Appeal No. 178TACD2020

Between/

[REDACTED]

Appellant

-and-

THE REVENUE COMMISSIONERS

Respondent

DETERMINATION

A. Introduction

1. This appeal is against a decision by the Respondent that the Appellant is liable to pay customs duty of €25,609.85 in respect of the years 2010, 2011 and 2012 as a result of what the Respondent alleges were incorrect claims for refunds submitted by the Appellant and granted by the Respondent under the Inward Processing Drawback system during the years under appeal.

B. Facts and correspondence relevant to the Appeal

2. The Appellant is a manufacturer of **[TYPE OF ALCOHOLIC BEVERAGE]**. As part of its business, it imports Chinese-made drinking glasses which are used in the preparation of gift packs of **[TYPE OF ALCOHOLIC BEVERAGE]** which are then exported outside the European Union.

3. The Appellant operates the Inward Processing (Drawback) system in relation to the import of the glasses. The Inward Processing (Drawback) system allows the Appellant to claim relief against customs duty by permitting it to import certain goods, up to specified quantities, pay the customs duty thereon, and then reclaim the duty paid when those goods are incorporated in the finished gift packs and exported.

4. The Appellant was permitted to operate the Inward Processing (Drawback) system on foot of Authorisations granted by the Respondent pursuant to the provisions of Articles 114 to 129 of Council Regulation 2913/92 (hereinafter **"the Customs Code"**) and Articles 496 to 502 and Articles 549 to 567 of Commission Regulation 2454/93, which contains provisions governing the implementation of the Customs Code. These Authorisations are granted by the Respondent following an application made by an importer for authorisation to operate the scheme. An application for an Authorisation is made by an importer to the Respondent's Economic Procedures Unit in Nenagh, which requests the local Customs & Excise Control Officer to examine the application prior to granting the Authorisation.

5. For the period under appeal, the Appellant was entitled to claim drawback under two separate Authorisations; Authorisation **[AUTHORISATION NUMBER 1]**, which covered the period from the 1st of July 2007 to the 30th of June 2010, and Authorisation **[AUTHORISATION NUMBER 2]**, which covered the period from the 1st of July 2010 to the 1st of July 2013. A previous Authorisation, **[AUTHORISATION NUMBER 3]** covered a period from 2005 to the 30th of June 2007 and a subsequent Authorisation, **[AUTHORISATION NUMBER 4]**, covered the period from the 1st of July 2013 to the 30th of April 2016, but these are not directly relevant to the years the subject matter of this appeal.

6. Both of the relevant Authorisations permitted the Appellant to operate the Inward Processing (Drawback) system in respect of its import of drinking glasses bearing Tariff Code 70132890; in each case, the Appellant was allowed to import up to 3,800,000 such glasses with an aggregate value of up to €690,000 over the duration of the Authorisation.

7. In March of 2014, the Appellant was audited by the Respondent in respect of the years 2010 to 2013 inclusive. Among the findings made by the Respondent's auditor was the following:-

> *"The drawback authorisation permits drawback to be claimed on goods of 7013289000 exported in Gift Packs. In the audit period drinking glasses have been declared at 7013371000; 7013289000; 7013339900 and 7013379900. Not all of these have been declared as inward processing. In the course of the audit I requested sight of some of the imported glasses. I also examined some of the stock of these glasses in the course of a stock take. None of the glasses produced to me were classified at the authorised code, 7013289000, all were, in my opinion, classifiable at 7013379900 and are therefore not entitled to any drawback."*

8. By letter dated the 29th of July 2014, the Appellant requested that the Respondent reconsider its decision to refuse the Appellant drawback relief, and advanced the following reasons in support of that request:-

> *"We were totally surprised by the CN code issue that you raised. Any confusion concerning the CN 8 digit codes probably arose a few years back when we were importing two types of drinking glasses ie.* [sic] *a type with a stem at base (we called them 'Martini Glasses') and the more regular type which you may have seen lately.*
>
> *When going through the files for this appeal we can point to our request to the C & E control officer and his verification of the two types of drinking glasses and both being entered under the one CN code.*

When we applied for IP Authorisation on 23rd November 2007 we did not give an 8 digit code and described them as 'Drinking Glasses'. That code 7013289000 was assigned by the people in Nenagh. Prior to that our control officer assessed this application on behalf of Nenagh.

Furthermore our records show that when there was some coding changes taking place, we e-mailed Nenagh on 18th February 2008 for code clarification and we were assured that all was in order.

When Authorisation **[AUTHORISATION NUMBER 2]** *came into effect on 1st July 2010 we were advised by our control officer that this Authorisation would '..apply as equivalence method for all types of glasses'. Similarly at importation the C & E Port Officers had cleared the inward shipments and we duly paid import duties at the 11% rate.*

This import duty rate of 11% also applies to the 7013379900 type of glasses.

There was never an intention on our part to cause any irregularity or gain any advantage.

On re-exportation we are merely reclaiming back part of the duty that we had paid out initially. We had paid out the duty assessed by Customs Clearance Agents with no loss to Irish or EU exchequers. There was, or is, no loss to Irish or EU exchequers.

In fact on two occasions these glasses were inspected by two separate Customs Officers while unloading here in **[ADDRESS OF APPELLANT]**.

We always provided proof that the glasses had been exported, and prior to any duty payments all claims were fully verified by C & E Officers.

We trust that you will reconsider and take into account the fact that any perceived breaches were inadvertent and unintentional."

9. The Respondent's auditor treated the aforesaid letter as an appeal against his audit findings pursuant to Regulation 4 of the European Communities (Customs Appeals) Regulations, 1995 and duly transmitted same to the Designated Appeals Officer. His submission to the Designated Appeals Officer on the issue the subject matter of this appeal stated as follows:-

"The second appeal arises from the company's operation of an IP drawback scheme. The company was authorised to import drinking glasses of tariff code 73132310 and to reclaim the duty on export of these glasses. The audit found that the company did not import any such glasses in the period covered by the audit. The company had nonetheless submitted claims to the effect that it had imported and exported these glasses. Import declarations also suggested that the glasses had been imported.

What had in fact been imported was glasses of tariff code 70133791 or 70133799 and as the company held no authorisation for these glasses it was not entitled to any refund. The appeal does not argue the classification of the goods but is based on the claim that the tariff code used was provided by "Nenagh" and that Customs had other opportunities to point out the error. I think it unlikely that the classification came from anyone but the company itself. The conditions attached to all drawback authorisations include, at condition 4, the following; "The Authorisation Holder is responsible for ensuring that the tariff code numbers quoted on the Authorisation are correct." There is no suggestion that there as anything deliberate in any of this. It is clearly a mistake. Unfortunately the duty is due as a result of that mistake. The company is in possession of several BTI and was free at any time to obtain BTI for this product but chose not to. There is nothing in the actions or inactions of Customs that would constitute an error within the meaning of Article 220. This duty has been entered in the accounts."

10. On the 12th of September 2013, the Designated Appeals Officer rejected the Appellant's first stage appeal, finding as follows:-

> *"The second part of your appeal relates to a demand for customs duty of €25609 in respect of customs duty claimed and granted under the Inward Processing (IP) drawback system. The drawback authorisation permits drawback to be claimed on goods classifiable at tariff heading 701328900 exported in gift packs. The audit findings were that the glasses that were exported were actually classifiable at tariff heading 7013379900 and are therefore not entitled to any drawback.*
>
> *The basis of your appeal in relation to this matter is that a classification opinion was sought from Nenagh at the time and Customs had other opportunity to point out the misclassification. In considering your appeal, I referenced the general conditions to be observed by persons authorised to engage in Inward Processing (IP) under the drawback system. Condition 4 clearly states 'The Authorisation holder is responsible for ensuring that the tariff code numbers quoted on the Authorisation are correct'.* **[NAME OF APPELLANT]** *was free to apply for Binding Tariff Information on this product but chose not to do so.*
>
> *While I accept that there was never any intention to cause irregularity or gain advantage, it is nonetheless my finding the customs duty of €25609 is due. Your appeal on this particular matter is therefore not being upheld."*

11. The Appellant then appealed to the Appeal Commissioners against the aforesaid decision of the Designated Appeals Officer pursuant to Regulation 5 of the 1995 Regulations.

C. Legislation

12. Section 2 of the European Communities Act, 1972 provides that:-

> *From the 1st day of January, 1973, the treaties governing the European Communities and the existing and future acts adopted by the institutions of those Communities shall be binding on the State and shall be part of the domestic law thereof under the conditions laid down in those treaties.*

13. The Customs Tariff of the European Communities, known as the Combined Nomenclature "**"CN"**), is EC legislation directly applicable in all Member States. The legal basis for the interpretation of the CN is contained in the *General Rules for the Interpretation of the Schedule of Customs Duties*, which are an integral part of the International Convention on the Harmonised Commodity Description and Coding System (**"the Harmonised System"**) pursuant to Article 3.1(a)(ii) of that Convention. Ireland became a contracting party to the Convention in 1987 and the Convention has the force of law within the European Union pursuant to Council Regulation No. 2658/87.

14. The Customs and Excise Tariff in this jurisdiction is directly based on the Customs Tariff of the European Community. During the years the subject matter of this appeal, customs procedures were governed by Council Regulation 2913/92 (**"the Customs Code"**) and Commission Regulation 2454/93, which contains provisions governing the implementation of the Customs Code.

15. Article 20 of the Customs Code provides, *inter alia*, that:-

> 1. *Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.*
>
> 2. *The other measures prescribed by Community provisions governing specific fields relating to trade in goods shall, where appropriate, be applied according to the tariff classification of those goods…*

16. Article 48 provides that:-

Non-Community goods presented to customs shall be assigned a customs-approved treatment or use authorized for such non-Community goods.

17. Article 59.1 provides that:-

All goods intended to be placed under a customs procedure shall be covered by a declaration for that customs procedure.

18. Article 85 provides that:-

The use of any customs procedure with economic impact shall be conditional upon authorization being issued by the customs authorities.

19. Article 87 further provides that:-

1. *The conditions under which the procedure in question is used shall be set out in the authorization.*

2. *The holder of the authorization shall notify the customs authorities of all factors arising after the authorization was granted which may influence its continuation or content.*

20. Article 220 provides that:-

1. *Where the amount of duty resulting from a customs debt has not been entered in the accounts in accordance with Articles 218 and 219 or has been entered in the accounts at a level lower than the amount legally owed, the amount of duty to be recovered or which remains to be recovered shall be entered in the accounts within two days of the date on which the customs authorities become aware of the situation and are in a position to calculate the amount legally owed and to determine the debtor (subsequent entry in the accounts). That time limit may be extended in accordance with Article 219.*

2. *Except in the cases referred to in the second and third subparagraphs of Article 217 (1), subsequent entry in the accounts shall not occur where:*

(a) the original decision not to enter duty in the accounts or to enter it in the accounts at a figure less than the amount of duty legally owed was taken on the basis of general provisions invalidated at a later date by a court decision;

(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration;

(c) the provisions adopted in accordance with the committee procedure exempt the customs authority from the subsequent entry in the accounts of amounts of duty less than a certain figure.

D. Submissions of the Appellant

21. The Appellant submitted that the tariff classification error discovered in the course of the 2014 audit by the Respondent was a "*typographical inaccuracy*" and that it would be *"grossly unfair*" to impose what the Appellant characterised as a penalty of €25,609 as a result of that inaccuracy.

22. It submitted that it had for a number of years imported drinking glasses from China for use in the preparation of its **[TYPE OF ALCOHOLIC BEVERAGE]** gift packs, which were then exported outside the European Union. It submitted that it had at all times operated the Inward Processing system in full compliance with all the relevant rules and regulations.

23. It further submitted that it always made the appropriate application to the Respondent's Economic Procedures Unit in Nenagh well in advance of any importation, and that the Nenagh Unit always requested the Local Customs & Excise Control Officer to examine the application prior to the grant of Authorisation. The Appellant stated that three different, named Control Officers had carried out these examinations prior to the grant of Authorisations and had never pointed out any inaccuracy in the CN Code used by the Appellant in its applications.

24. In support of this submission, the Appellant furnished a copy of its November 2007 application for Authorisation, which ultimately resulted in the grant of Authorisation **[AUTHORISATION NUMBER 1]** in February of 2008. As the Appellant highlighted, section 7 of the application form stated that the goods to be placed under the Customs Procedure has CN Code 70132 and were described as "Drinking Glasses." Annex 1 to the application form gave the same CN Code and description of the goods.

25. As stated in paragraph 5 above, Authorisation **[AUTHORISATION NUMBER 1]**, which was issued by the Respondent on foot of the said application, permitted the Appellant to operate the Inward Processing (Drawback) system in respect of its import of drinking glasses bearing Tariff Code 70132890.

26. The Appellant further submitted that while it had imported and exported both stemmed (or 'Martini' type) and non-stemmed glasses, it had only ever used Tariff code 7013289000 on both its applications for authorisation and on import and export documentation. In support of this submission, the Appellant furnished a Claim for Repayment under the Inward Processing Drawback scheme dated the 16th of January 2009. That claim document did distinguish between *"Regular Drinking Glasses"* and *"Martini Drinking Glasses"* but used Tariff Code 7013289000 in respect of both.

27. The Appellant submitted that these claims for repayment were examined by Control Officers before a duty drawback was granted, and they never indicated that there was any problem with the Tariff codes being used by the Appellant.

28. The Appellant further submitted that it was never at any time asked to further categorise the type of glasses being imported and exported, or asked to distinguish between stemmed and non-stemmed glasses. It submitted that it would certainly have distinguished between the two types of glasses had it been requested to do so, and pointed out that the 11% rate of duty is applicable to both types of glass. The Appellant further submitted that it would have applied for a Binding Tariff Information ruling from the Respondent had it been aware that there was any doubt or uncertainty about the correct Tariff code to be applied to the glasses it was importing and exporting, but was unaware prior to the audit that there might be any issue in this regard.

29. The Appellant further submitted that it had e-mailed the Inward Processing Unit in Nenagh on the 18th of February 2008, requesting clarification of some changes to the nomenclature system. The Appellant submitted that e-mail at the hearing. It stated:-

> *"Dear* **[NAME OF REVENUE OFFICIAL]***, thank you for your help on phone this morning.*
>
> *Our 2005 Authorisation* **[AUTHORISATION NUMBER 3]** *had tariff code 70132999 and due to changes in coding our 2006 and 2007 imports under that authorisation were entered as 7013291000 and 7013289000 respectively (all at 11%).*
>
> *As we are now claiming drawback we request that you authorise this change…"*

30. The Appellant stated that on the 20th of February, a named officer of the Respondent telephoned the Appellant and advised them that they were classifying the glasses correctly.

31. The Appellant further submitted that Customs Officers at the points of import had full access to samples and paperwork as required on importation, and that Single Administrative Documents-

IM were duly completed. In support of this, the Appellant submitted customs document showing the importation of 9,168 stemmed glasses in August 2007, which had been given Commodity Code 7013289000 thereon, and which were described as Martini glasses on the accompanying Custom Invoice.

32. The Appellant further submitted that because the same levy rate applied irrespective of whether the glasses were stemmed or non-stemmed, there was never any loss of duty payment or any incorrect claim by the Appellant. It submitted that it was only seeking to rightfully reclaim monies which it had already paid to the Respondent, and that penalising the Appellant by refusing it to do so was not only grossly unjust but would result in its low-margin exports of the gift packs being rendered unprofitable. Finally, it submitted that refusing it the drawbacks sought would undermine the whole principle on which the Inward Processing System was based, namely allowing European exporters to compete on a level playing field.

E. Submissions of the Respondent

33. The Respondent characterised the Appellant's case by saying that it was based on the fact that the Customs Authorities did not tell him that the imported goods were not covered by the Authorisations but the Appellant believed that they were so covered.

34. The Respondent submitted that it was obliged to operate the law as it was laid down in the regulations, and that the regulations required that in order to benefit from a customs procedure, goods must be entered for that procedure and must be authorised for that procedure.

35. It submitted that in the instant case, the glasses imported and exported by the Appellant were correctly classified at either 70133791 or at 70133799. The latter classification covers glasses "*cut*

or otherwise decorated", and the Respondent's auditor took the view that the printing of a brand or logo on the glass did not constitute decoration, and classified them at 70133791.

36. The Respondent further submitted that the classification of the goods at 70132890 was clearly incorrect. While the Appellant relied upon the fact that the various Control Officers, the Customs Officers at the points of import and the authorising authorities in the Economic Procedures Unit had not corrected the error, the Respondent submitted that there was no evidence that anyone other than the Respondent's auditor ever actually examined the glasses. The Respondent submitted that it was therefore not possible for it to have informed the Appellant whether the commodity code was accurate or not.

37. In relation to the e-mail sent on the 18th of February 2008, referred to in paragraph 29 above, the Respondent stated that the e-mail referred to changes in classification which came into effect on the 1st of January 2007; prior to that date, there had been no requirement to distinguish between stemware and other types of glasses. The Respondent submitted that the Appellant had advised in its e-mail of the 18th of February 2008 that glasses were entered at 7013291000 (stemware) and 7013289000 (drinking glasses of toughened glass) [in fact, it appears that the Respondent's submissions have attached the incorrect descriptions to the relevant codes in this part of submission], and consequently the Appellant's authorisation was amended to cover glasses at 7013289000. The Respondent submitted that this change was entirely at the instigation of the Appellant.

38. The Respondent further submitted that the responsibility for the correct classification of the goods, both on the authorisation and on the import declaration, rested solely with the Appellant. While it was unfortunate that the error occurred and continued for so long, the result of the error in classifying the goods incorrectly on the Authorisations was that the import goods were liable to duty and were not eligible for drawback under the Authorisations.

F. Analysis and Findings

39. I believe that the first question which requires to be answered in order to determine this appeal is what Tariff code ought to have been used by the Appellant in relation to its import of non-stemware glasses and its subsequent export of same as part of the **[TYPE OF ALCOHOLIC BEVERAGE]** gift packs.

40. It is clear that a number of different Tariff codes for those glasses have been used, both by the Appellant and by the Respondent, in the years prior to the appeal period and in the years under appeal. They include:-

(a) 70132999, which was the Tariff code on Authorisation **[AUTHORISATION NUMBER 3]** which covered the period from 2005 to the 1st of July 2007. This code relates to drinking glasses, other than of glass ceramics, not of lead crystal, not of toughened glass and not cut or otherwise decorated.

(b) 7013291000, which was used by the Appellant for drawback claims during 2006. This code relates to drinking glasses, other than of glass ceramics, of toughened glass.

(c) 7013289000, which was the code used on Authorisations **[AUTHORISATION NUMBER 1]** and **[AUTHORISATION NUMBER 4]**, and which was used by the Appellant in its claims for drawback from 2007 until alerted to a potential issue as a result of the 2014 audit by the Respondent. This code relates to stemware drinking glasses, other than of glass ceramics, not of lead crystal and gathered mechanically.

(d) 701337100, which the Respondent submits was a Tariff code used for declarations by the Appellant during the audit period. The code relates to non-stemware drinking glasses, other than of glass ceramics, not of lead crystal, of toughened glass.

(e) 7013339900, which the Respondent submits was another Tariff code used for declarations by the Appellant during the audit period. The code relates to non-stemware drinking glasses,

other than of glass ceramics, of lead crystal, gathered mechanically and not cut or otherwise decorated.

(f) 7013379900, which the Respondent submits was another Tariff code used for declarations by the Appellant during the audit period and which the Respondent's auditor initially concluded was the correct code for the glasses the subject matter of this appeal. The code relates to non-stemware drinking glasses, other than of glass ceramics, not of lead crystal and not of toughened glass, gathered mechanically and not cut or otherwise decorated.

(g) 70133791, which the Respondent indicated in its written submissions might be the correct code as an alternative to 7013379900. The code relates to non-stemware drinking glasses, other than of glass ceramics, not of lead crystal and not of toughened glass, gathered mechanically and cut or otherwise decorated. The Respondent's written submissions indicated that its auditor had concluded that the fact that the Appellant's logo or brand had been affixed to the drinking glasses did not render them cut or decorated; however, the fact that this Tariff code was posited as an alternative would seem to indicate that this matter is not entirely free from doubt.

(h) 73132310, which the Respondent's auditor's submission to the Designated Appeals Officer dated the 31st of July 2014 indicated was the code on the Appellant's Authorisation. However, this would appear to be a typographical error, as the Tariff codes on the Authorisations in force for the years under appeal were 70132999 and 7013289000, as set out above.

41. Having carefully considered the foregoing Tariff codes, I am satisfied, and find as a material fact, that the drinking glasses which are the subject of this appeal are non-stemware drinking glasses, other than of glass ceramics, not of lead crystal and not of toughened glass, gathered mechanically and cut or otherwise decorated and, as such, the Tariff code applicable to such glasses during the years under appeal was 70133791. In so finding, I respectfully disagree with the view reached by the Respondent's auditor that the application of the Appellant's brand or logo to the glasses does not render them "*cut or otherwise decorated*"; in my view, the application of the brand or logo does constitute a form of decoration.

42. It follows from this finding that the glasses imported by the Appellant had a different Tariff code to the type of glasses which the Appellant was authorised to import and then export as part of the **[TYPE OF ALCOHOLIC BEVERAGE]** gift packs; the Authorisations in place during the relevant years only authorised the operation of the Inward Processing Drawback scheme in respect of goods with the Tariff code 701328900.

43. Accordingly, the Appellant is *prima facie* not entitled to avail of the Inward Processing Drawback system in respect of the glasses the subject matter of this appeal. I believe it is clear from the legislation detailed above in section ***C*** of this Determination that the Inward Processing Drawback scheme must be operated in accordance with the relevant international and domestic legislation and regulations. It is clear from my finding above that the Appellant now seeks to avail of the Inward Processing Drawback scheme in respect of goods which were not referred to in the Authorisations relevant to the years under appeal. I also accept that the Authorisations themselves made clear in condition 4 that the Appellant was responsible for ensuring that the Tariff code numbers quoted on the Authorisation were correct.

44. In so far as the Appellant seeks to avoid the consequences of its use of the incorrect Tariff code on the grounds that the imposition of the consequences of same would be grossly unfair or unjust and/or would be contrary to the whole principle upon which the whole Inward Processing system is based and/or because there was no loss to the Exchequer, these are arguments which fall outside the jurisdiction of this forum and cannot properly be considered by me.

45. However, the Appellant can still succeed in its appeal if I am satisfied that it is entitled to avail of the provisions of Article 220(2)(b) of the Customs Code. That subparagraph provides that:-

> [S]*ubsequent entry in the accounts shall not occur where:*
>
> *…*
>
> *(b) the amount of duty legally owed failed to be entered in the accounts as a result of an error on the part of the customs authorities which could not reasonably have been detected by the person liable for payment, the latter for his part having acted*

in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declaration…

46. This legislative provision is intended to protect the legitimate expectations of the person liable for payment that all the information and criteria on which the decision to recover or not to recover duties is based are correct (*per* the decision in ***Mecanarte* C-348/89**).

47. In order for Article 220(2)(b) to apply, four cumulative conditions must be met, namely:-

(a) the amount of duty was not entered in the accounts as a result of an error on the part of the customs authorities themselves;

(b) this error could not reasonably have been detected by the person liable for payment;

(c) the person liable for payment must have complied with all the provisions laid down by the legislation in force as regards the customs declaration; and,

(d) the person liable for payment acted in good faith.

48. Looking at the first of these conditions, it is well-established that the error must be caused by an act of the customs authorities themselves, as only errors on the part of the authorities can cause the person liable for payment to entertain legitimate expectations (see, *e.g.*, ***Mecanarte*** and ***Illumitronica* C-251/00**). However, certain passive acts have also been deemed errors within the meaning of Article 220(2)(b), such as where the customs authorities have raised no objection concerning the tariff classification of goods imported in large numbers over a long period of time, even though a comparison between the tariff code declared and the explicit description of the goods would have disclosed the incorrect tariff classification (see ***Hewlett-Packard* C-250/91**).

49. In the instant appeal, a number of actions or inactions on the part of the Respondent have been criticised by the Appellant and could potentially constitute errors on the part of the Respondent, namely:-

(a) an alleged failure by the three named Control Officers to identify and/or inform the Appellant that the incorrect Tariff code was being used when carrying out an examination as part of the Appellant's applications for Inward Processing Drawback Authorisations;

(b) an alleged failure by the Respondent's Customs & Excise Unit in Nenagh to insert the correct Tariff code in Authorisation **[AUTHORISATION NUMBER 1]** when the Appellant had not inserted a full Tariff code in the application form;

(c) an alleged failure by the Respondent to take any action or query the Appellant when it was aware that the Appellant was claiming Drawback relief in respect of more than one type of drinking glass (for example from the Claim for Repayment under the Inward Processing Drawback scheme dated the 16th of January 2009, which distinguished between 'Regular Drinking Glasses' and 'Martini Glasses') but using the same Tariff code for each type.

(d) an alleged failure by the Respondent's Customs & Excise Unit in Nenagh to inform the Appellant of the correct tariff code after the Appellant had sought clarification by its e-mail of the 18th of February 2008;

(e) an alleged failure to advise the Appellant correctly when it was advised by the Respondent's Control Officer when Authorisation **[AUTHORISATION NUMBER 2]** came into effect that this Authorisation would *'..apply as equivalence method for all types of glasses'*; and,

(f) an alleged failure by the Respondent's Customs & Excise Officers to identify and/or inform the Appellant that the incorrect Tariff code was being used when examining the glasses that had been imported and/or when checking the Appellant's claim for drawback of duty paid following export of the gift packs.

50. It is well-established that the burden of proof is on the Appellant to satisfy me that the alleged error or errors occurred, and that I must be so satisfied on a balance of probabilities basis.

51. I am not satisfied that the Appellant has established on a balance of probabilities basis that the alleged errors detailed in subparagraphs (a), (e) and (f) above took place. In relation to subparagraphs (a) and (f), the Appellant was aware from the Respondent's written submissions that the Respondent was arguing as part of its case that there was no evidence that the glasses in

question had ever been inspected by anyone other than the Respondent's auditor. It was open to the Appellant to put before me some evidence that such inspections had in fact taken place but it did not do so. In relation to the alleged statement by the Respondent's Control Officer detailed in subparagraph (e), there was no evidence before me that such a statement was actually made, other than the assertion of same in the Appellant's letter of the 29th of July 2014.

52. In relation to subparagraph (b), however, I am satisfied on the balance of probabilities that there was an error on the part of the Respondent when it issued Inward Processing Authorisation **[AUTHORISATION NUMBER 1]** on the 4th of February 2008. The Appellant's application for that Authorisation did not contain a full Tariff code; it simply described the relevant goods as "Drinking glasses" and gave CN Code "70132". This was not a complete CN Code; while it did indicate that the Appellant was referring to stemware drinking glasses other than of glass ceramics, it could have been a reference to stemware glasses of lead crystal, whether gathered by hand (70132210) or gathered mechanically (70132290), or to stemware glasses other than lead crystal glasses, whether gathered by hand (70132810) or gathered mechanically (70132890).

53. I accept the Appellant's submission that, notwithstanding that there were four valid Tariff codes which could have been compatible with the Appellant's application for Authorisation, the Respondent's Economic Procedures Unit in Nenagh did not make any inquiry of the Appellant as to precisely which type of glasses were intended to be covered by the Authorisation; instead, it simply issued an Authorisation which covered one of the four possible types of glasses. I believe it is relevant to have regard to the fact that it did so at a time when a requirement to distinguish between stemware and non-stemware glasses had been introduced for the first time less than twelve months prior to the Appellant's application for Authorisation.

54. I am further satisfied on a balance of probabilities basis that when the Appellant applied in April of 2010 for a new Authorisation to cover the period from the 1st of July 2010, it indicated that the goods being imported had Tariff code 713289000 because this was the Tariff code which the Respondent had inserted on its previous Authorisation, under which the Appellant had

successfully claimed repayments under the Inward Processing Drawback system during the previous three years.

55. In relation to subparagraph (c), I am also satisfied on a balance of probabilities basis that the Appellant has established that it specified on its claims for repayment of customs duty under the Inward Processing Drawback system that it was using two types of drinking glass in its gift packs (described respectively as 'Regular Drinking Glasses' and 'Martini Drinking Glasses') but used the same Tariff code in respect of both types of glasses. While the documentary evidence submitted related to a period prior to the years under appeal, I accept as accurate the submission by the Appellant that it did so consistently, and this submission was not challenged on behalf of the Respondent at the hearing before me. I further accept that these returns were reviewed by the Respondent prior to repayments being made, but the use of the same Tariff code for what had been identified by the Appellant as two different types of glasses was never challenged or queried by the Respondent.

56. In relation to subparagraph (d), I am not satisfied that the Appellant has established that there was an error on the part of the Respondent in its response to the query e-mailed on the 18th of February 2008. It is clear from the wording of the e-mail that the Appellant was pointing out that there was a discrepancy between the Tariff code on the Authorisation which covered the period up to the 30th of June 2007 (70132999) and the Tariff codes which the Appellant had used in relation to its imports of drinking glasses in 2006 (7013291000) and 2007 (7013289000). The Tariff code used in 2006 simply identified the imported glasses as being drinking glasses, other than of glass ceramics, made of toughened glass; it did not indicate whether the glasses were stemware or non-stemware. Accordingly, the fact that the Appellant used a code in 2007 which indicated that the glasses were stemware (and such a distinction was only required from the 1st of January 2007 onwards) did not necessarily indicate that the incorrect Tariff code had been used in preceding years.

57. More fundamentally, I do not accept that the e-mail in question can sensibly be read as a request for clarification from the Respondent as to the correct Tariff code to be used thereafter. Instead, it was a request that the Respondent amend the Tariff code on the Authorisation which covered the years in respect of which repayment was being claimed, in order that those repayments could be made. That request was acceded to by the Respondent and the Appellant was advised accordingly by telephone on the 20th of February and by letter dated the 26th of February.

58. In summary, I accept the Appellant's argument that the Respondent committed an error when it specified Tariff code 7013289000 in Authorisation **[AUTHORISATION NUMBER 1]**, when the Appellant's application had not identified with precision the type of drinking glasses the Authorisation was sought to cover. I further accept that this error was perpetuated in 2010 when a new Authorisation was sought and granted. I further accept that there was an ongoing passive error on the part of the Respondent in failing to challenge or query the Tariff code being used by the Appellant in circumstances where the Appellant's claims for repayment of customs duty indicated that the same Tariff code was being used for two different types of glasses.

59. These errors resulted in the Appellant holding Authorisations in respect of goods other than those the subject matter of this appeal, and accordingly I am satisfied, and find as a material fact, that the amount of duty was not entered in the accounts as a result of errors on the part of the Respondent, and so the first of the cumulative conditions is satisfied.

60. The second cumulative condition requires me to be satisfied that the errors could not reasonably have been detected by the Appellant. In order to determine whether the errors made by the Respondent could reasonably have been detected by the Appellant acting in good faith, I must have regard in particular to the nature of the error, the professional experience of the Appellant and the degree of care which it exercised, and to do so it is necessary for me to look specifically at all the circumstances of the case (see ***Deutsche Fernsprecher* C-38/95**). The fact that the customs authorities made an error is not in itself sufficient to prove that the error could not reasonably have been detected by the trader.

61. In relation to the nature of the error, I am required to determine whether the rules concerned are complex enough for an examination of the facts to make an error easily detectable (*per* ***Hewlett-Packard***). While there are authorities for the proposition that a rule or terminology should not be considered complex if the goods could have been classified with little difficulty simply by following the normal tariff classification rules (see, *e.g.*, **REC 1-91**), rules can be considered complex where the terminology used may have caused confusion (see ***Foods Import srl* C-47/95**).

62. In the instant appeal, having regard to the fact that even following the 2014 audit which involved an examination of the glasses in question, the Respondent's submissions suggested two possible Tariff codes for the glasses, I am satisfied that the terminology did entail a degree of complexity and the proper classification of the glasses was not straightforward.

63. In relation to the professional experience of the Appellant, I accept that it was involved in the import and expert of goods; however, this is not determinative and can be disregarded in circumstances where the Appellant had been using the same Tariff code for a number of years and where the Respondent had never indicated that its doing so was incorrect (see **REM 6/99**).

64. In relation to the degree of care exercised by the Appellant, I am satisfied on the evidence before me that it sought to ensure that it was following the correct procedures and took reasonable steps to ensure that it was using the correct Tariff code. I believe that this is evidenced by the fact that its claim for repayment of customs duty correctly distinguished between the two types of glasses it imported and by the fact that it contacted the Respondent's Economic Procedures Unit in February 2008 when it became aware that there was a difference between the Tariff code quoted on its Authorisation and the Tariff codes applicable to the glasses it had exported as part of the gift packs. I further accept the submission of the Appellant that it would be unreasonable to expect it to have applied for a Binding Tariff Information ruling from the Respondent in circumstances where it did not, at least prior to the audit, have any suspicion that it was using the

incorrect Tariff code and had in fact been using the same Tariff code for a number of years without query or challenge from the Respondent.

65. I am therefore satisfied, and find as a material fact, that the error in the Tariff code used by the Appellant could not reasonably have been detected by the Appellant, having regard to all the circumstances of the case.

66. The third cumulative condition requires me to be satisfied that the Appellant complied with all the provisions laid down by the legislation in relation to the customs declarations. To meet this condition, the Appellant must have supplied the Respondent with all the necessary information provided for by both European Union rules and national rules supplementing or transposing the European Union rules in relation to the customs treatment requested for the goods the subject matter of this appeal. However, that obligation is confined to the production of information and documents that the Appellant could reasonably be expected to possess and obtain. It follows that if the Appellant produced in good faith information which, although incorrect, was the only information of which it reasonably had knowledge or could obtain, this requirement must be considered to have been fulfilled (see ***Top Hit* C-378/87**).

67. The only argument advanced on behalf of the Respondent at the hearing before me was that the correct Tariff code for the drinking glasses imported by the Appellant was different from the Tariff code detailed on the Authorisations relevant to the years under appeal; it was not submitted that the Appellant had otherwise failed to comply with the international or domestic legislation or rules. The Appellant submitted that it had been operating the Inward Processing system in full compliance with all relevant rules and regulations from at least 1990 onwards, and I am satisfied on the balance of probabilities that this submission is correct save for the Appellant's use of the incorrect tariff code.

68. I therefore find as a material fact that the Appellant complied with all the provisions laid down by the legislation in force as regards the customs declarations.

69. The fourth and final cumulative condition requires me to be satisfied that the Appellant acted in good faith. It was submitted both in the Appellant's written submissions and at the hearing before that this was very much the case. It is worth recording that the Respondent has at all times accepted that the Appellant acted in a *bona fide* manner, and did not seek to suggest otherwise in submissions or during the hearing. As the Respondent's auditor put it in his submission to the Designated Appeals Officer, *"There is no suggestion that there was anything deliberate in any of this. It is clearly a mistake."* I believe this to be a correct characterisation of what transpired, and I find as a material fact that the Appellant was acting in good faith when using the incorrect Tariff code.

70. In light of the foregoing findings of material fact, I am satisfied that the four cumulative conditions required for the application of Article 220(2)(b) of the Customs Code have been satisfied and the Appellant is consequently entitled to relief from entry in the accounts of liability for the customs duty under appeal.

G. Determination

71. My findings can be summarised as follows:-

(a) The Tariff code applicable to the drinking glasses imported by the Appellant the subject matter of this appeal was 70133791.

(b) As this Tariff code was not quoted on either of the Authorisations relevant to the years 2010, 2011 and 2012, the Appellant was *prima facie* not entitled to the refund of customs duty it received under the Inwards Processing Drawback system.

(c) The Respondent acted in error in issuing Inward Processing Authorisation **[AUTHORISATION NUMBER 1]**, which covered goods with Tariff code 7013289000, when the Appellant's application for such Authorisation had not specified that Tariff code.

(d) There was a further ongoing, passive error on the part of the Respondent in failing to challenge or query the Tariff code being used by the Appellant in circumstances where the Appellant's claims for repayment of customs duty indicated that the same Tariff code was being used for two different types of glasses.

(e) These errors were perpetuated when the Appellant applied for and was granted Inward Processing Authorisation **[AUTHORISATION NUMBER 2]**.

(f) These errors on the part of the Respondent resulted in the incorrect amount of customs duty being entered in the accounts for the years under appeal.

(g) These errors could not reasonably have been detected by the Appellant.

(h) The Appellant acted in good faith and complied with all the provisions laid down by the legislation in force as regards the customs declarations.

(i) The Appellant is consequently entitled pursuant to Article 220(2)(b) of Council Regulation 2913/92 to relief from entry in the accounts of liability for the customs duty under appeal.

72. I will therefore allow the appeal and set aside the refusal by the Respondent to allow the Appellant's claim for repayment of the customs duty the subject matter of this appeal.

Dated the 6th day of August 2020

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MARK O'MAHONY
Appeal Commissioner