



TC01517

Appeal number: TC/2010/02005

CUSTOMS DUTY – Whether Mastectomy bra should be classified to commodity code 6212 1090 00 as a clothing article – whether proper to code 9021 1010 00 as an orthopaedic device – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

AMOENA (UK) LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: MISS J C GORT (Judge)
RUTH WATTS DAVIES FCIPD MIH**

Sitting in London on the 22 and 23 August 2011

Mr T. Eicke QC, instructed by Bell Davies, appeared on behalf of the Appellant

Mr Sarabjit Singh, of Counsel, instructed by the Solicitors Office, appeared on behalf of the Respondents

DECISION

1. This is an appeal against a decision of the Commissioners for Her Majesty's Revenue and Customs ("HMRC") dated 29 January 2010 to uphold on Formal Departmental Review, a decision dated 16 October 2009 to issue a Binding Tariff Information ("BTI") document classifying the Appellant's Carmen Mastectomy bra to commodity code 6212 1090 00.

10 **Background**

2. On 12 October 2009 the Appellant applied for a BTI for the bra describing it as: *"a mastectomy bra which is worn by post operated women following amputation of a breast or breasts. The bra is especially designed to hold silicone breast forms and has left and right pockets to hold the breast forms firmly in place. The other design features which differentiate the mastectomy bra from an ordinary bra are the wide padded straps which help support the weight of the breast form and help to avoid undue stress associated with neck/shoulder problems for the post operated women. The bra is also designed to ensure the breast form itself does not show and therefore has a specific cut and shape dissimilar to a conventional bra"*. On the application form the product was further stated to be: *"Carmen Mastectomy bra"*.

3. In its application the Appellant stated inter alia that it considered that the bra was an orthopaedic appliance because it is worn to compensate for a disability i.e. following amputation. The mastectomy bra is excluded from the normal brassière heading (6212) due to Note 2(b) of Chapter 62 which states that orthopaedic appliances, surgical belts, trusses or the like (heading 9021) are not covered within Chapter 62.

4. By a letter dated 16 October 2009, sent with the BTI, HMRC informed the Appellant that they considered the item to be excluded from 9021 1010 00 and it was not an orthopaedic appliance as it is mass produced and not made to individual needs, as well as being a clothing article. They further informed the Appellant that the CNEN to 9021 states that an orthopaedic appliance is to substitute for a function of the defective or disabled part of the body. It was contended that this does not include appliances which simply alleviate the effects of the defect or disability. Furthermore the HSEs state that 9021 does not include supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derived solely from their elasticity. Further correspondence followed between the parties and by a letter dated 11 November 2009 the Appellant wrote to HMRC disagreeing with its classification of the item, contending that it was akin to prosthetics such as artificial arms or legs. Such a prosthesis becomes part of the body and the item is needed to support these. It further contended that HMRC's reference to "mass produced" was not relevant to the item as that heading only referred to shoes; the exclusion of the item by virtue of it being an item of clothing cannot be correct as orthopaedic corsets and suspenders are classified to 9021. It was the Appellant's case that the item does substitute for the disabled part of the body; the item does not rely

solely on elasticity; and Note 2(b) to Chapter 61 states that orthopaedic devices are not included in 6210. The Appellant sent to the Respondents a statement by a Mr Martin Lee (Consultant Surgeon) as to the function of the mastectomy bra. Following a letter dated 17 December 2009 by which the Appellant requested a review of the decision to classify the item to 6212 1090 00, the Appellant submitted the testimony of a breast cancer sufferer. By a letter dated 29 January 2010 HMRC upheld the classification of the item.

The Law

5. Article 12 of the Customs Code provides that the Commissioners “shall issue binding tariff information ... on written request, acting in accordance with the committee procedure”.

6. For tariff purposes, products in the European Community are subject to classification under headings introduced by the Combined Nomenclature Regulation (Reg (EEC) No 2658/87 of 23 July 1987, OJ L256 of 7.9.87 which provides the legal basis for the Community’s Tariff. An annual amendment to this Regulation contains the Combined Nomenclature, which is reproduced in the UK Tariff. The Combined Nomenclature provides a systematic classification for all goods in international trade and is designed to ensure, with the aid of the ‘General Interpretative Rules’ (“GIRs”) that any product falls to be classified in one place and one place only.

7. GIR 1 provides that: “The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the heading and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions”.

8. GIR 6 provides: “For legal purposes, the classification of goods in the subheadings of a heading 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 the rule the relative section and chapter notes also apply, unless the context otherwise requires”.

9. Both parties accepted the principles of classification which were established by the European Court of Justice (“the ECJ”) and set out by the High Court in the case of *CCE v General Instrument (UK) Limited (formerly Next Level Systems (Europe) Limited)* [2001] 1 CMLR 34 as follows:

- (i) the characteristics and objective properties of the product are the decisive criteria for classification
- (ii) the function or intended use of the product can be an objective characteristic

- (iii) the intended use of a product is only relevant if that use is reflected in the physical characteristics of the product and
- (iv) if the “very purpose” of the product is to perform the function described in a heading, it should be classified there.

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10. The Explanatory Notes to the Harmonised System (“HSENS”) and the Explanatory Notes to the Combined Nomenclature (“CNENS”) are an important aid to the interpretation of the scope of the various headings in the Combined Nomenclature, albeit they do not have legally binding force. It has been held by the ECJ that a national court should establish on the basis of all of the characteristic of the product concerned, “whether it has the essential characteristics listed” in the CNENS and HSENS. (*CK C-400/05 BAS Trucks BV v Staatssecretairs van Financien* [2007] ECR I-311).

11. In *Uroplasty BV v Inspecteur van de Belastingdienst – Douane district Case Rotterdam* (2006) ECR I-67219 C-514/04 the ECJ upheld the approach to the classification of goods under the Combined Nomenclature as set out by Advocate General Kokott in her opinion in the following terms:

“First, the intended use and the material composition of the article must be precisely determined. Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken according to the article’s intended use and material composition. There must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters a definitive classification may be reached. If not, then in order to resolve the conflict between the competing provisions recourse must be had to Rules 2-5 of the General Rules. Lastly, classification must be made under the sub-headings.

“Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first sub-heading can be compared only with the wording of other first sub-headings on the same heading; and the wording of a second sub-heading can be compared only with the wording of other second sub-headings of the same first sub-heading.

“In this exercise the wording of the headings and the explanatory notes of the CN are to be interpreted so as to be consistent with the Harmonised System. The Court has consistently held that the explanatory notes drawn up, as regard to the Harmonised System, by the World Customs Organisation, may be an important aid to the interpretation of the individual tariff headings, although they do not have legally binding force.”

12. Chapter 62 applies to: “Articles of apparel and clothing accessories not knitted or crocheted.” Heading 6212 applies to: “Brassieres, girdles, corsets, braces, suspenders, garters and similar articles and parts thereof, whether or not knitted or crocheted”. The HSENS state that heading 6212 applies to: “brassieres of all kinds”.
- 5 Note 2(b) to Chapter 62 of the Combined Nomenclature states that: “This chapter does not cover: ...(b) orthopaedic appliances, surgical belts, trusses or the like (heading 9021)”. The question for the Tribunal, therefore, is whether the mastectomy bra is an “orthopaedic appliance” within the meaning of heading 9021.
- 10 13. Chapter 90 applies to: “Optical, photographic cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus, parts and accessories thereof.”

Note 1 provides:

- 15 1. This chapter does not cover:
 ...
 (b) supporting belts or other support articles of textile material, whose intended effect on the organ to be supported or held derived solely from the elasticity ... “
- 20 2. Subject to Note 1 above, parts and accessories for machines, apparatus, instruments or articles of this chapter are to be classified according to the following rules:
 ...
 (b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, with a number of machines, instruments of the same heading... are to be classified with machines, instruments or apparatus of that kind.
- 25 ...
- 30 6. For the purposes of heading 9021, the expression ‘orthopaedic appliances’ means appliances for:
 - preventing or correcting bodily deformities;
 or
 35 - supporting or holding parts of the body following an illness, operation or injury.

CN code 9021 applies to: “Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability.”

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- 45 9021 29 00 - - other
 9021 39 - - other
 9021 39 10 - - - Ocular prostheses
 9021 90 90 - - other

9021 in the Combined Nomenclature applies to “orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability”.

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The Issue

14. The issue for the Tribunal is whether the mastectomy bra should be classified as a brassiere under sub-heading 6212 10 90 in the combined Nomenclature or as an orthopaedic appliance under sub-heading 9021 10 10, as the Appellant submits.

15. In its Statement of Case the Respondents contended that the item is, when classified objectively, a brassière. The prostheses which are inserted in the item do not take over the function of the amputated breasts and are, therefore, not analogous to prosthetic limbs. The item itself does not go so far as the prosthesis, it is a garment which looks and acts as a brassière and is worn in the same manner. It does not perform a function analogous to anything within the heading 9021.

The Evidence

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16. An agreed bundle of documents was provided, and also a joint bundle of witness statements. The Tribunal heard evidence from Mrs Brigitte Seehaus, the product manager for the German parent company of the Appellant. We also heard evidence from Mr David Harris, a Higher Officer employed in the Tariff Classification Service of HMRC. Other statements were provided to which we will refer as necessary. We also saw the product in question, and various other examples of brassieres, and items which had been accepted by the German authorities as being orthopaedic appliances under heading 9021.

The Facts

The appearance

17. We examined the Carmen Mastectomy bra carefully. The example we saw was size 42E, GB sizing. It was 95F in Europe and 42DDD in the US. It might be considered a large size. For comparison we were shown a normal bra UK size 40D. The most noticeable differences between the two garments was that the mastectomy bra had two side supports on the outside of each breast, which were absent in the normal brassiere which we saw, and the straps in the mastectomy bra were positioned centrally over the breasts whereas in the normal bra the straps were marginally over to the sides. It was Mrs Seehaus’s evidence that the area under the bust was not elasticated, however, we do not accept this evidence, it appearing to us that there was some give in that area. She also referred to the fact that there was more fabric used to cover what might be called the cleavage, i.e. the middle part of the bra, than would be found in a normal brassiere.

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18. In her witness statement Mrs Seehaus pointed to the following as the key features of the mastectomy bra:-

- (i) Pockets to hold the breast form (see below).
- (ii) Wide adjustable padded straps.
- (iii) Positioning of the straps towards the centre of the cups.
- (iv) Cut and shape of the bra to conceal the breast form.
- 5 (v) Wide underband.
- (vi) Use of soft material inside bra.
- (vii) Non-elastic underbust.
- (viii) Elastic top of cup.
- (xii) At least two hooks.
- 10 (xiii) Elastic side stick.

19. We find that there is not one of the above features which may not be found in an ordinary brassiere, although the positioning of the pockets to hold the breast form in conjunction with the higher cup to cover it is not such as would usually be found in
 15 an ordinary brassiere where the opening is more normally used in conjunction with a low cut bra, and where it is found, it is in order to insert padding to create an appearance of a larger bust; the central positioning of the straps is a feature which we accept it would be unusual to find in a normal brassiere.

20. The Carmen Mastectomy bra we saw was modelled for us by a woman who had had a mastectomy. As previously stated it was a large size and the breast form did have significant weight, but we had no evidence as to whether or not it was the same weight as the model's remaining breast. However, we assume that it was, as in
 25 her witness statement Mrs Seehaus stated: "In order to achieve optimum weight compensation, the so-called regular weighted silicone was developed to copy the weight of the natural breast." We therefore had a conflict of evidence between Mrs Seehaus and the medical authorities she produced in that they referred to the weight of the breast form in a mastectomy bra as given rise to the very problems with shoulders and back it is intended to alleviate (see below).

30 ***The Purpose***

21. The purpose of the mastectomy bra is partly as set out in the description above given in the Appellant's application for a BTI decision. Curiously, in its BTI decision
 35 HMRC omitted the two aspects relating to purpose included in that application, namely "left and right pockets to hold the breast forms firmly in place and the purpose is to avoid undue stress associated with neck/shoulder problems for the post operated woman." HMRC referred simply to the bra being "designed for post-mastectomy use". Mrs Seehaus emphasised that it was not solely for post-mastectomy use, but was
 40 also designed for patients who had had a lumpectomy or where there has been breast reconstruction. We refer to it as a 'mastectomy bra' throughout but on the understanding that that word includes the other two purposes for which it has been designed.

45 22. The intended use of the product is relevant to its classification if, in the words of the ECJ itself in the case of *Uroplasty* at paragraph 42: "it is inherent in the

product, and such inherent character must be capable of being assessed on the basis of the products objective characteristics and properties.”

5 “In this case, as the Advocate General observed in paragraph 48 of her opinion, the polydimethylsiloxane (the product being considered) could be classified either as according to its essential characteristics or according to its objective purpose under one of [four different] headings of the CN.”

23. We find that the primary purpose of the mastectomy bra is to hold the breast form(s) in place. The breast forms made by the Appellant are silicone pads which
10 come in some 150 different shapes and sizes. The purpose of the breast form is to replace as far as possible in size and shape the form of the remaining breast, in cases where there has been the removal of one breast only, and of both breasts where there has been a double mastectomy. The patient would be carefully measured by a trained fitter to ensure that the mastectomy bra and the bra form fitted properly. It was the
15 Appellant’s case that because the female body developed muscles to carry a breast on either side, the female body was naturally balanced by an even distribution of the weight of both breasts, therefore the removal of any (significant) amount of tissue/muscle disturbed that balance which, if not compensated for by a breast form, leads to neck or back problems for the patient. Orthopaedic problems also occurred
20 where there was a bi-lateral mastectomy. The purpose of the breast form was to prevent the body from over compensating by developing a rounded back caused by a tendency to protect the chest wall and make up for the lost weight. It was contended that the mastectomy bra itself assumed the function of the muscles which had been removed. Evidence was given that after reconstructive surgery or a lumpectomy a
25 special brassiere is required to help the flow of lymph fluid which has been corrupted by the removal of the lymph nodes from under the arm, however, we had no specific medical evidence as to this, the only medical opinion was from Professor Doctor Karsten Munstedt who had stated: “This is considered to reduce the likelihood of lymphedema (sic) formation on the side of the operated breast.” Dr. Munstedt did
30 not state that this was his own opinion, something he had been very clear about when giving an opinion in relation to other aspects of the case.

24. There was evidence before us that it was preferable that the breast form should not be too heavy, and in a paper written by Andreas Hackethal and Doctor Munstedt it
35 was stated: “The use of external prostheses, however, can lead to discomfort for the patients through shoulder pain and muscle hardening. It can be assumed that this is caused by strain on the shoulder due to the weight of the prosthesis”. The conclusion of the study was that “weight-reduced contact prostheses present optimal treatment after breast amputation” (emphasis added). In an abstract written by Doctor
40 Munstedt, W. Milch and C. Reimer it was concluded that: “After mastectomy restoration of body symmetry, a very important aspect of coping with daily life, may be achieved either using breast forms that are suspended in a brassiere or by a new system in which breast forms are attached by adhesive strips to the thorax wall. The system promises free and easy movement, favourable effects on lymphoedema, and
45 improvements with respect to dressing. Brassieres are not necessarily needed. The influence of improved prosthetics on patients self concept and wellbeing was investigated. A group of 67 patients after unilateral mastectomy tested custom breast

forms and self-adhesive breast forms. ... Most patients were better satisfied with epicutaneous self-adhesive breast forms. ... Breast reconstruction became less important for 62%. The new concept of self-adhesive breast forms is an improvement with respect to social and physiological rehabilitation.”

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25. A final purpose of the breast form and the mastectomy bra put forward by Mrs Seehaus is the lessening of the psychological impact of having had a mastectomy. We accept her evidence as to this, but not only is this a matter which is not obvious from examination of the mastectomy bra, but it is not the mastectomy bra itself which achieves this, but the mastectomy bra when it contains a breast form and without the breast form there would be no such effect.

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26. Other evidence produced on behalf of the Appellant is a) the opinion of Jackie Benzecry, Chair of Breast Friends Breast Cancer Support Charity who states that 95% of the members of that organisation wear a mastectomy bra and concludes that an ordinary brassiere is usually unsuitable for use with an external prosthesis; b) The opinion of Brigitte Overbeck-Schulte, who is President of the equivalent German Cancer Support Charity who states: “Using the mastectomy bra, lymphoedema, wrong body postures and muscular misuse can be avoided”; c) an opinion from Doctor Munstedt (the co-author of two of the papers sighted above) who was asked to comment on the differences between an orthopaedic bra after mastectomy and an ordinary bra. He refers to the beneficial effects of bras with specific features after sternotomies, i.e. cardiac surgery and in cases of breast pain not related to a mastectomy. He also considers the question which is for the Tribunal, namely if special bras for patients after mastectomies can be regarded as orthopaedic appliances and if they are primarily designed to compensate for a defect or disability. He considers them to be “more advantageous compared to conventional bras which mainly or exclusively have aesthetic purposes”. We do not accept Dr. Munstedt’s opinion that conventional bras are mainly or exclusively worn for aesthetic purposes, particularly in the case of larger-breasted women they are worn to prevent the breasts from becoming misshapen and to give them support. Dr. Munstedt did not refer in his statement to the two papers which he co-authored which appear to contradict this opinion in that one refers to the problem caused by the weight of the prosthesis (the breast form) and recommends a weight-reduced prosthesis, which is not suggested by Mrs Seehaus on behalf of the Appellant, and the other which recommends an adhesive form of prosthesis rather than the mastectomy bra. However, whilst we accept that the fact that there maybe other forms of prosthesis which are preferable to the mastectomy bra cannot in any way alter the objective of the mastectomy bra itself, it does give cause to doubt whether it properly achieves that objective.

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Whether it is an orthopaedic appliance

27. Having examined the mastectomy bra and compared it with a normal bra, we now turn to the evidence as to it being an orthopaedic appliance within heading 9021, and thereby being excluded from heading 6212. We were provided with various items, including a wrist orthosis, a lumbar support belt, an elbow support and functional knee supports, which were all items which had been held by the German

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authorities to come within chapter 90. There could be no doubt from the appearance of these items that they were orthopaedic appliances, that matter having been decided by the ECJ in the case of *Lohmann GmbH & Co. KG (c-260/0 to c-262/000)*, the question having been referred to it as to whether the items came within Chapter 60 or Chapter 90. The ECJ then referred the items to the German court where the question to be decided by the German authorities was whether or not their intended effect was derived solely from elasticity and thus they were excluded from 9021 by Note 1(b). The appliances themselves which we examined are very different in appearance and kind from the mastectomy bra. The purpose of the items is discernible from their objective appearance, which we find is not the case with the mastectomy bra. We do not find that the mastectomy bra is itself worn to compensate for a defect or disability within 9021, because it is worn to carry the breast form, and without the breast form it would not achieve any of the above purposes ascribed to it. The breast form is worn to compensate for a defect, and also for the various reasons given by Mrs Seehans above, that cannot be said of the mastectomy bra itself. Its appearance is so close to that of a normal brassiere that it could not be determined from its objective characteristics that it is worn to compensate for a defect or disability, something which is very obvious in the case of the items which were considered by the German authorities. However, insofar as it is necessary for us to decide the matter of elasticity, the evidence was that the Carmen Mastectomy bra was made of 50% polyamide, 25% elastene, 15% cotton and 10% viscose. The supports we saw had a lycra-spandex component of 20%. The label on the mastectomy bra indicated that the back band was made of 30% spandex. We do not consider that the support provided by the mastectomy bra to the breast form derived solely from its elasticity, and therefore the garment should not be excluded from Chapter 90 on the basis of Note 1(b).

The Appellant's Case

28. Mr Eicke submitted that the definition of "disability" should correspond with that in the Equalities Act 2010 which provides in para 6(a) of Schedule 1 that: "Cancer, HIV infection and multiple sclerosis are each a disability" therefore the lack of breast tissue caused by a woman having cancer should equally come within the definition of disability, the need for the breast form and a mastectomy bra only arises as a result of such a disability. The mastectomy bra acts both as an accessory to another article consistently classified under heading 9021, namely the breast form, without which that article could not fulfil its medical purpose; and as an article which takes over or substitutes for the function of a defective part of the body, namely the connective tissue and muscles which have had to be removed as part of the operation and which would otherwise have supported the woman's natural breast.

29. It was submitted that the mastectomy bra serves a medical purpose, that being so the question for the Tribunal is whether the mastectomy bra in issue in this appeal can be distinguished from a simple or ordinary brassière by reference to either the method of manufacture of the mastectomy bra; the nature of the materials of which it is made; its adjustability to the handicaps which it is intended to correct; or other

special characteristics, in particular the specificity of its purpose. We were referred to the case of *Lohmann GmbH & Co KG*. In that case at paragraph 40 the ECJ said;

5 “Where a product exists in different versions and where, in its simple or ordinary version, it serves a general purpose, whilst in a different version designed to perform a medical function it is used for orthopaedic purposes, it is only in the latter version and by application of the above mentioned criteria that it is to be classified in CN heading 9021.”

10 30. It was the Appellant’s case that Note 1(b) to Chapter 90 was not applicable, and there was no evidential basis for applying the exclusionary rule. The US authorities relied on by HMRC, under which they concluded that a product with 9% elastic material automatically fell within Note 1(b) was plainly incorrect in that it
15 contradicted the binding case law of the ECJ: it erroneously assumed that the percentage content of elastic material in the whole product is necessarily synonymous with the question of elasticity achieving a product’s desired effect and was inconsistent with the approach taken by the German tax court in the *Lohmann* cases.

20 31. The Tribunal was referred to the provision of mastectomy bras both under the VAT regime and under the Medical Devices Directive 93/42. Whilst neither of those provisions have any direct relevance to the classification of the mastectomy bra under the CN, Mr Eicke submitted that there should be a broadly consistent approach. In order to fall under the Medical Devices Directive the authorities have accepted that
25 the mastectomy bra is an:

 “... instrument, apparatus, appliances, material or other article, whether used alone or in combination, ... the purpose of:

- 30 - diagnosis, prevention, monitoring, treatment or alleviation of disease,
 - diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap, ...”

35 In order to be accepted as zero-rated for VAT purposes, HMRC have accepted that a mastectomy bra falls within the definition of “drugs, medicines, aids for the handicapped” under Group 12 of Schedule 8 to the VAT Act 1994. The most likely heading under which this could have been achieved is paragraph 2(a):

40 “The supply to a handicapped person for domestic or his personal use, or to a charity for making available to handicapped persons by sale or otherwise, for domestic or their personal use, of –

- 45 (a) medical or surgical appliances designed solely for the relief of a severe abnormality or severe injury.”

Under these provisions the relevant authorities have accepted that a mastectomy bra have the necessary medical purpose concerned with correcting of bodily deformities and/or the relief of an abnormality or serious injury. It was submitted that the same recognition should inform the tribunal’s approach to the classification of the mastectomy bra under heading 9021.

Reasons for Decision

32. CN 9021 (set out above) refers where relevant to “appliances which are worn or carried, or implanted in the body, to compensate for a defect or disability”. It also refers to “artificial parts of the body”. Whilst we consider that the breast form is an artificial part of the body, we do not find that the mastectomy bra itself can so be described. It is worn in order to carry an artificial part of the body without being such itself. It is also worn (in cases where there is a single mastectomy) to carry the normal breast. Note 6 (see above) relates specifically to heading 9021. The Appellant relies on this note for its submission that the mastectomy bra is used to prevent or correct bodily deformities. The breast form could not compensate for the deformity without a mastectomy bra because there is no way that it could achieve its desired compensatory effect on its own, there being nothing to hold it in place. The mastectomy bra itself corrects the deformity caused by the absence of relevant muscle structure that previously held in place a natural breast. It is only through the combination of breast form and mastectomy bra that the existing bodily deformities can be corrected, further bodily deformities prevented and the relevant part of a woman’s body (whether artificial or otherwise) be supported or held. The mastectomy bra cannot perform any corrective functions on its own without being used in conjunction with the breast form and therefore it cannot come within 9021.

33. Mr Eicke made a submission (provided after the hearing) that the fact that artificial parts of the body which resemble the natural parts, such as eyes, are stated in the HSEN to come within the heading 9021, should allow the mastectomy bra to come within the same heading. He submitted that as heading 9021 39 10 includes ocular prostheses (i.e. ‘artificial eyes’), which cannot take over the primary function of the eye, so the prosthesis in this case could not take over or substitute for the mammary functions of the natural breast. Whilst this last is true, it is irrelevant as we are considering the function of the mastectomy bra, not that of the prosthesis, and as the bra is imported independently of the prosthesis, the function of the prosthesis cannot determine the correct classification of the bra. We also note his late submission that the *Lohmann* judgment emphasises the ‘characteristics’ of the mastectomy bra rather than its material composition. Our conclusions are not based on the material composition of the bra. On examination of the mastectomy bra we could find no evidence that its function was not just the containment of the breast form, but was also the prevention of shoulder pain and problems arising from the absence of lymph nodes. We are fortified in our conclusion as to the objective characteristics of the mastectomy bra by the fact that it is symmetrical. It is not made to be either specifically left handed or right handed but may be used equally by a person who is missing either a left or a right breast or both.

34. The Respondents referred us to various decisions of the United States Customs Service which had in several cases ruled that a mastectomy bra was properly classified as a brassière under heading 6212 not as an orthopaedic appliance under heading 9021. A ruling of the Irish authorities on the 4 March 2011 also was to the effect that a mastectomy bra should be classified under sub-heading 6212 10 90. These decisions relied on a finding that the mastectomy bras were excluded from 9021 by Note 1 (b), i.e that their intended effect derived solely from elasticity. Whilst we accept the need for consistency in the approach of the different authorities who are considering very similar products, we are not governed by these cases in arriving at our decision to dismiss this appeal, and indeed arrive at our conclusion that the mastectomy bra is properly to be classified under commodity code 6212 1090 00 for the reasons stated above, and because of Note 1(b). This appeal is dismissed.

35. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

MISS J C GORT
TRIBUNAL JUDGE
RELEASE DATE: 21 October 2011