the Panels consisted of three layers of cross-laminated timber, consistent with the definition of the HSEN. Mr Barth therefore contends that the FTT fell into error in failing to rely upon the definition of plywood within the HSENs and should have found that the product in question was a plywood panel (with a surface coating).

51. We reject this submission.

52. The FTT was, having regard to the evidence of Mr Attwood, entitled to reach the view (at [39] of the decision) that the panels were not "plywood" within this definition. This was consistent with the evidence of Mr Attwood who explained to the FTT "where[as] plywood is thinly sliced (or peeled) from the outer part of the log, our product is a thicker lumber cut from the core of the log…solid wood planks are also manufactured from the core of these trees" (paragraph 29 of his WS).

53. The FTT was similarly entitled to conclude, as it did, that the panels were laminboard rather than plywood: 'The Panels are of three unequal layer construction and are a form of laminboard. ... 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'.

54. Where the product was capable of falling into either definition of plywood or laminboard under the HSEN descriptions, the FTT was entitled to rely upon and accept the witness evidence available to it on the appeal, consistent as it was with the HSEN definitions.

55. The FTT came to a rational conclusion open to it on the evidence available and it gave sufficient reasons for its conclusion.

56. Ground 1 is dismissed.

<u>Ground 2- the FTT relied on irrelevant considerations in concluding that the Panels were not plywood</u>

57. Mr Barth, for HMRC, submits that the FTT erred in its reliance on certain factors to conclude that the panels were not plywood. In the absence of such erroneous factors and the persuasive (if not definitive) HSENs, the FTT would have concluded that the panels were plywood.

58. The FTT appears to have determined that the panels were not plywood because ([39]):

> (1) The panels have *'unequal layers'* whereas plywood has layers which are *'normally similar in size'*.
>
> (2) The panels 'do not look like plywood which, depending on its thickness, has a significantly greater number of layers…'
>
> (3) The panels 'do not look like plywood which, depending on its thickness, has… thinner or finer layers'.

(4) The panels are a *'specialist product'* due to the MDO Noxcrete coating.

59. Mr Barth criticises each of the four reasons relied upon by the FTT.

60. Unequal layers: the FTT held that the panels have three unequal layers whereas plywood has equal layers. He argues this is wrong:

(1) There was no evidential or other basis before the FTT for the assertion that plywood has equal layers. Neither party put forward evidence or made submissions on the point.

(2) Regulation 309/2010 provides for classification of a product with outer layers of 8.5mm and a core layer of 10mm. The Commission determined that this was plywood (despite unequal layers).

(3) In any event, there was no positive evidence that the plywood layers were, in fact, unequal. The diagram provided by IPL indicated the three layers were 6mm, the sample provided to HMRC showed that each were approximately 8mm and in oral evidence Mr Attwood only addressed the overall thickness of the panels ([13] of the Decision).

61. Greater number of layers: the FTT held that plywood has a greater number of layers than three. Mr Barth contends that this is clearly flawed:

(1) The HSENs indicate that plywood can have three layers.

(2) Regulation 309/2010 determined that a three-layered wood panel was a plywood panel such that it was excluded from 44.18 of the CN.

62. Thinner layers: the FTT held that plywood has thinner layers than the panels (albeit that it did not make a specific finding of fact about the size of the panel layers save for recording evidence/submissions that one (or possibly two) layers exceeded 6mm).[2] Again, Mr Barth argues that this is flawed:

(1) Neither the HSENs nor the CNENs define plywood by reference to the thickness of the plies (see further below in relation to IPL's argument that plywood cannot have layers in excess of 6mm).

(2) The layers of the panels were between 6mm and 8mm.

(3) Regulation 309/2010 determined that a product with plies of 8.5mm and 10mm (thicker than the panels) was a plywood panel for the purposes of exclusion from 44.18 of the CN.

63. MDO and Noxcrete: the fact that product is '*specialist'* either relates to the subjective factors (which the FTT appropriately indicated were to be disregarded) or relates to the MDO and Noxcrete. Insofar as these points were relied upon to conclude that the panels were not plywood, Mr Barth submits that:

(1) The MDO Noxcrete additions are affixed to the wood panels and do not alter the underlying material. The FTT held that *'the Noxcrete MDO coating gives a visible, varnish like sheen to the outer surface…'* ([39]) so is a surface treatment of/addition to the wood.

[2] See [14], [15] & [36] of the Decision.

(2) The HSENs to 44.18 state *'plywood panels, even if surface treated for the purposes of concrete shuttering, are classified in heading 44.12*'. It follows that the surface-treatment of a panel does not affect its status as plywood.

(3) For clarity, HMRC does not contend that the MDO and Noxcrete are irrelevant when considering the objective characteristics of the panel. Rather, they do not alter the physical properties of the underlying plywood panel.

64. Mr Barth therefore argues that the factors set out above were mistakenly relied upon by the FTT in concluding that the panels were not plywood and, absent such error, should have followed the persuasive HSENs.

65. We do not accept these submissions.

66. There was no material error by the FTT in its finding at [39].

67. The FTT did not take into account irrelevant considerations in a material manner in making its finding. Specifically: At [39], the FTT stated that plywood "depending on its thickness has a significantly greater number of…thinner or finer layers". Given the definition provided in the explanatory note refers to "sheets" (and the evidence of Mr Attwood), the FTT was entitled to conclude that plywood layers are thinner/finer that those in the panels. To the extent that HMRC submit that Regulation 309/2010 determined that the panels therein being considered were plywood, that is incorrect. The panels in that Regulation were found to fall within '4412 94 90: - *other* - - *blockboard, laminboard and battenboard*' rather than plywood.

68. At [39] of the decision, the FTT described the panels as being of a "three unequal layer construction". Nowhere was it said that it was because of this unequal layer construction that the Panels could not be classified as plywood. Again, HMRC's reliance on Regulation 309/2010 is misplaced for the reason explained above.

69. The reference at [39] of the FTT's decision to the Panels being a "specialist product" is in the context of the FTT finding that the Panels had a cement resistant MDO and a coating of Noxcrete (which were relevant objective characteristics demonstrating intended use). There was no separate/free standing reliance on the product being "specialist" (as made clear by the FTT at [40] of its decision). Nor did the FTT say that the presence of the MDO and Noxcrete meant that the panels could not be plywood.

70. The finding at [41] that the panels were a similar product to Plywood – namely laminboard – was reasonably open to the FTT. There are significant similarities between plywood and laminboard (see the definitions in the HSEN to 4412 set out at paragraph 25 above) and it was open to a properly instructed tribunal to conclude that the panels were the latter. There was no material error of law.

71. Ground 2 is dismissed.

Ground 3 - the FTT erred in concluding that the intended use of the Panels as shuttering for concrete constructional work was capable of being assessed on the basis of its objective characteristics and properties

72. Mr Barth, for HMRC, submits that the FTT erred in concluding from the properties of large size and coating that the intended use was as concrete shuttering.

73. The FTT held that the intended use of the panels as shuttering for concrete constructional work is inherent in its objective characteristics by reason of *'their large size and the visible coating*' ([39]).

74. The FTT was correct to state at [8c] that '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)' (see also Case C-309/98 *Holz Geenen*).

75. In *Case C-228/89 Farfalla Flemming* [1992] 1 CMLR 133, in relation to subjective characteristics, the Court held:

> *22… Just as any artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities…*

76. In *EP Barrus, Kubota v HMRC* [2013] UKUT 0449 (TCC), the Upper Tribunal adopted the wording of the Court in *Farfalla*:

> *41.(2) The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities*.

77. In relation to large size, Mr Barth submits that the FTT heard no evidence that the size of the panels was relevant to their intended use as shuttering and there is no logical reason that the size can reveal the intended use as shuttering. It is unclear how a customs officer, looking at a plywood panel, would be able to conclude that the large size revealed the intended use. Indeed, the intended use of the product in Regulation 309/2010 was for concrete shuttering even though the product was far smaller.

78. In relation to visible coating, Mr Barth argues that the FTT erred in concluding that the visible coating revealed the intended use as shuttering:

> (1) The objective, external characteristic which can be appraised by a customs officer was found by the FTT as follows: '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.'
>
> (2) A visible, varnish like sheen does not indicate to a customs officer that the intended use of the product is for concrete shuttering. Its external characteristic is no different to a varnish-like sheen applied for an alternative purpose.

79. We reject these submissions.

80. While we accept the submission that the large size of the panels on its own may not be a sufficient objective characteristic to lead to classification as concrete shuttering, it is a matter that the FTT was entitled to take into account when making its evaluative assessment. It was reasonable and open to the FTT to do so.

81. Again, we accept that the FTT was entitled to take into account the coating when looking at the characteristics objectively even if it may not be sufficient alone to necessitate a finding as being concrete shuttering. Indeed, this had to be assessed objectively rather than by reference to the subjective apprehension of an officer. The FTT had accepted the evidence of Mr Attwood at [11]-[12]:

> 11…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. … 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.

82. We therefore accept that the FTT was entitled to take into account the two properties it relied upon in inferring from the objective characteristics of the panels that their intended use was shuttering for concrete constructional work. This was primarily an evaluative judgment or finding of fact which it was reasonably open to the FTT to make (a reasonable tribunal properly instructed could have come to this conclusion on the evidence available). Whether or not we would have come to the same conclusion matters not.

83. Therefore, we dismiss Ground 3.

84. That is not to say that we agree with the FTT that the correct classification of the panels was as concrete shuttering under 4418. We do not. We now go on to explain in relation to Grounds 4 and 5 why we are satisfied that the FTT erred in law making a classification under 4418.

Ground 4: the FTT misinterpreted the HSEN and CNEN to 4418 in failing to give due weight to the importance of the whole shuttering assembly

85. Mr Barth submits that the FTT misinterpreted the HSENs and CNENs to 4418 in failing to give due weight to the references to assembled goods or recognisable unassembled pieces and to assembled shuttering. The FTT indeed determined that shuttering within the CN did not refer to a complete shuttering assembly as this would be an *'impermissible and unnecessary gloss on the term'* ([44]).

86. Mr Bedenham submits that at [44] of the FTT's decision, it rightly rejected HMRC's submission that the panels could not be "Shuttering for concrete constructional work" (within 4418 40) because that only referred to panels to which there was attached (at importation) the brackets and props. The FTT was right to reject that submission. The panels are shuttering (albeit the shuttering when used may be held in place by ancillary items such as brackets and props). Indeed, he submitted, the CNENs (relied on by HMRC) show the fallacy in HMRC's submission given it states that "shuttering is manufactured from resinous wood (planks, beams etc)" (and does not suggest that these planks, beams etc have to be attached to a bracket or prop at importation before they can be classified as shuttering).

87. Mr Bedenham argued that the panels did not need to be assembled on importation and in any event could form free standing shuttering without any additional parts – for example by being placed in a trench.

88. We reject the submissions on behalf of IPL and agree with Mr Barth. We are satisfied that the FTT did indeed err in law in making its classification under 4418 40 00 as HMRC submit.

89. The HSENs to 4418 (set out at paragraph 31 above) state that products within 4418 include *'assembled shuttering for concrete constructional work'* [emphasis added].

90. The CNENs to 44 18 (set out more fully at paragraph 32 above) state:

> ***Shuttering for concrete constructional work***
> *Shuttering of this subheading is an assembly used for all types of concrete constructional work (for example, for foundations, walls, floors, columns, pillars, props, tunnel sections, etc).* [emphasis added]

91. Both sets of explanatory notes refer to shuttering within 4418 as *assembled shuttering* or *an assembly.*

92. We accept that the HSEN to heading 4418 also refer to "recognisable unassembled pieces". This is consistent with the general rule that whether a product is imported assembled or unassembled is irrelevant for classification purposes because it must be regarded as a complete article (per GIR 2(a)). Further, in *Develop Dr Eisbein* (Case C-35/93), at paragraph 19, the Court held:

> *The second sentence of* [GIR] *Rule 2(a) must therefore be interpreted as meaning that an article is to be considered to be imported unassembled or disassembled where the component parts, that is the parts which may be identified as components intended to make up the finished product, are all presented for customs clearance at the same time and no account is to be taken in that regard of the assembly technique or the complexity of the assembly method.* (emphasis added)

93. The reference to *assembled* or *assembly* within the Explanatory Notes conveys that shuttering within the CN is more than the individual constituent elements that can be used as part of a shuttering assembly. Rather, in order for a product to be classified as shuttering, it must be the *complete* assembly (albeit that it can be imported unassembled). All parts which make up the finished product must be imported together.

94. This approach is consistent with the requirement for classification of products based on their objective characteristics alone. The individual elements that make up shuttering (even if coated and the use as part of shuttering is '*unmistakable'*) do not have the objective characteristics of shuttering without more.

95. The Panels were imported as wooden panels, of a uniform size and without any additional parts. There was no evidence before the FTT that the panels could be used as shuttering without further parts. In fact, the evidence before the FTT was the reverse – parts were required. The panels could not be used as shuttering without further products to complete the assembly, including holding them together and providing the supporting structure ([14]-[15] of the Decision as set out above). Moreover, IPL's evidence had been that shuttering was "a form of mould", which we take to mean a casting mould. This presupposes pieces cut to the required shape to make the required concrete structure, rather than sheets of uniform size.

96. We are satisfied in order for the objective characteristics to reveal the intended use as shuttering, the entire assembly (panels along with the pieces which create the structure) must be

present. The FTT erred at [44] in deciding this created an impermissible and unnecessary gloss on the term shuttering.

97. We are therefore satisfied that the FTT erred in law in classifying the panels to 4418 when the panels did not have the objective characteristics of shuttering because they were not assembled nor were they recognisable disassembled pieces of an assembly of shuttering.

98. Ground 4 succeeds.

Ground 5 - the FTT erred in not treating laminboard as a subcategory of plywood such that it should be excluded from 4418

99. Mr Barth submitted that, on the basis of the FTT's finding that the panels were laminboard, they should have been classified within heading 44.12. The definition in the HSENs did not exclude laminboard panels from classification as plywood. Therefore, the FTT should have applied the exclusions contained in the final sentences of the explanatory notes that we have cited at paragraphs 31 and above.

100. Mr Barth submits that the nature and definition of laminboard within the HSENs to 4412 does not exclude the same from classification as plywood. In the circumstances, insofar as IPL's panels are laminboard, they are to be treated as plywood panels and the exclusion within the HSENs and CNENs to 4418 applies.

101. Mr Bedenham submitted to the FTT (and maintains on this appeal) that the panels are not properly described as Blockboard, Laminboard or Battenboard. He argues that in finding at [39] that the panels were a "form of Laminboard", the FTT erred. He contends that in any event laminboard is not a "sub-category of plywood" for classification purposes. He submitted that 44.12 covers "Plywood, Veneered Panels and similar laminated wood". The explanatory notes explain that "similar laminated wood" includes "Blockboard, laminboard and battenboard", and these products fall under 44 12 94 (i.e. the commodity code that HMRC say should be applied). So, on HMRC's own analysis, the panels are "similar i.e. are *not* "plywood panels") so the exclusion in the explanatory note to 44 18 40 does not apply.

102. Mr Bedenham therefore argued that the panels are not plywood. He relied on the evidence of Mr Attwood, the witness for IPL, given to the FTT "where[as] plywood is thinly sliced (or peeled) from the outer part of the log, our product is a thicker lumber cut from the core of the log…solid wood planks are also manufactured from the core of these trees" (paragraph 29 of his statement).

103. Mr Bedenham contended that if the plywood panel exclusion in the explanatory note to 4418 40 does not apply, 4418 is to be preferred to 44 12 because: it is more specific (GIR 3(a)); and it is last in numerical order (GIR 3(c)).

104. Mr Bedenham also submitted that HMRC's reliance on EC Classification Regulation 309/2010 as excluding the panels from 4418 40 00 is similarly misplaced. Indeed, that Regulation supports IPL's case. As made clear in *Hewlett-Packard* Case C-199/00, in 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.

105. However, he submitted, the panels *do* have characteristics that objectively demonstrate that they were designed for use as concrete shuttering – the MDO and the Noxcrete. Had the European Commission considered that "blockboard, laminboard and battenboard" were "plywood panels" within the exclusion referred to in the explanatory note to 4418 40, there would have been no need to state, "the product does not have any characteristics other than a coating of resin, enabling it to be identified as being for constructional purposes". Instead, the Commission could simply have said something like "blockboard, laminboard and battenboard are types of plywood panels, and plywood panels used as shuttering are excluded from 44 18 00 by virtue of the explanatory note".

106. Mr Bedenham therefore argued the plywood panel exclusion referred to in the explanatory note to 44 18 40 does not apply; and for the reasons set out above, CN 4418 40 00 takes precedence.

107. We have already stated our conclusion that the FTT did not err in law in holding that, for the purposes of heading 4412, the panels were laminboard rather than plywood. The issue raised by Ground 5 is in reality an issue of the interpretation of the exclusion in the explanatory notes.

108. We have concluded that the exclusion in the explanatory notes does apply to any concrete shuttering that falls within the scope of heading 44.12. This is for two reasons: first, that that interpretation produces an outcome consistent with the CN, and secondly, that it is supported by the reasoning in Classification Regulation 309/2010. We consider that the process of reasoning by which the FTT came to the conclusion that the correct classification of the panels was under subheading 44 18 40 00 involved errors of law.

109. In *Build-A-Bear Workshop v HMRC [2022] EWCA Civ 825, §15(6),* the Court of Appeal endorsed the approach that *'Classification must proceed on a strictly hierarchical basis, taking each level of the CN in turn. The wording of headings and subheadings can be compared only with the wording of headings and subheadings at the same level (see the opinion of Advocate General Kokott, Uroplasty [43]).'*

110. Applying this approach, the FTT should first have considered, in accordance with GIR 3(a), which of the headings 4412 and 4418 provided the more specific description. In our judgement, the description in 4412 'Plywood, Veneered Panels and similar laminated wood' is more specific to the panels than that in 4418 'Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes'.

111. Thereafter, the FTT should have followed the hierarchical structure, following 44 12 down to the 8 digit code therein which best described the panels. On the basis of the FTT's findings of fact, that would have led them to 4412 94 10.

112. We do not accept Mr Barth's submission that blockboard, laminboard and battenboard are a sub-category of plywood. We agree with the FTT that the title to the heading 4412 and its HSEN both make clear that they are distinct sub-categories, even if similar. The HSEN refers to the heading at 4412 covering three sub-categories: (1) Plywood; (2) Veneered panels; and (3) Similar laminated wood. Similar laminated wood covers blockboard, laminboard and battenboard. They are each distinct from plywood and the definitions of

plywood and blockboard, laminboard and battenboard differ. There is no reason, given the differing definitions, that laminboard should be a sub-category of plywood (there are common features to both such as multiple plies of wood glued together but there are differences such as the requirement in plywood for the grains of the sheets of wood in plywood to be at an angle).

113. However, we do accept that the FTT also erred in adopting a narrow approach to the exclusions in the HSENs and CNENs to 4418 as applying only to plywood and not to laminboard. We consider that the reasoning in Regulation 309/2010 supports the conclusion the panels are excluded from classification under 4418 by the explanatory notes.

114. The annex to Regulation 309/2010 describes a three-layered fir wood panel classified to 4412 94 90 (as blockboard, laminboard or battenboard – without at least one outer ply of non-coniferous wood). That panel is not identical to the panels in this case: the panels are of smaller height and width dimensions, there is a different coating (being resin) and the same coniferous wood is used throughout. We accept the differences in the product noted by the FTT at [42] from the panels. However, there are also strong similarities: for example, the thickness of the outer of the three layers of wood is around 8mm.

115. Therefore, we do not accept the FTT's reasoning that the differences rendered the annex to the Regulation irrelevant for classification purposes. We are satisfied that the products are sufficiently similar (near identical) such that the Regulation is instructive for classification purposes. What is instructive is that in the Annex to the Regulation there is reference to the exclusion in the last sentence in the HSENs for 4418 (the plywood exclusion to concrete shuttering) despite the product not being categorised as plywood (but blockboard, laminboard or battenboard). We consider that the intention expressed in the HSENs and CNENs to 4418 is to exclude unassembled but surface-treated multi-ply laminated wood from being classified as concrete shuttering.

116. We accept Mr Barth's submission that the annex to the Regulation sets out a number of sequential reasons why that product is not to be classified as concrete shuttering:

> *Classification under heading 4418 as carpentry of wood, more specifically as shuttering for concrete constructional work, is excluded, as the product does not have any characteristics other than the coating of resin, enabling it to be identified as being designed for constructional purposes. See also the Harmonised System Explanatory Notes to heading 4418 (in particular the last sentence of paragraph 3). The intended use for construction shuttering is therefore not inherent to the product. Consequently, the product does not have the objective characteristics and properties to be classified under heading 4418.*

117. The reference to '*See also the Harmonised System Explanatory Notes to heading 4418 (in particular the last sentence of paragraph 3)'* is material to the reasons why that product was excluded from 4418. We do not agree with Mr Bedenham that the words 'See also' are non operative. That product shares the same six digit classification as the panels in this case and is excluded from being concrete shuttering because of: a) the lack of any of the required objective characteristics of shuttering (eg. the lack of assembly); b) the coating of resin being insufficient to make it identifiable as shuttering; and c) the HSENs exclusion in 4418. The same applies to IPL's panels.

118. We are therefore satisfied that the FTT erred in the two ways submitted above: a) in classifying the panels as concrete shuttering under 4418 and not under 4412; and b) further, in

not treating the laminboard panels as a sufficiently similar category to treated plywood such that they should be excluded from 4418.

119. Therefore, even if we were wrong about the scope of the exclusion in the HSENs & CNENs to 4418 (as we conclude in paragraph 118(b) above), we have nevertheless come to the conclusion that the FTT erred in deciding that the panels were required to be properly classified as concrete shuttering under 4418. This is for the reasons set out in paragraph 118(a) above and in Ground 4.

120. Ground 5 succeeds.

Ground 6 - the FTT erred in holding that the burden of proof is on HMRC

121. The FTT held at [8] of the decision that the burden of proof in establishing the proper classification is on HMRC. This is an error of law which is accepted by IPL. It tends to suggest that HMRC had to persuade the FTT that their classification was correct, failing which the IPL's argument would be accepted. Indeed, in the decision (at [41]-[44]), the FTT sets out its view on HMRC's submissions before continuing (at [45]) that *'It follows that the Tribunal accepts the submissions made by Mr Bedenham on behalf of [IPL]'*. We do not, however, think that that gives a fair impression of the FTT's attitude to the case; elsewhere in the Decision they give every indication of having considered both parties' arguments even-handedly.

122. We do not therefore consider that misstatement was material and this appeal is allowed upon other grounds.

Remaking or remittal

123. It follows from the above that the FTT made material errors of law on Grounds 4 and 5 in making its decision. The FTT's decision (allowing the appeal and classifying the panels to 4418 40 00 as concrete shuttering) must be set aside.

124. For all the reasons set out above, we re-make the decision classifying the panels to 4412 94 10 (- Other -- Blockboard, laminboard and battenboard --- With at least one outer ply of non-coniferous wood). This classification requires the payment of 10% duty as set out in HMRC's C18 post clearance demand and revised down in its review decision to the sum of £277,930.83 (comprised of £231,609.02 in Customs Duty and £46,321.81 in Import VAT), based on a customs duty rate of 10% and a penalty for £1,250.

Postscript

125. We would add the following. We have noted above that, while supporting the decision of the FTT, IPL dispute the tribunal's conclusion that their product is laminboard. We have found that that holding involved no error of law. We add for completeness that, even if the FTT's conclusion were factually incorrect, our interpretation of the law would lead to the same outcome. That is because, if the panels were neither plywood nor blockboard, laminboard or battenboard but some other form of "laminated wood", they would fall under the residual commodity code 4412 99 50. This alternative classification would also attract Customs Duty at the same rate as 4412 94 10, namely at 10%.

Conclusion

126. We allow the appeal on grounds 4 and 5. We set aside the FTT's decision for material error of law. We remake the decision classifying the panels to 4412 94 10 as HMRC have contended. We uphold the demand for the sum of £277,930.83.

JUDGE RUPERT JONES
JUDGE NICHOLAS PAINES KC
RELEASE DATE: 17 NOVEMBER 2023