[2017] UKUT 0192 (TCC)

Appeal number: UT/2016/0010

CUSTOMS DUTY – Harmonised Commodity Description and Coding System – Combined Nomenclature – Correct Classification of Commodities – Review of its Decision by the FTT - s 9 Tribunals, Courts and Enforcement Act 2007

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

VITAL NUT CO. LIMITED **App**

- and -

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

TRIBUNAL: The Honourable Mr. Justice Marcus Smith
Judge Colin Bishopp

Sitting in public at The Rolls Building, Fetter Lane, London EC4A 1NL on 13 and 14 March 2017

Frank Mitchell, instructed by John Weston & Co. Solicitors, for the Appellant

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondent

DECISION

A. INTRODUCTION

1.
The European Community is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System (the "Harmonised System"). The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System. All contracting states therefore use the headings and sub-headings of the Harmonised System.

2.
The Harmonised System is administered by the World Customs Organisation in Brussels. It publishes explanatory notes to the Harmonised System, known as "Harmonised System Explanatory Notes" or "HSENs".

3.
At Community level, the amount of customs duties on goods imported from outside the Community is determined by reference to the "Combined Nomenclature" or "CN" established by Article 1 of Council

Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:

(1)
The nomenclature of the Harmonised System.

(2)
Community sub-divisions to that nomenclature.

(3)
The preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

4.
The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are “00”. There may also be ninth and tenth digits, which identify further Community sub-headings, of which there are about eighteen thousand. For present purposes, it will only be necessary to refer to the first four digits of this numerical system.

5.
In addition to the Harmonised System Explanatory Notes or HSENs, the European Commission issues “Combined Nomenclature Explanatory Notes” or “CNENs”.

6.
The Appellant, Vital Nut Co. Ltd (“Vital Nut”), is an importer of preserved, diced, papaya from Thailand into the United Kingdom, manufactured by a company called Vanda. Vital Nut imported the papaya under commodity code heading 20.08 of the Combined Nomenclature. This classification was challenged by the Respondents, the Commissioners for Her Majesty’s Revenue and Customers (the “Commissioners”) who, after examination, determined that the proper commodity code for the papaya was under heading 20.06 of the Combined Nomenclature. This resulted in a higher rate of customs duty being payable.

7.
Vital Nut appealed this decision to the First-tier Tribunal (Tax Chamber) (the “FTT”). By a decision dated 7 July 2015 (the “Original Decision”) and revised following a review on 5 November 2015 (the “Revised Decision”), the FTT upheld the classification of the Commissioners, and determined that the papaya fell to be classified under commodity code heading 20.06 and not under commodity code heading 20.08 of the Combined Nomenclature.

8.
On 23 December 2015, the FTT gave permission to appeal the Revised Decision. Paragraph 1 of the permission reads:

“Having considered the application for permission to appeal I consider that as it is arguable that there is an error of law in the amended decision released on 5 November 2015 which will also provide the Upper Tribunal with an opportunity to clarify the scope of a review of a decision under rule 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 permission to appeal is GRANTED.”

9.
This is the determination of the appeal from the FTT's decision. It considers the following points in the following order:

(1)
Section B considers the definition of commodity code headings 20.06 and 20.08 of the Combined Nomenclature.

(2)
Section C sets out the conclusion of the FTT, and identifies how the terms of the Revised Decision differ from those of the Original Decision.

(3)
Section D describes Vital Nut's grounds of appeal. Essentially, Vital Nut advances two broad grounds of appeal:

(a)
"Ground 1" (which has three limbs, which we shall call "Ground 1(a)", "Ground 1(b)" and "Ground 1(c)"); and

(b)
"Ground 2".

We consider Ground 1 in Section E and Ground 2 in Section F.

B. HEADINGS 20.06 AND 20.08 OF THE COMBINED NOMENCLATURE

10.
Chapter 20 of the Combined Nomenclature as at 31 October 2007 deals with "Preparations of vegetables, fruit, nuts or other parts of plants". The explanatory notes to Chapter 20 make clear that the term "tropical fruit" includes "papaws (papayas)": it follows that papayas are "fruit". It was common ground between the parties that the papaya in this case falls within Chapter 20 and that no other Chapter of the Combined Nomenclature is applicable.

11.
Within Chapter 20, commodity code heading 20.06 refers to:

"Vegetables, fruit, nuts, fruit peel and other parts of plants, preserved by sugar (drained, glacé or crystallised)".

Commodity code heading 20.08 refers to:

"Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or sweetening matter or spirit, not otherwise specified or included".

12.
Both codes 20.06 and 20.08 contain multiple sub-classifications: for the purposes of this Decision, nothing turns on these sub-classifications. It was also common ground between the parties that if the papaya did not fall to be classified under code 20.06, it was properly to be classified under code 20.08 (which is something of a "catch-all" coding, for commodities not falling within anterior classifications).

13.

The Chapter Notes to Chapter 20 say nothing relevant to this appeal, and in particular are silent about the means of preparation and preservation of the items within the Chapter, but both codes 20.06 and 20.08 have explanatory HSENs. These, to the extent material, provide as follows:

“ **20.06 – Vegetables, fruit, nuts, fruit peel and other parts of plants, preserved by sugar (drained, glacé or crystallised).**

The products of this heading are prepared first by treating the vegetables, fruit, nuts, fruit peel or other parts of plants with boiling water (which softens the material and facilitates penetration of the sugar), and then repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration until they are sufficiently impregnated with sugar to ensure their preservation.

…

Crystallised products are prepared by allowing the sucrose syrup to penetrate into the product so that, on drying, it forms crystals on the surface or throughout the product.”

“20.08 – Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included.

…

(10) Fruit preserved by osmotic dehydration. The expression ‘osmotic dehydration’ refers to a process whereby pieces of fruit are subjected to prolonged soaking in a concentrated sugar syrup so that much of the water and the natural sugar of the fruit is replaced by sugar from the syrup. The fruit may subsequently be air-dried to further reduce the moisture content.”

C. THE CONCLUSION OF THE FTT

14.
The FTT concluded that the papaya in this case had correctly been classified under commodity code 20.06.

15.
The FTT reached this conclusion in the following way:

(1)
The FTT began by determining, first, the intended use of the product and, then, its objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (see [49] of both the Original Decision and the Revised Decision).

(2)
The FTT concluded that the intended use of the papaya was its inclusion in cereals or as a snack, either on its own or with other fruit (see [50] of both the Original Decision and the Revised Decision).

(3)
As regards the objective character of the papaya, the FTT concluded that it was “clearly a ‘tropical fruit’ as defined by the notes to chapter 20 and therefore a fruit within heading 2006 if ‘preserved by sugar (drained, glacé or crystallised)’ or under heading 2008 if not” (see [50] of both the Original Decision and the Revised Decision).

(4)

The FTT then sought to determine whether the papaya was “preserved by sugar”. As to this:

(a)
The FTT noted that the objective character of the papaya was suggestive of preservation by crystallisation (see [51] of both the Original Decision and the Revised Decision). HMRC’s expert, Ms. Geary, had placed some reliance on the presence of sugar crystals in the papaya (see [26] to [28] of both the Original Decision and the Revised Decision). However, Vital Nut’s expert, Professor Niranjan, contended, and Ms. Geary accepted, that the process of osmotic dehydration (which is the process described under code 20.08) could produce sugar crystals in papaya (see [29] of both the Original Decision and the Revised Decision).

(b)
In these circumstances, the FTT considered that it was necessary to have regard to the process by way of which the papaya was produced (at [54] of both the Original Decision and the Revised Decision). In this regard, Vital Nut placed considerable emphasis on the HSEN to code 20.06, which refers to a process whereby products are “prepared first by treating the … fruit … with boiling water (which softens the material and facilitates penetration of the sugar), and then repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration until they are sufficiently impregnated with sugar to ensure their preservation” (emphasis added).

(c)
Before the FTT, it was common ground between the parties that the burden of proving which was the applicable class fell on the taxpayer, here Vital Nut. This was also not a controversial point before us. In this case, the Commissioners issued a C18 Post Clearance Demand Note (C1802/163608) which was predicated on the classification of the papaya under commodity code heading 20.06. Vital Nut accepted that it was not for the Commissioners to justify this classification. Rather, the onus was on Vital Nut to show that the 20.06 classification was wrong and that commodity code heading 20.08 was the appropriate one: Brady (HM Inspector of Taxes) v. Group Lotus Car Companies plc [1987] 3 All ER 1050.

(5)
In the Original Decision, the FTT concluded:

“[55] However, there was no evidence before us in relation to the way the papaya was preserved during 2008, the year in which the papaya samples were taken by HMRC. The only evidence of the preservation process is contained in Ms. Uppatham’s witness statement made in August 2014 which did not address the issue of whether the processes described were in operation in 2008. It is also clear that neither Professor Niranjan nor Mr. Brunton could assist with this issue. Had Ms. Uppatham or Vanda’s factory manager, who Professor Niranjan said spoke good English and was aware of the preservation process, been called to give evidence it is quite possible that the Company would have been in a position to establish, on the evidence, that the process does not satisfy the scientific requirement of the HSEN to 2006 and therefore should not be classified under heading 2006 but under heading 2008.

[56] Although we may have reached a different conclusion if evidence of the preservation process during 2008 had been adduced, in the absence of any such evidence we have no alternative but to dismiss the Company’s appeal.”

(6)
In the Revised Decision, the FTT concluded:

“[55] However, there was insufficient no evidence before us in relation to the way the papaya was preserved during 2008, the year in which the papaya samples were taken by HMRC. Although Ms. Uppatham did refer to this in her witness statement, made in August 2014, it is unclear whether the processes described were in operation in 2008. Clearly, as Mr. Mitchell acknowledged in his skeleton argument ‘there has been some uncertainty around the technical detail of the production process.’ The only evidence of the preservation process is contained in Ms. Uppatham’s witness statement does not, in our view, satisfactorily made in August 2014 which did not address the issue of whether the processes described were in operation in 2008. It is also clear that neither Professor Niranjan nor Mr. Brunton could assist with this issue. Had Ms. Uppatham or Vanda’s factor manager, who Professor Niranjan said spoke good English and was aware of the preservation process, have been called to give evidence it is quite possible that the Company would have been in a position to establish, on the evidence, that the process does not satisfy the scientific requirement of the HSEN to 2006 and therefore should not be classified under heading 2006 but under heading 2008.

[56] Although we may have reached a different conclusion if satisfactory evidence of the preservation process during 2008 had been adduced, in the absence of any such evidence we have no alternative but to dismiss the Company’s appeal.”

16.
We have identified, by underlining and strikeout the manner in which the Revised Decision differs from the Original Decision in [55] and [56]. In each case, the conclusion was the same: the FTT was not satisfied that Vital Nut had demonstrated that the process by way of which the papaya was produced brought the commodity within code 20.08. The classification contended for by the Commissioners, namely code 20.06, thus prevailed.

D. GROUNDS OF APPEAL

(1) The Original Decision

17.
Vital Nut applied for permission to appeal the Original Decision. Its application largely focussed on the statement, made in [55] of the Original Decision, that there was “no evidence” of the manner in which the papaya was produced in 2008. It was contended (paragraph 4 of the Application for Permission to Appeal) that:

“The instant permission application is made on the basis that the FTT erred in law in concluding that it had before it no evidence of the 2008 production process. That submission is made, inter alia , on the basis that the FTT reached a conclusion on the facts which no reasonable Tribunal could have reached whilst properly having regard to the evidence before it, such as amounts to an error of law as provided for in Edwards (Inspector of Taxes) v. Bairstow [1956] AC 14. We have here referred to such alleged error as an alleged error of fact.”

18.
The Application for Permission to Appeal was considered by a Judge of the FTT. In a letter dated 21 September 2015, the FTT wrote to Vital Nut in the following terms:

“The primary basis on which permission to appeal is sought is that in paragraphs 55 and 56 of the decision the Tribunal referred to there being ‘no evidence’ and the ‘absence of any such evidence’ of the production process of the product concerned in 2008 despite there being evidence of this before the Tribunal.

In the circumstances, and in accordance with rules 40 and 41 of the Tribunal Rules (First-tier Tribunal) (Tax Chamber) Rules 2009, the judge has undertaken a review of the decision and proposes to take action to amend paragraphs 55 and 56 of the decision as follows…"

19.
Paragraphs 55 and 56 of the Decision were then amended in the manner set out above. The basis for these amendments was fully set out in the Revised Decision, as follows:

"[57] This decision was originally released to the parties on 7 July 2015. On 27 August 2015 the Company made an application for permission to appeal to the Tax and Chancery Chamber of the Upper Tribunal. The primary basis for the application was that the Tribunal had made an error of law by referring, in paragraphs 55 and 56 of the original decision, to there being 'no evidence' and the 'absence of any such evidence' of the production process of the product concerned in 2008 despite there having been evidence of this before the Tribunal.

[58] Under rule 40(1) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009:

On receiving an application for permission to appeal the Tribunal must first consider, taking account of the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision).

Rule 41 provides:

(1) The Tribunal may only undertake a review of a decision –

(a) pursuant to rule 40(1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(2) The Tribunal must notify the parties in writing of the outcome of any review, unless the Tribunal decides to take no action following the review.

(3) The Tribunal must not take any action in relation to a decision following a review without giving every party an opportunity to make representations in relation to the proposed action.

[59] In the circumstances, and in accordance with rules 40 and 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, a review of the decision was undertaken and it was proposed that the decision be amended with paragraphs 55 and 56 of the original decision (which is as set out in the appendix) replaced with new paragraphs 55 and 56 which are as stated above.

[60] Therefore, on 21 September 2015 pursuant to rule 41(3), the Tribunal wrote to the parties to explain that a review had been undertaken. The letter from the Tribunal included the details of the proposed amendment and invited written representations within 28 days or confirmation that it was not intended to make any representations.

[61] HMRC responded, by email, on 13 October 2015 stating that no representations were to be made.

[62] In a letter dated 16 October 2015 the Company's solicitors contended that rule 41(1)(b) of the Tribunal (First-tier Tribunal) (Tax Chamber) Rules 2009 did not empower the Tribunal to make the proposed amendments as it is only entitled to undertake a review of a decision in order to correct an error of law in that decision. The clear implication of this is that the Tribunal is not permitted to correct an error of fact such that with which the Tribunal's proposal is concerned.

[63] However, as recognised by the application for permission to appeal itself, it is an error of law for the Tribunal to find there was ‘no evidence’ before it on a particular issue when this was not the case. The amendment to paragraphs 55 and 56 correct this error. Therefore, having considered the representations it has been decided to amend and re-issue the decision accordingly.”

(2) The Revised Decision

20.
The basis upon which the Revised Decision is appealed is more difficult to state succinctly. That is, in part, because Vital Nut contended, as part of its appeal, that the FTT was not entitled to amend the Original Decision in the manner that it did. In other words, Vital Nut contended that this appeal was in respect of the Original Decision, and not the Revised Decision. However, because this issue of the propriety of the revisions was itself an open question on the appeal, Vital Nut’s grounds of appeal were framed in the alternative as first grounds of appeal in respect of the Original Decision; and secondly grounds of appeal in respect of the Revised Decision.

21.
Vital Nut’s grounds of appeal are set out in paragraphs 7 to 11 and 72 to 73 of its skeleton argument, but in particular in paragraphs 9 to 11, which state:

“9. In deciding the appeal against the Appellant, the FTT did so exclusively on the basis that the Appellant did not tender any (or any satisfactory) evidence from an individual present in the factory in 2008 when the product was manufactured. In approaching the analysis in this way, the FTT erred in law in:

i. asking itself the wrong question (the Tribunal appears to have posed for itself the question ‘how was this product manufactured’ rather than the question ‘was this product manufactured by repeatedly heating it to boiling point in sugar syrup of increasing concentration?’)

ii. excluding from its consideration legally relevant and probative evidence as to the manner of manufacture such as documentary evidence, physical evidence, scientific evidence and expert evidence (as opposed to strictly factual evidence) as to the manner of manufacture of the product in question in 2008;

iii. failing to have any regard to the objective character of the products in question when applying the terms of the HSEN.

10. Each of the foregoing grounds of appeal are squarely directed at errors of law (and not errors of fact) contained within the Tribunal’s Original and Amended Determinations.

11. In the alternative, to the foregoing, even if the Tribunal was correct, as a matter of law, to limit its consideration of the matter to direct evidence of the manufacturing process tendered by the manufacturer itself, in concluding (at paragraphs 55 and 56 of its original determination) that there was no such evidence and (at paragraphs 55 and 56 of its amended determination) that Ms. Uppatham’s witness statement did not ‘satisfactorily address the issue of whether the processes described were in operation in 2008’, the Tribunal reached findings of fact which no reasonable Tribunal could have reached. It is only to this limited extent that the Applicant challenges the Tribunal’s finding of fact in the amended Determination.”

22.

We refer to the ground of appeal identified in paragraphs 9 and 10 of Vital Nut's skeleton argument as Ground 1. As is clear from paragraph 9 of Vital Nut's skeleton argument, Ground 1 has three limbs:

(1)
Ground 1(a): whether the FTT had regard to the objective character of the products in question when applying the terms of the HSEN. (This is the ground set out in paragraph 9 iii of Vital Nut's skeleton argument.)

(2)
Ground 1(b): whether the FTT asked itself the "wrong" question. (This is the ground set out in paragraph 9 i of Vital Nut's skeleton argument.)

(3)
Ground 1(c): whether the FTT excluded from its consideration legally relevant and probative evidence. (This is the ground set out in paragraph 9 ii of Vital Nut's skeleton argument.)

23.
Ground 1 is considered in Section E below.

24.
We refer to the ground of appeal identified in paragraph 11 of Vital Nut's skeleton argument as Ground 2. This is considered in Section F below.

E. GROUND 1

(1) Ground 1(a): Failing to have regard to the objective character of the product

25.
Vital Nut contends that the FTT failed to have any regard to the objective character of the products in question when applying the terms of the HSEN.

26.
The approach to the interpretation of CNs was set out, in identical terms, in [38] to [41] of both the FTT's Original and Revised Decisions:

"[38] The approach to interpretation of a CN has recently been considered by the Court of Appeal in Amoena (UK) Limited v. HMRC [2015] EWCA Civ 25 where Arden LJ said:

'[54] It is clear from the Opinion of Advocate General Kokott in Uroplasty [Case C-514/04 Uroplasty BV v. Inspecteur van de Belastingdienst – Douana district Rotterdam [2006] ECR 1-67219] that the court must apply a structured approach. At the first stage it must determine the intended use and material composition of the article. Next the court must make a provisional classification by reference to section and chapter headings. Then the court must make a combined examination of the headings and Notes, applying GIRs 2 to 5 in case of conflict. The interpretation of the headings and EN should be consistent with the HS. Finally the article must be placed under the appropriate subheading. The relevant paragraphs in the Opinion are as follows:

[42] First, the intended use and 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 to 5 of the general rules. Lastly, classification must be made under the subheadings.

[43] …

[44] 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 regards 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.

[55] The CJEU emphasised that the determination of the characteristics and properties of the article must be an objective one, and that the wording of the CN must prevail over the EN, which cannot alter the scope of the headings:

[40] According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters …

[41] The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope …

[42] For the purposes of classification under the appropriate heading, it is important, finally, to recall that the intended use of a product may constitute an objective criterion in relation to 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 …'

[39] She observed at [64]:

'While the HSENs are not binding on the CJEU, they are important as an aid to interpretation as a means of ensuring the uniform application of the EU Customs Code: see, for example, Lohmann [Joined Cases C-260/00 to C-263/00 Lohmann GmbH & Co KG and Others v. Oberfinanzdirektion Koblenz [2002] ECR I-10045] where the CJEU held:

'[31] In addition, the Court has consistently held that the purposes of interpreting the Common Customs Tariff both the notes which head the chapters of the Common Customs Tariff and the HS Explanatory Notes are important means of ensuring the uniform application of the Tariff and as such may be regarded as useful aids to its interpretation.'

[40] In Weber v. Milchwerke Paderborn-Rimbeck [1989] ECR 1395 Case 40/88, the European of Justice ('ECJ') was asked for a preliminary ruling in relation to the interpretation of the Common Customs Tariff and whether the way in which a product was manufactured could have an effect on the tariff classification of the product. In its decision the Court stated:

'[13] In order to reply to those questions it should be pointed out, first, that according to settled case-law … in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their characteristics and objective properties as defined in the wording of the relevant heading of the Common Customs Tariff and of the notes to the sections or chapters.

[14] With regard to the question whether the method of manufacture of the product has an effect on classification for customs purposes, the Court has already decided…that whilst the Customs Tariff does indeed in certain cases contain references to manufacturing processes it is generally preferred to employ criteria for classification based on the objective characteristics and properties of products which can be ascertained when customs clearance is obtained.'

[41] However, it is clear from the decision of the Court of Justice of the European Union ('CJEU') in Delphi Deutschland GmbH v. Hauptzollamt Düsseldorf [2011] EUECJ C-423/10 at [23] to [26] that while, as in Weber , the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes it is 'necessary to take into account also the explanatory notes.'"

27.
It was not suggested by Vital Nut that the foregoing was an incorrect statement of the law by the FTT – nor could it realistically do so as it was expressly approved by the Supreme Court on Amoena's appeal to that court (see Amoena (UK) Limited v. HMRC [2016] UKSC 41, [2016] 1 WLR 2904). Rather, Vital Nut's contention was that the FTT had failed properly to apply this approach to the facts of the instant case.

28.
As to this:

(1)
As is clear from the case-law cited by the FTT, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their character and objective properties as defined in the wording of the relevant parts of the CN, HSEN and CNENs.

(2)
Certainly, this means that the starting point for any classification involves a consideration of the character and objective properties of the commodity in question. In many cases – but not in all cases – the character and objective properties will be determinative.

(3)
In this case, the FTT, quite rightly, began with a consideration of the character and objective properties of the papaya, examining these in the context of the CN and HSENs: see [42] to [51].

(4)
The FTT concluded, having considered these characteristics and objective properties, that the papaya appeared to be crystallised and so might be said to fall within heading 20.06. At [51], the FTT stated:

"…It was also not disputed that the papaya samples contained sugar crystals. Given the infusion of the sucrose syrup solution which occurs simultaneously with the dehydration of the papaya it would appear to fall within the definition of 'crystallised' as set out in the HSEN."

(5)
The FTT did not, however, end its analysis at this point. Rather, the FTT noted (at [54]) that the HSEN defined commodities "preserved by sugar (drained, glacé or crystallised)" by reference to the process by which they are produced. To quote again from the relevant part of the HSEN, but with emphasis supplied:

“The products of this heading are prepared first by treating the vegetables, fruit, nuts, fruit peel or other parts of plants with boiling water (which softens the material and facilitates penetration of the sugar), and then repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration until they are sufficiently impregnated with sugar to ensure their preservation .”

In other words, the very terms of the HSEN compel reference to the process by way of which the commodity in question is produced. The HSEN explicitly abandons a classification solely based upon character and objective properties, and adopts one based on process.

29.
In these circumstances, the FTT cannot sensibly be criticised for having regard to the process by way of which the papaya was produced, for that is precisely what was required of it in the in the wording of the relevant parts of the CN, HSEN and CNENs that the FTT was considering.

30.
In [52]ff of both its Original and Revised Decisions, the FTT went on to consider this process.

31.
Accordingly, we reject Ground 1(a) as entirely without merit. Indeed, in this appeal, Vital Nut appeared to be criticising the FTT for taking precisely the course that had been advocated by it: see [52] (“…as Mr. Mitchell emphasised, the first paragraph of the HSEN refers to the preparation of the ‘products of this heading’ first by treating with boiling water ‘and then by repeated heating to boiling point and storage in syrups of progressively increasing sugar concentration’ …”).

(2) Ground 1(b): Asking the wrong question regarding process

32.
Secondly, as Ground 1(b), Vital Nut contended that the FTT asked itself the wrong question: instead of focussing on the terms of the HSEN – “was the commodity manufactured by repeatedly heating it to boiling point in sugar syrup of increasing concentration?” – the FTT asked itself an altogether more general, and irrelevant, question – “how was the commodity manufactured?”

33.
We entirely accept that the question, as framed by Vital Nut, and derived from the terms of the HSEN, is the correct question to ask. Plainly, where the classification turns on a specific process having been followed, what must be determined is whether that process was followed. If the relevant test in the HSEN – as here – relates to only a part of the manufacturing process, then it is that part of the manufacturing process that must be considered.

34.
That said, we can see nothing in either the Original or the Revised Decision to suggest that the FTT erred in the manner suggested by Vital Nut. In paragraph [52] of both the Original and the Revised Decisions, the FTT correctly identified the relevant part of the process, and then proceeded to determine whether – on the evidence – that process was, or was not, followed.

35.
Ultimately, the Tribunal concluded that there was “no evidence” as to the process followed ([55] of the Original Decision) or that there was “insufficient evidence” as to the process followed.

36.
We conclude that the FTT asked itself the correct question and, accordingly, we reject Ground 1(b).

(3) Ground 1(c): Excluding legally relevant and probative evidence from consideration

37.
Vital Nut's third contention was that the FTT had excluded from its consideration legally relevant and probative evidence as to the manner of manufacture of the papaya.

38.
It is at this point that the revisions to the Original Decision become material. The Original Decision, at [55], contained the bald and incorrect statement that "there was no evidence before us in relation to the way the papaya was preserved during 2008".

39.
It is notable that this statement is incorrect on the face of the Original Decision. The evidence adduced before the FTT is set out, in some detail, at [7] to [35]. Of these paragraphs, [17] to [20] describe the process by which the papaya was produced.

40.
Appeals from the FTT to this Tribunal are confined to errors of law: see s 11 of the Tribunals, Courts and Enforcement Act 2007 (the "2007 Act"). It is not permitted to challenge a finding of fact by the FTT, unless that finding of fact is not merely wrong, but such that no other reasonable Tribunal could have made it, so as to render it an error of law.

41.
The relevant principles are stated in Why Pay More for Cars Ltd v. Revenue and Customs Commissioners [2015] UKUT 468 (TCC), [2016] STC 254:

"[24] The appeal to the Upper Tribunal is on a point of law arising from the FTT's decision (s 11 Tribunals, Courts and Enforcement Act 2007 ('TCEA 2007')). If the Upper Tribunal finds that the making of the FTT's decision involved the making of an error on a point of law, it may set aside the FTT's decision and, if it does so, must either remit the case to the FTT with directions for its reconsideration or remake the decision (s 12(2) TCEA 2007). In remaking the decision, the Upper Tribunal may make any decision that the FTT could make if the FTT were re-making the decision and may make such findings of fact as it considers appropriate (s 12(4) TCEA 2007).

[25] The fact that an appeal against a decision of the FTT must be on a point of law means that, generally, findings of fact by the FTT cannot be the subject of an appeal. As Edwards v. Bairstow shows, findings of fact by the FTT, whether primary facts or factual inferences, can be challenged where the finding is one that the FTT was not entitled to make, e.g. where the FTT failed to take account of relevant evidence or took account of irrelevant material."

42.
The Upper Tribunal in Why Pay More for Cars Ltd then summarised the basis upon which a finding of fact by the FTT could be challenged as an error of law. Such a challenge could only be made on the basis set out in Edwards v. Bairstow [1955] 3 All ER 48, [1956] AC 14:

"[27] … In that case, Viscount Simonds said ([1955] 3 All ER 48 at 53, [1956] AC 14 at 29) that a finding of fact should be set aside if it appeared that the finding had been made 'without any evidence, or on a view of the facts which could not reasonably be entertained'. Lord Radcliffe said ([1955] 3 All ER 48 at 57, [1956] AC 14 at 36) that a finding of fact would be an error of law where the facts found were 'such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal' or, in a formulation which he said he preferred, 'the true and

only reasonable conclusion contradicts the determination'. It seems to us that … the proper approach in a case such as this one remains as described by Evans LJ, who gave the only judgment, in the Court of Appeal in Georgiou (t/a Marios Chippery) v. Customs and Excise Comrs [1996] STC 463 at 476:

'… the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.

It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong'."

43.
Clearly, Vital Nut's prospects of establishing an Edwards v. Bairstow type of error of law were better if it was the Original Decision that was being appealed than if it was the Revised Decision that was the subject of the appeal. That is because, as we have noted, [55] of the Original Decision makes a statement about the evidence ("… there was no evidence before us …") that suggests that the FTT excluded from its consideration legally relevant and probative evidence that was undoubtedly before it. That, plainly, is very much Edwards v. Bairstow territory.

44.
The question we must consider, therefore, is whether the FTT was entitled to make the revisions to the Original Decision that it did make.

45.
As to this:

(1)
The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, S.I. 2009/273 (the "FTT Rules") permit the FTT to correct its decisions in two cases:

(a)
In the case of clerical mistakes and accidental slips or omissions. Rule 37 of the FTT Rules provides:

"The Tribunal may at any time correct any clerical mistake or other accidental slip or omission in a decision, direction or any document produced by it, by –

(a) sending notification of the amended decision or direction, or a copy of the amended document, to all parties; and

(b) making any necessary amendment to any information published in relation to the decision, direction or document."

(b)
In the case of an application for permission to appeal. The FTT Rules provide, in Rule 40(1):

“On receiving an application for permission to appeal the Tribunal must first consider, taking account of the overriding objective in rule 2, whether to review the decision in accordance with rule 41 (review of a decision).”

Rule 41 provides:

“(1) The Tribunal may only undertake a review of a decision –

(a) pursuant to rule 40(1) (review on an application for permission to appeal); and

(b) if it is satisfied that there was an error of law in the decision.

(2) The Tribunal must notify the parties in writing of the outcome of any review, unless the Tribunal decides to take no action following the review.

(3) The Tribunal must not take any action in relation to a decision following a review without giving every party an opportunity to make representations in relation to the proposed action.”

(2)
The statutory basis for these FTT Rules is s 9 of the 2007 Act. This provides that:

(a)
A First-tier Tribunal may review a decision made by it on a matter in a case: see s 9(1).

(b)
This power of review is exercisable by the First-tier Tribunal either of its own initiative or on the application by a person who has a right of appeal: see s 9(2).

(c)
Tribunal procedure rules may provide that the First-tier Tribunal may not review certain specified decisions or may only review them in certain cases: s 9(3). The power conferred by s 9(1) and s 9(2) can thus be restricted or limited by the tribunal procedure rules.

(3)
The FTT Rules do not limit the FTT’s power under s 9 to review clerical mistakes and accidental slips or omissions. Rule 37 of the FTT Rules is broadly framed. However, the power to review in all other cases other than clerical mistakes/accidental slips/omissions is confined by two pre-conditions:

(a)
There must be an application for permission to appeal; and

(b)
The FTT must be “satisfied” that there was an error of law in the decision.

(4)
Once these “gateway” requirements are met, there is nothing in either the 2007 Act or the FTT Rules to constrain the FTT in terms of the sort of review it undertakes. We stress that this does not mean that the FTT is entirely unfettered in the manner it may review its decision: the only point we make is that neither the 2007 Act nor the FTT Rules provide any support for the contention of Vital Nut that the power of review was in some way confined to certain types or kinds of correction. We reject altogether any suggestion, advanced by Vital Nut, that the FTT may only correct a “legal” error in the wording of the decision, and not a “factual” error. Even if these categories have a clear meaning – and

given that under Edwards v. Bairstow, a sufficiently serious error of fact can amount to an error of law, we doubt it – there is no support for such an approach in the statutory wording.

(5)
Nor is any support to be derived from the case-law. Before us, Vital Nut cited various decisions considering the power to review: JS v. Secretary of State for Work and Pensions [2013] UKUT 100 (AAC); WS v. Information Commissioner [2013] UKUT 181 (AAC); Scriven v. Calthorpe Estates [2013] UKUT 469 (LC); and AA [2015] UKUT 00330 (IAC). None of these decisions supports the contention that once the "gateway" conditions for a review are met, statute imposes other fetters on the review that can be undertaken.

(6)
To the contrary: in JS v. Secretary of State for Work and Pensions [2013] UKUT 100 (AAC) at [22], the Upper Tribunal (Administrative Appeals Chamber) stated, in respect of the similar tribunal procedure rules that pertained in that case, as follows (emphasis supplied):

"The legislation specifies conditions precedent for a review and the action that may be taken in the light of the review. The combined effect of section 9 and rules 39 and 40 is that the First-tier Tribunal may only review a decision on an application for permission to appeal and on the ground of error of law . These are the essential conditions that must be satisfied before a review can take place…"

With one qualification, we agree with this statement. The qualification we would make is that the conditions precedent for a review – or "gateway" requirements, as we call them – require there to be an application for permission to appeal and that the FTT be satisfied that there is an error of law in the decision. There is no requirement that there actually be an error of law, merely that the FTT be satisfied that there is, which is a very different matter.

(7)
Of course, the fact that the 2007 Act and FTT Rules say nothing about the substance of a review of a decision once the "gateway" requirements are met does not mean that the FTT can – through the review – re-write its original decision in an unfettered way. In JS v. Secretary of State for Work and Pensions [2013] UKUT 100 (AAC), the Upper Tribunal made this clear. The Upper Tribunal conducted a thorough review of the relevant authorities, which we adopt and do not repeat.

(8)
We consider the position, as regards the FTT, to be as follows:

(a)
The purpose of the review is clarificatory. The process is intended to give the FTT a second chance to provide adequate reasons for its decision without the inconvenience that might be involved were the Upper Tribunal to allow a reasons challenge and then have to remit the case: Woodhouse School v Webster [2009] EWCA Civ 91, [2009] ICR 818 at [26].

(b)
The FTT should avoid the temptation to advance arguments in defence of its decision and against the grounds of appeal. The FTT should not engage or appear to engage in advocacy rather than adjudication: Woodhouse at [27]; Brewer v. Mann [2012] EWCA Civ 246.

(9)
In short, whilst it is perfectly permissible for the FTT to use the review process to clarify what has already been decided, the FTT should refrain from seeking to justify its decision on other, even better,

grounds or from seeking to defend its decision in advance from an attack that is anticipated in an appeal.

46.
No doubt, in some cases, this line will be a difficult one to discern. But this is not such a case. In this case, we can see nothing objectionable in the review that was carried out by the FTT. It is obvious, when reading the Original Decision, that [55] contained a simple misstatement, no doubt made in error. It is also obvious, from the earlier paragraphs of the Original Decision, that the FTT "excluded" no evidence, but considered all the evidence before it. All that the review did was to correct an (obvious) error of formulation.

47.
Had the FTT sought to incorporate – by way of revision – a review of evidence not actually undertaken in the original decision, then this would have been a questionable use of the review process. We stress that this is not what occurred. Such a matter did arise in WS v. Information Commissioner [2013] UKUT 181 (AAC), where the First-tier Tribunal had made a clear and material factual error in its decision. This error was not spotted by the First-tier Tribunal, but on appeal, by the Upper Tribunal. However, the Upper Tribunal did, briefly, consider whether this was an error that might have been capable of correction through the review process. It concluded that it would not have been appropriate to use the review process to correct an error of this sort: at [43]. We agree, but would only stress that that is not this case.

48.
It follows that the proper decision to review is the Revised Decision: the revisions were properly made. It also follows that Ground 1(c) fails.

49.
We should say that we would have reached the same conclusion on the basis of the Original Decision. It is, when the Original Decision is considered as a whole, tolerably clear that [55] contains a statement that is at variance with the earlier paragraphs of the same Decision. All the Revised Decision did was remove the potential for an appeal being allowed on what was, effectively, a false basis.

F. GROUND 2

50.
We turn to the second ground of appeal, which is that the FTT made an Edwards v. Bairstow error of law.

51.
Ground 2 comprises precisely the sort of roving selection of evidence, coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong, deprecated in Georgiou (t/a Marios Chippery) v. Customs and Excise Comrs [1996] STC 463 (see paragraph 42 above). In its written and oral submissions, Vital Nut trawled through the evidence before the FTT that pointed towards the conclusion that, in 2008, the process by which the papaya was manufactured did not involve boiling.

52.
In our judgment, this approach entirely misses the point. The FTT considered the factual, expert and documentary evidence that was adduced before it: see [7] to [35]. Having considered this evidence,

the FTT was not satisfied that Vital Nut had discharged the burden – which was on it – of proving that in 2008 the process by which the papaya was produced did not involve boiling and so fell outside the 20.06 classification.

53.
The FTT reached this conclusion for the following reasons:

(1)
Although Ms. Uppatham referred to the process in her witness statement, “it is unclear whether the processes described were in operation in 2008”: see [55] of the Revised Decision.

(2)
What is more, Ms. Uppatham did not attend for cross-examination: her evidence could not be tested: see [11] and [12] of the Revised Decision.

(3)
None of the other witnesses called by Vital Nut could assist on what happened in 2008: see [55] of the Revised Decision. That included the expert called by Vital Nut, Professor Niranjan, who the FTT found an impressive witness. Impressive or not, Professor Niranjan could not assist on the essentially factual question of the process in 2008.

(4)
Ms. Uppatham was the marketing manager of the manufacturer of the papaya, Vanda: she was not the factory manager or (as we understand) directly involved in the manufacturing process. The FTT was told that Ms. Uppatham gave the statement because her English was “very good” (see [11] of the Revised Decision), the implication being that no-one else in Vanda had good English. This, however, was contradicted by Professor Niranjan, who had interviewed the factory manager in 2014, and who “spoke good English” (see [12] of the Revised Decision).

54.
These were all matters that the FTT – the tribunal that actually heard the evidence – was entitled to take into account in reaching its conclusion. We consider that the question of whether the burden of proof was discharged was pre-eminently one for the FTT, and we see nothing in the Revised Decision – nor, for that matter, the Original Decision – to suggest that the FTT made an error.

55.
Ground 2 therefore fails.

G. DISPOSITION

56.
For these reasons, we dismiss the appeal.

The Honourable Mr. Justice Marcus Smith

Judge Colin Bishopp

Release Date: 16 May 2017

Corrected under Rule 42: 17 May 2017