



[2012] AATA 112

Division **GENERAL ADMINISTRATIVE DIVISION**

File Number(s) **2010/4853**

Re **LINEN HOUSE PTY LTD**

 APPLICANT

And **CHIEF EXECUTIVE OFFICER OF CUSTOMS**

 RESPONDENT

DECISION

Tribunal **Mr John Handley, Senior Member**

Date **24 February 2012**

Place **Melbourne**

The Tribunal affirms the decision under review.

(sgd) John Handley
Mr John Handley, Senior Member

CUSTOMS - Applicant imported goods described as European pillow cases, neck roll covers and U-shaped pillowcases - identification and classification of goods - whether the goods are bed linen or other furnishings - goods slept on or under or goods which decorate a bed are bed linen - decision affirmed.

LEGISLATION

Customs Act 1901

Customs Tariff Act 1995

Acts Interpretation Act 1901

CASES

Re J Rapee & Co Pty Ltd and Collector of Customs (1990) 24 ALD 313

Re RD Urquart and Son Pty Ltd and Collector of Customs (Vic) [1983] AATA 412

Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic) (1987) 72 ALR 591

Re Tridon Pty Ltd and Collector of Customs (1982) 4 ALD 615

Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs [1992] FCA 211

REASONS FOR DECISION

1. The Applicant imported products for home consumption described as European pillowcases, U-shaped pillowcases and neck roll covers. The parties dispute the appropriate tariff classification for those goods.
2. The Applicant paid duty under protest pursuant to s 167 the *Customs Act 1901* (the Act). Consequently, the jurisdiction of the Tribunal is enlivened to review the dispute pursuant to s 273GA(2) of the Act.
3. The issues to be determined by this review are whether the imported goods should be classified to tariff heading 6302 of the *Customs Tariff Act 1995* (the Tariff Act), namely, *bed linen, table linen, toilet linen and kitchen linen* or tariff heading 6304, namely *other furnishing articles excluding those of 9404*. Tariff Heading 9404 comprises:

mattress supports; articles of bedding and similar furnishings (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered).

4. The Applicant contends that the goods should be classified to heading 6304. The Respondent contends that the goods should be classified to heading 6302 consistent with the decision that was made and which is under review in these proceedings. The Respondent contends that the imported goods can be *other furnishing articles* within the meaning of heading 6304 only if they are not *bed linen* within the meaning of heading 6302. On that basis, it was submitted that an assessment should first be made whether the imported goods are *bed linen* within heading 6302.

BACKGROUND

5. Before April 2010 the Respondent classified European pillowcases as *other furnishing articles* on the basis of two decisions of the Tribunal (*Re J Rapee & Co Pty Ltd and Collector of Customs* (1990) 24 ALD 313 and *Re RD Urquart and Son Pty Ltd and Collector of Customs (Vic)* [1983] AATA 412).
6. On 7 April 2010 the Manager of the Tariff Classification and Review Branch with the Respondent considered an application for refund of duty paid by the Applicant for goods imported for home consumption identified as European and body pillow cases. The manager had regard to previous decisions of the Tribunal and considered that *contemporary usage* indicated to him that the term *bed linen* had a much broader meaning with respect to the range and type of articles and fabrics that previously existed. It was his view that bed linen was *accepted as including articles intended to cover and protect bed furnishings made of cotton, poly-cottons and other fabrics*. He also had regard to the *Explanatory Notes to the Harmonised Commodity Description and Coding System* (the Explanatory Notes) which permitted him to be influenced and guided by the intent of its authors and which has been adopted in Australia within the Tariff Act.
7. As a consequence of his decision, a new tariff advice was issued (N^o19775600). The text of that advice is in the following terms:

Bed linen, in the context of the sub-headings of 6302, consists of the following.

- *Cases for pillows, bolsters or like articles used solely or principally as part of the furnishings of a bed.*
- *Sheets for beds.*
- *Covers for eiderdowns, duvets, quilts or similar articles used solely or principally as part of the furnishings of a bed.*
- *Covers for mattresses provided that the cover is not stuffed or internally fitted with any material or of cellular rubber or plastics. (Covers that are stuffed or internally fitted with any material or of cellular rubber or plastics are considered bed furnishings in their own right and classified under 9404).*

Bed linen does not cover bedspreads as these are considered bed furnishings in their own right and are classifiable to 6304.

8. On 22 June 2010 the Respondent issued another tariff advice (N° 19837900) which stated that European pillowcases are also *bed linen* and should be classified under heading 6302.
9. The Applicant imported the European pillowcases, U-shaped pillowcases and neck roll covers between 1 July 2010 and 31 August 2010 (the goods in issue in these proceedings).

THE HEARING

10. Mr Slonim appeared on behalf of the Applicant. Ms Azzopardi appeared on behalf of the Respondent. A number of documents and goods, either manufactured or imported by witnesses, were received into evidence.
11. Mr Slonim called:
 - i) Mr Peter Elsworth, the Managing Director of *Easy Rest Pillows* (Easy Rest); and
 - ii) Mr Russell Grubb, the Managing Director of the Applicant (Linen House).

Ms Azzopardi called Mr Robert Adair, the owner of *Abode Living* (Abode).

Peter Elsworth

12. In an Outline of Evidence (Exhibit A1), Mr Elsworth said that his company makes standard and European pillows for Myer, Kmart, Target and Big W under the *heritage*, *homemaker* and *house x home* brands. His company also makes *cushion inserts*. Both products manufactured by him are sold to the Australian market. The pillows and cushions are filled with polyester fibre. He estimated that his company supplied between 40 and 50% of the Australian market.
13. Mr Elsworth recorded that the *pillows* used for sleeping are described in the manufacturing and retail industries as *standard pillows*. They are manufactured in three sizes for domestic use being (in centimetres) 45 x 70, 46 x 73 and 48 x 74. A *king-size pillow* which measures 50 x 80 is manufactured for commercial purposes, for example, for use in hotels. The filling (the *fill weight*) of standard pillows is between 300 and 700 gms. The fill weight will determine whether the pillow is *soft, medium or firm*.
14. Easy Rest also manufactures European pillows which measure 65 x 65 cm. Mr Elsworth recorded that within the industry, European pillows are regarded as *decorative products*. The fill weight for European pillows manufactured by Easy Rest is between 900 and 1000 gms.
15. The packaging for the European pillows sold by Easy Rest under the *Heritage* brand records the product as *ideal for decorating your bed*. The packaging for the European pillow sold under the *homemaker* and *house x home* brands records the product as being *ideal as a decorative pillow*.
16. Mr Slonim principally called Mr Elsworth to have him confirm the contents of his outline of evidence. In cross-examination, Mr Elsworth said that he was not aware that European pillows manufactured by Abode, which are filled with feather or goose down, are sold as either *soft, medium, or firm*. He was asked to read the outline of evidence of Mr Adair (Exhibit R3). He then acknowledged that Abode sell standard, king and European pillows with a *gentle firm or medium density*, despite each having a fill weight of 650 gms.

17. Mr Elsworth agreed that there must therefore be a market for different densities of European pillows in Australia. He also agreed that the density of the pillow would not need to be varied if it was to be used only as a decorative item. On the basis that European pillows sold by Abode which contained white Hungarian goose down and retailed at approximately \$250, he agreed it was more likely that they would be used for sleeping rather than as a decorative item.
18. Mr Elsworth agreed that a European pillow is described commercially as a *pillow* and not as a *cushion*. He agreed that the packaging of the European pillow under the *heritage* brand has the description *ideal for decorating your bed*. He agreed that the European pillows manufactured by him *are generally not used to sleep on; they're a decorative item* (Transcript, p 26).
19. Mr Elsworth said that Easy Rest also manufactures U-shaped pillows which are also known in the industry as *V shaped pillows, boomerang pillows or curved pillows*. He agreed that they are used on a bed, as a supportive pillow but not, in his experience, to sleep on. He said that a U-shaped pillow is more likely to be used when reading in bed or when feeding a baby. A neck roll or *bolster*, in his opinion, is a decorative item, used on a bed (Transcript, p 28).
20. In re-examination, Mr Elsworth said that he had slept, in Europe, on a European pillow, which was filled with feather or goose down.
21. In answer to some questions from me, Mr Elsworth said that in his experience, a pillow would be used for sleeping, however a cushion would be a decorative item that would be found on a couch or, if on a bed, for decorative purposes only. He said that persons would *throw their cushions and bolsters and European pillows off the bed and jump into bed and sleep on the pillow*. He agreed that the European pillows manufactured by him are described by the labelling on the packaging as decorative, but also as a pillow. He said that description is dictated by the retailer. That is, *if Target want to call it a "pillow," we call it a "pillow;" if they want to call it a "cushion" we would call it a "cushion."* He said if he had free rein to decide the description on the labelling, he would call it a *pillow* (Transcript, p 30).

Russell Grubb

22. Mr Grubb is the Applicant's Managing Director and has held that position for approximately two years.
23. In an outline of his evidence dated 17 March 2011, Mr Grubb recorded that the Applicant imports and wholesales *homewares* which are sometimes known as *soft homewares, manchester, bedding or bed linen*. He recorded the items of *bed linen and accessories* imported and sold by the Applicant which, relevantly to this review, include standard pillow cases, cushion covers, European pillow cases (described, he said, in the trade, as *Euros*), bolster covers and U-cushions (which he also described as *U-pillows* at paragraph 13 of his statement (Exhibit A6)).
24. He recorded that sheets and quilt covers are predominantly sold in sets. A single sheet set consists of one fitted sheet, one flat sheet and one standard pillow case which measures 48 x 73 cm. A single quilt cover set comprises one quilt cover and one standard pillow case. Double, queen and king sets always include two standard pillow cases. Sheets and quilt covers can be sold as single items. However, quilt covers are only sold in sets with standard pillow cases.
25. Mr Grubb recorded that the standard pillow cases imported and sold by the Applicant are all of the same size to fit a *standard pillow* that is used for sleeping. Both sides of standard pillow cases *are more generally* manufactured from plain fabric. Others have one side made with plain fabric and other side made of fabric that is textured, embroidered, embossed or decorated. Some standard pillow cases are imported for sale as single items. The thread count for standard pillowcase fabric ranges between 180-300 threads per 10cm².
26. Cushion covers imported by the Applicant vary in size between 30 x 30 and 50 x 50 cm and are made from a wide variety of fabrics of different textures and decoration. Mr Grubb recorded in his outline of evidence that:

They are imported as single items and marketed as individual accessories for living rooms, for beds and bedroom furnishings, and as accessories in bedroom 'collections' (at paragraph 7).

27. European pillow cases are described in his outline as *large square cushions that measure 65 x 65 cm*. Euros are imported and sold only as *individual furnishing items*. He recorded that *euros ... are never sold in sets with sheets or quilt covers*. However, in his evidence, he withdrew that comment and said European pillowcases *are sometimes sold as part of a quilt cover set* (Transcript, p 51). He also recorded that European pillowcases are imported and sold in a *wide variety of plain and decorative designs and styles*. He recorded that the filling in European pillows is heavier and firmer than the filling used in standard pillows because European pillows:

...are primarily used, apart from the decorative function, for leaning against and occasionally for sitting. Standard pillows are lighter and softer as they are used during sleep (at paragraph 9).

28. Mr Grubb recorded that bolsters are cylindrical cushions in shape, ranging in size from 18 x 40 to 18 x 60 cm. Recently, market demand has shown an increase in sales of bolsters, however neck rolls, which are smaller, have been a *fashionable bedroom accessory for around 20 years*. He described bolster covers as *fashion items that are often highly decorated and can include features such as piping and tassels* (paragraph 11).

29. Mr Grubb described U-shaped pillows as being *specialised cushions* that are primarily used to *support individuals in an upright or partly erect position whilst feeding babies or reading* (at paragraph 13).

30. Mr Grubb also recorded in his statement that many sheet and quilt cover sets are marketed by the Applicant as part of collections which *include co-ordinated accessories such as European pillows, cushions of different sizes, neck rolls and throws or bed runners* (paragraph 12).

31. The evidence in chief of Mr Grubb was confined to him identifying a number of products imported and sold by the Applicant, together with a number of product catalogues.

32. Mr Grubb identified 13 European pillowcases, 2 neck rolls covers, 5 cushion covers and a cushion, 3 standard pillowcases and 2 U-shaped pillow cases. The composition, materials, colour, decoration and design of each of these products was consistent with the

descriptions recorded in his outline of evidence (refer above). Some of the items are sold individually or in sets.

33. The three catalogues were identified as *hiccups* being a catalogue of products for children, a Linen House winter catalogue and a Linen House summer catalogue. Each of the catalogues contained photographs of the Applicant's products being sheets, covers and cases fitted to European pillows, standard pillows, neck rolls, doonas and cushions. These items were mainly depicted in a bed room setting and assembled on a bed. Some of the products shown in the catalogues were exhibited by Mr Grubb.
34. Mr Grubb agreed in cross-examination that much of the Applicant's product is sold as a set or a collection. As an example, he was asked to comment on photographs in the Linen House winter catalogue showing a European pillow case in the *Antique* style as part of a set or a collection (Exhibit A24). Those photographs depict a bedroom setting comprising 2 European pillows, 4 standard pillows, 2 cushions, a neck roll and a quilt, all covered in the Applicant's products. Mr Grubb agreed that the photographs depict the goods as decorative, appealing and having a function not only intended for sleeping. The products are coordinated and the fabric comprising the European pillows and the quilt cover is identical. He also agreed the packaging of the European pillowcase depicts it on a bed and describes the content as a *European pillowcase* (Exhibit A7). The catalogues record the European pillowcases and neck roll by those names (Transcript, p 43-44).
35. Mr Grubb also agreed that the photograph depicted 4 standard pillows. Two are decorative on one side and the other 2 are plain on both sides. He agreed that the standard pillow covers are marketed on the basis that persons are likely to sleep on the plain standard pillow covers only and the decorative pillowcases *decorate the bed* (Transcript, p 45).
36. Mr Grubb was asked to comment on the products at Exhibit A10 and A22 being a *Tailored European PC* and a *Standard Frilled U-shaped PC*, respectively. Both products are of plain colour and but for the U-shaped pillowcases having a frilled edge, they are without any decoration or adornment. Both products are 50% polyester and 50% cotton, a blend Mr Grubb described as suitable for sleeping. He also agreed that invoices found

within the packaging of European pillowcases at Exhibit A8 (*Sombrero*) and Exhibit A10 (*Antimony*) record each product as being a *Euro pillowcase*.

37. An invoice found within Exhibit A10 (which comprised a number of the goods imported by the Applicant) under the *Aura* brand describes a product as a *cotton voile crushed euro cushion* cover being 65 x 65 cm. The labelling on the package describes the product as a *voile crush European sham*. There was no evidence in these proceedings concerning what would constitute a European *sham*. The product is 65 x 65 but it is of a different type of construction and appearance to euro pillowcases as described earlier. The item has two distinct sides. The decorative (front) side is quilted with a circular pattern and is heavily stitched. The fabric is crushed and lined on the inside with an open weave fabric (that holds the padding). The reverse is a different colour and made of plain fabric. It has a zip 7 cm from an edge. The reverse side fabric spills across the front to create a 1cm edge of contrasting colour.
38. Mr Grubb agreed that despite his Outline of Evidence recording that European pillowcases *are primarily used, apart from their decorative function, for leaning against and occasionally for sitting*, they are in fact predominantly *used on a bed*.
39. Mr Grubb said that he was responsible for the internet advertising of the Applicant's products but he did not oversee it on a daily basis. When printed extracts from the Applicant's internet site were drawn to his attention, he agreed that some of his products were described as bed linen. He agreed that potential customers would click the bed linen tab in order to observe the Applicant's products. He acknowledged that his product is marketed as bed linen, including European pillowcases and neck roll covers. He also acknowledged that the internet marketing material consistently depicts the Applicant's products as fitted or resting on a bed and not in lounge rooms or any other locations. Mr Grubb agreed that the Applicant's products are sold as bed linen by other retailers and customers are likely to find the Applicant's products in bed linen sections of retail stores. Mr Grubb agreed that in his own advertising material, European pillowcases and neck roll covers are not described as cushion covers.

40. In answer to some questions from me, Mr Grubb said that in his experience, a European pillow is more likely to be located in a person's bedroom. A cushion is more likely to be found in rooms other than a bedroom. Cushions and European pillows, in his experience, are decorative items. A European pillow, in his opinion would decorate a bed.
41. Mr Grubb said he understood the term *bed linen* as incorporating sheets and quilt covers. He acknowledged that other persons would hold differing opinions. A pillow cover in his opinion formed part of a *quilt cover set range*. On reflection, he thought that *bed linen* was something *that you actually sleep on*. He did acknowledge however that bed linen could incorporate other items that decorate a bed (Transcript, p 61-62).

Robert Adair

42. Mr Adair prepared a witness statement dated 14 April 2011 (Exhibit R3). He is the owner of Abode, a manufacturer and retailer of bed linen, bedding and other products. He has worked in the linen industry for 35 years and is experienced in the manufacture and retail of bed linen. Prior to commencing Abode in 1991, he was the founder and Chief Executive Officer of *Adair's* which he described as a leading Australian retailer of bed linen, manchester and home wares.
43. Mr Adair recorded that Abode manufactures the majority of its products in Melbourne and currently employs 20 persons. He is mainly involved in manufacturing and retailing of *high quality products for the bedroom*. He manufactures white goose down quilts and covers, standard and European pillows and pillowcases, Egyptian cotton sheeting, neck rolls and body pillows. He does not now manufacture U-shaped pillows or their cases but has made them in the past. He also manufactures table linen and home and bed related clothing.
44. In his experience, the term *bed linen* is:
- ... used to describe sheets, fitted sheets, pillow cases of various sizes and shapes, bolster or neck roll cases and quilt covers. The term is used in the industry to describe linen or cloth products that are put on a bed. Blankets quilts and pillows would not be described as bed linen (at paragraph 8).

45. He recorded the fabrics used in the manufacture of bed linen, typically cotton or polyester or blends, is irrelevant when describing *bed linen, in the industry, in modern times*. Decoration, detailing and stitching is also irrelevant. In the linen industry, cloth products of various fabrics are described as *linen*. For example, *table linen is the term used in the industry to describe cloth products that are used on a table, for instance, tablecloths and napkins* (at paragraph 10).
46. In his experience, Mr Adair recorded that European pillowcases, neck roll covers and U-shaped pillowcases are marketed as bed linen, irrespective of whether they are sold individually or as part of a set. Covers for cushions which may be placed on a bed as a decorative item would be seen in the industry as *furnishings*. Cushions are used in other areas of the home, in addition to a bed, for example in a living room or on a sofa or a chair. The covers for cushions are not marketed or described in the industry as *bed linen* because of their wide use throughout a home. European pillowcases, U-shaped pillowcases and neck roll covers, which are used extensively and predominately on a bed are described and marketed as *bed linen*.
47. Mr Adair recorded that European pillows are primarily used on a bed to rest a person's head or as support when sitting or reading in bed. They are also a fashion item to decorate a bed. Unlike cushions, European pillows are not ordinarily used outside the bedroom because they are too large to be used on a chair or a sofa.
48. Neck rolls, in his experience, are mainly used to decorate a bed. They are not used elsewhere in the home.
49. U-shaped pillowcases are marketed and known as *bed linen*. They are primarily used as back support for sitting up in bed or reading or breastfeeding. Although U-shaped pillows can be used outside of a bedroom, they are mostly used on a bed.
50. He stated that *in Europe, European pillows are always made for people to sleep on* (at paragraph 16). They are usually filled with feather or down and are softer than European pillows made in Australia which tend to more dense and more decorative. In his opinion, whether a product is slept on or under is irrelevant to whether it is *bed linen*. On the basis

of his industry experience, he stated that the term *bed linen is used to describe items more broadly than those only used for sleeping* (at paragraph 20).

51. Mr Adair recorded that the presentation of beds and bedrooms has changed in contemporary Australia. Previously sheets, blankets and pillows on a bed were covered by a bedspread. Presently, a bed is usually layered with a number of products including coverlets, quilts and numerous pillows. He likened the presentation of a bed to the manner in which people layer their clothing. Bed linen in his experience has become expressive and decorative. Consumers now buy and use a greater range of pillows of differing shapes and sizes in addition to standard pillows. The choice of pillows and pillowcases is driven by fashion and function and because pillows are used on a bed, pillowcases for them are regarded as *bed linen*.
52. In concluding his statement, Mr Adair recorded that the fabrics used in *bed linen* are frequently changing. Historically, the term *linen* referred to fabric made from flax but that product is no longer used. Predominantly, bed linen has for many years been made of cotton and polyester/cotton blends. Bed linen, in his experience, is not defined by the fabric, rather it is relevant to its placement and use in a bedroom.
53. In evidence, Mr Adair was shown a number of exhibited items being A7, A10, A11 and A22. Except for Exhibit A11, which is a neck roll cover, the other three exhibits were referred to and identified in the evidence of Mr Grubb. Exhibits A7 and A10 are European pillowcases. Exhibit A22 comprises two U-shaped pillowcases. Mr Adair said that based on his experience in the industry he regarded each of the four items as being bed linen.
54. In cross-examination Mr Adair was examined principally about his understanding of the expression *bed linen* and what types of items would be embraced by that expression.
55. On the basis of their relative sizes, their construction of heavyweight cotton fabric and the fitting of a zip, Mr Adair identified products at Exhibit A15, A17 and A18 as cushion covers. He was then asked to identify the cover on the outside of Exhibit 13 which comprised a cushion and cover. He described it as a *decorative bed cushion*. In forming

that opinion, Mr Adair had regard to its style, fabric, design and the probability that it would be used to match a doona cover. He did not regard the cover as *bed linen* but conceded that it was a *grey area*. He acknowledged that the cushion with that cover would be used on a bed but it could also be used on a couch. He regarded the cover as *strictly for decorative purposes only*, indeed he said *it wouldn't be used for any other purpose than just look nice* (Transcript, p 68-69).

56. In answer to a question from me, Mr Adair said that the cover alone would be described by him as a *bed cushion cover*. He said he used the word *bed* in that description because of the weight of the fabric and the design. He said *it looks like a design that would go on a bed rather than on a – as furnishings on a couch. But it could be used on a couch too* (Transcript, p 78).
57. Mr Adair was then shown Exhibit A15 which is a 50 x 50 cushion cover. He said that he *wouldn't imagine people would put that on a bed. It's too big*. He also thought that the cushion to which that cover would be fitted would be *too big for a bed cushion*. However, that cover, fitted to a cushion, is depicted in the Linen House Winter catalogue as part of a collection described as *Zagora* (Exhibit A24). It is depicted in the catalogue on a bed as part of a collection comprising European pillows, standard pillows, cushions of varying sizes, a fitted sheet and doona with a cover and a throw rug (Transcript p69-70).
58. Mr Adair conceded that looking at the cover alone he would identify it as a cover for a cushion. But having observed it in the catalogue as part of a collection, he identified it as a *bed cushion*. He agreed that *the only way you can tell that it is a bed cushion or regular cushion is by how it is marketed in the brochure or sold* (Transcript, p 70).
59. Mr Adair was then asked to specifically identify the items that he would include within his definition of *bed linen*. He said that bed cushion covers were a *grey area* as were bed skirts or valances. He said that *bed linen* would include fitted or flat sheets, pillowcases, *possibly* quilt covers and *maybe* blankets. On reflection he thought that *bed skirts fall, probably, into the bed linen category* (Transcript, p 71). Later, when he was asked to clarify some of his evidence concerning items that would fall within the definition of *bed*

linen, Mr Adair said that he would not regard blankets as fitting within that description. He said that so far as online sales are concerned, websites would classify them as *bedroom products* (Transcript, p 75).

60. Mr Adair was then asked to describe the item which became Exhibit A26. He described it as an *undersized throw rug*. He said a *throw rug* is a *piece of textile designed to throw over a couch or a bed to give extra warmth on the couch or the bed or just for decoration* (Transcript, p 71). He said a throw rug was not *bed linen*, even if it was marketed as comprising part of a collection and having the same pattern as other items in the collection. Later, in answer to some questions from me, Mr Adair described the throw rug as being of acrylic fabric and would not be regarded as *bed linen* because it is a *throw rug* (Transcript, p 80). He said items of that type, including blankets, are well understood by consumers and do not fit within the description of *bed linen*. He acknowledged that *it does fall, in a vague way, under the category of "bed linen," but is probably not bed linen as such* (Transcript, p 78-79).
61. Mr Adair said that Abode makes pillows and pillow cases of varying sizes being French, Italian, European, king and standard pillows. He said that French and Italian pillows are *elongated European pillows* which fit across the entire width of a bed depending on whether it is a queen or king-size bed. He said they *fill up the back of the bed*. (Two European pillows fill the back of a double bed) (Transcript, p 73-74).
62. Historically, *Continental* pillows were made in Australia which were 80 x 80 cm. They were *too big* and did not sell. Mr Adair said *the industry* agreed to make pillows of uniform size of 65 x 65 cm and decided to call them *European*. He thought that happened sometime in the 1960s or 1970s. Mr Adair learnt that Mr Elsworth from Easy Rest had given evidence that persons slept on European pillows, in Europe. Mr Adair agreed but said that European pillows are only *half filled with feather and down mixture* and persons fold them in half to create a *pillow shape* for sleeping (Transcript, p 74).
63. Mr Adair said he did not know when the expression *bed linen* became common usage. He acknowledged that historically, items of sheets and pillowcases were known as *Manchester*. That term gradually disappeared and *bed linen* became the common

description. He said the term *bed linen* is sometimes confusing because of the word *linen* within the description. He said that most *bed linen* products are mostly of cotton construction and he speculated that the description should really be *bed cotton* (Transcript, p 75-76).

CONCLUSION

64. The goods in issue in this review comprise European pillowcases, U-shaped pillowcases and neck roll covers (also described as bolsters).
65. Duty was paid under protest over the European pillowcases and the U-shaped pillowcases. There was an initial jurisdictional dispute concerning the neck roll covers. The history of this issue is recited in the Respondent's Outline of Submissions dated 10 August 2011 between sub-paragraphs 3.3 and 3.4. The Respondent eventually consented to this review being extended to include neck roll covers. This issue does not require any further discussion.
66. There was an issue between the parties about the classification of the imported goods described as *body pillowcases*. The Applicant applied for a refund of duty in respect of European pillowcases and body pillowcases it had imported. On 7 April 2010 the Respondent decided to refuse that application (T3). The Applicant did not challenge the decision. The European pillowcases which were the subject of that application are not goods which are the subject of this review, which is confined to goods imported between 1 July 2010 and 31 August 2010. The Respondent also addresses this issue in the Outline of Submissions between paragraphs 3.5 and 3.11. The Applicant conceded that body pillowcases are not goods within the ambit of this review (Transcript, p 9).
67. As discussed earlier the issue between the parties is whether the imported goods should be classified to tariff heading 6302 namely *bed linen, table linen, toilet linen and kitchen linen* or tariff heading 6304 being *other furnishing articles excluding those of 9404*. The parties contend, and I agree, that if the subject goods fall for classification under tariff heading 6302 there is no need to consider whether they fall for classification under tariff heading 6304.

Identification

68. The classification of goods for customs tariff purposes can only be achieved after the goods have been identified. There are many decisions of the Federal Court and the Tribunal which have distilled the principles of identification and which can be summarised as follows:

- Identification must be objective and have regard to the characteristics of the goods on an informed inspection at the port of entry without regard to the intention or opinion of the overseas manufacturer or the importer.
- Knowledge of how persons who trade in goods would describe them will be relevant but not necessarily conclusive.
- Descriptive terms that may fairly identify goods may be relevant to classification of those goods.
- Identification of goods will frequently extend to the characterisation of the goods and have regard also to their design features including their presentation, colour, decoration, labelling and packaging.
- Visual inspection will not always or readily permit identification. Tests may be needed or enquiries made, including references to documents, catalogues, invoices etc to ascertain relevant characteristics of the goods.

(Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic) (1987) 72 ALR 591 at 599; Re Tridon Pty Ltd and Collector of Customs (1982) 4 ALD 615 at 620-22).

69. A wharf side inspection of the goods described in these proceedings as *European pillowcases* may at first glance confuse the person inspecting as to their use, especially if the goods are not packaged or labelled.

70. If the goods are without packaging or labelling a person inspecting the goods could be excused for classifying them as covers for cushions. However, there are particular characteristics of these goods which would, in my view, distinguish them from covers for cushions, namely, they do not contain a zip, the cloth from which they are constructed is usually either very delicate or heavily patterned, decorated, textured or adorned and they are all of a universal size, namely 65 x 65 cm. That latter feature of itself would not, in ordinary experience permit a wharf side inspection to conclude that the product is a cover for a cushion. That is to say, cushions in ordinary everyday experience are smaller and varied in size and shape.

71. The person inspecting the products in a packaged form similar to the form exhibited in these proceedings would readily conclude that the product is a European pillow. The labelling on each (clear plastic) package describes the product as *European* or *euro pillow case*. The dimensions of 65 x 65 cm are also recorded. The reverse of the packaging has a photograph of the product in situ, being part of a collection of other cloth covered products resting on the bed of similar design and colour. The labelling also refers to the type of cloth and laundry instructions.
72. Inspection of each product, but for 3 of the 10 exhibited European pillowcases indicates that the decorative and adorned elements of construction and design appear on one side only and the reverse side is plain smooth fabric. The other 3 European pillowcases comprise one of plain colour and unadorned; another is of printed fabric and the other is of a more luxurious patterned fabric with piping on its edges.
73. A visual inspection by me of all of the goods labelled European pillowcases in these proceedings – by removing them from their packaging – indicates that a pillow is inserted into the pillowcase by an entry point in the middle of the reverse side of it, unlike a standard pillow which has an entry point at one end or a cushion which has a zip on one edge or end (depending on its shape) into which a cushion is inserted.
74. On balance, I am satisfied that the goods described in these proceedings as *European* or *euro pillowcases* are properly described. They would not be identified as covers for cushions.
75. Before leaving this part, I should refer to the item received as part of Exhibit A10. It is a *boysenberry* coloured item which I described at paragraph 37, above. A cardboard insert in its clear plastic bag bears the brand name and describes the item as a *voile crush* constructed of pure cotton outer and a polyester fill. A bar code label attached to the plastic bag identifies the product as a *voile crush European sham*. It also has the measurements of 65 x 65 cm. An invoice within the packaging describes the product as a *cotton voile crushed euro cushion cover*.

76. The product is the same size as a European pillow. However, the label inside and on the outside of the packaging and the manufacturer's invoice all describe the product differently. Unlike all of the European pillowcases exhibited in this proceeding, it has a zip fitted approximately 7cms inside an edge. A photograph forming part of the packaging depicts the product covering what appears to be a European pillow, in situ, on a matching bedspread, in a bedroom setting.
77. Mr Grubb identified this item as a European pillowcase (Transcript, p 33). Its size suggests the characteristics of a European pillowcase but little else. The word *euro* appearing on the packaging supports that it may be the cover for a European pillow but its description as a *crush* and as a *sham* (which I presume has a trade meaning but over which there was no evidence) prohibits me reaching any firm conclusion over the identity that should be applied to this product. Neither party made any oral or written submissions concerning its identification.
78. There were two *neck roll/bolster covers* exhibited in these proceedings (Exhibit A11 and A12). Both were presented without packaging. They are both highly decorative and adorned. They are cylindrical in shape and each has a tassel at each end. Both have a zip running the length of the cover into which the neck roll would be inserted. Each has a label attached which identifies it as a neck roll and as part of a collection (*Antique* and *Louis*). Both products are depicted in the Applicant's winter catalogue (Exhibit A24). Each is 18 x 60 cm in size.
79. A wharf side inspection of these goods without packaging or labelling may have difficulty identifying them. A small label attached to each item does describe each as a neck roll. Unlike identification of the goods found above to be European pillowcases, there was no controversy in this review concerning the identification of these goods. I am satisfied that they are neck rolls or bolster covers.
80. There were two *U-shaped pillowcases* exhibited in this review (Exhibit A22). Both are of plain colour (black and purple). Each has frilled edges. Both are without adornment or decoration. Both have an entry point at each end into which the U-shaped pillow would be inserted. Both items are identical in shape, size and construction. They are packaged

and labelled *Standard Frilled U-Shape PC*. They are both described on the label as polyester/cotton blend having a 250 thread count. The same type of blend and cloth weight is recorded on the plain unadorned European pillowcases referred to earlier. There was no controversy in this review concerning the identity of these goods. I am satisfied that they are properly identified as U-shaped pillowcases.

81. Before dealing with classification, it is necessary to deal with a submission that attracted considerable prominence, having been initiated by Mr Slonim, concerning the identity of the product known as a European pillow. It was his submission that a European pillow is in fact, a cushion. He said a characteristic of a pillow is a product which is used to support a person's head whilst sleeping (Transcript, p 95). He submitted it was convention only that referred to an object being 65 x 65 cm as being a European pillow when there was in fact no difference between it and a *large cushion*. That his client – Mr Grubb – described some of his products as European pillowcases and labelled them accordingly did not *govern* identity. Identification, in his submission, cannot be influenced by trade meaning or customer understanding (Transcript, p 101-102).
82. With respect I disagree. I am satisfied that the product referred to in this submission as a European pillow is properly named and described. It follows that a European pillowcase is applied and fitted to a European pillow.
83. The Oxford dictionary defines a *cushion* as *a case of cloth, silk, etc, stuffed with some soft elastic material, used to sit, recline, or kneel upon*. It is also defined separately within the Oxford dictionary *as to rest, seat, or set upon a cushion, to prop up with cushions*.
84. The Macquarie dictionary has a similar definition except it also identifies a cushion as something to *lie on*.
85. The Oxford dictionary defines a *pillow* as *support for the head in sleeping or reclining; a case made of linen etc stuffed with feathers down etc especially as forming part of a bed*. The Macquarie dictionary gives a similar definition.

86. The definitions above indicate similarities between *cushions* and *pillows*. In the absence of any other information, a distinction could be drawn between the above definitions, namely, that persons sleep or rest their head on a pillow which will form part of a bed. A cushion can be used as an aid for resting, but also for a number of other purposes unrelated to sleeping.
87. The evidence in these proceedings indicates that there are stark differences between both products. The most obvious distinction is the size of a European pillow, being uniformly sized at 65 x 65 cm. It is a product well recognised and understood by manufacturers (Mr Elsworth and Mr Adair), and retailers (Mr Adair) and importers (Mr Grubb).
88. Mr Grubb labelled these products as European pillow cases. The invoices from his overseas manufacturers identified the products by that name. Mr Elsworth is a manufacturer of pillows and gave evidence of the distinction between standard, king and European pillows; that distinction only being shape and size. Mr Adair is a manufacturer of European pillows and retails them.
89. I see no reason to disregard the evidence of these witnesses. They are experienced in the manufacture, import and retail of bed linen, which include a universal understanding of what constitutes a European pillow and its use. A European pillow is not a cushion. The evidence of Mr Adair was particularly telling. He spoke about the manufacture some years ago of Continental pillows which did not have public appeal. Manufacturers decided to make a smaller pillow which became universally known as a *European pillow*. Additionally, European pillows in Europe are filled with feathers or down and are folded and used as a traditional pillow for sleeping. Although European pillows in Australia are filled with a different fibre (polyester) and are more dense in construction, they are no less a *European pillow*, despite the fact also they are not slept on.
90. Mr Adair is a manufacturer and retailer of European pillows which are filled with feathers and down. Those pillows are 65 x 65 cm. They are retailed and labelled by that name. I see no valid distinction to be drawn between the European pillows manufactured by him or the European pillows manufactured by Mr Elsworth or the covers for them as imported by Mr Grubb. A characteristic of European pillows is their size and use on a

bed and, in the case of the European pillows filled with feather or down, they are slept on. They are not distinguished by their filling.

91. This submission concerning the identification of a European pillow, as I now reflect on it, has the risk of distracting attention to the particular goods under review, namely the cases for a European pillow, not the European pillow itself. Tariff heading 6302 is concerned – relevantly – with *bed linen*. Tariff heading 6304, embraces *furnishing articles*, excluding those that fall within 9404. Pillows are specifically included in tariff heading 9404.
92. The European pillow and the European pillowcase should not be considered as composite items. Each has their own separate identity for the purposes of the tariff headings. The European pillow case should not be *subordinated to the identity of the combination* (Refer *Re Tridon* at 621). The pillow should not be considered in the context of tariff heading 6304 as if it were in a pillowcase. Equally, tariff heading 6302 is concerned only with items which may properly be described as bed linen. Nothing points to an interpretation in that heading or the explanatory notes of *furnishing articles* covered with bed linen.
93. On balance, I am therefore satisfied that the product that was the subject of these contentions is not a cushion. It is a pillow, properly described as a European pillow. The cover for it is a European pillowcase.

Classification

94. The Applicant relies on a tariff heading 6302 (Bed linen), more precisely 6302.2 (*other bed linen, printed: of cotton or of man-made fibres*) or 6302.3 (*other bed linen – of cotton or of man-made fibres*). There is no difference in the duty payable on goods classified under either of these sub-headings. Tariff heading 6302 also incorporates table linen, toilet linen and kitchen linen. The linen products in issue in this review are clearly not linen products referable for use in those three locations. If the goods are to be classified under heading 6302 they cannot be classified under heading 6304.

95. There was some discussion during the hearing of the meaning in contemporary terms of the word *linen*. Historically, linen was made from the flax plant. The word is now used more broadly. It is well understood – and there was no serious dispute – that products made of cotton, a cotton blend or entirely man-made fibres are understood and referred to by manufacturers, retailers and consumers as *linen*.
96. In an Outline of Submissions, the Respondent contended that the term *bed linen* encompasses many different items (at paragraph 44). The submission resembles the tariff precedent published in the tariff classification review report (T3, p 14) which arose out of the classification of the Applicant’s products in April 2010.
97. There were no submissions as to whether I am entitled in law to have regard to the new tariff precedent. Out of caution, I will not have regard to it or the Respondent’s submissions at paragraph 44. However, I am entitled in law to have regard to the Explanatory Notes to avoid any ambiguity; not to displace the clear and plain words of the heading but to confirm the meaning given to the heading (*Toyota Tsusho Australia Pty Ltd and Nippondenso Australia Pty Ltd v Collector of Customs* [1992] FCA 211; s 15AB of the *Acts Interpretation Act 1901*). An ambiguity exists to the extent that *bed linen* may be thought to incorporate only pillowcases and sheets.
98. The explanatory notes for heading 6302 records:
- These articles are usually made of cotton or flax, but sometimes also of hemp ramie or man-made fibres, etc; they are normally of a kind suitable for laundering. They include:*
(1) **Bed linen**, e.g. sheets, pillowcases, bolster cases, eiderdown cases and mattress covers.
99. Those notes indicate that *bed linen* is not confined to sheets and pillowcases only, but to other products *used* on a bed and not confined only to sleeping on, or sleeping under. The explanatory notes extending to *bolster cases* (neck rolls) indicates that *bed linen* has a wider meaning. The items listed as examples are not intended to exhaust the possible items that may come within the ambit of *bed linen*.
100. Although the review in *Rapee* was concerned with the tariff heading applicable to *cushion covers*, there was discussion about the tariff heading of *bed linen* which the

importer contended was the appropriate heading. Deputy President McMahon agreed that whilst *bed linen means only fabrics actually slept upon or fabrics which cover one whilst one sleeps*, he went further and decided that *bed linen* also includes *fabrics which decorate the bed* (at [44]). I respectfully agree.

101. I would go further and conclude that *bed linen* includes not only *fabrics which decorate the bed*, but individual items of fabric on a bed, whether for sleeping on or under, or for decoration, constructed to *cover* an item that furnishes a bed.
102. A feature of this review was the quantity of illustrative material demonstrating compositions of contemporary beds and bedrooms. As Mr Adair indicated, there has been changing trends and presentations of bedrooms which reflected the style or appearance of a bed. He likened it to the way people layer their clothing. He said that bed linen had become expressive and decorative and was not confined to goods which were slept on or slept under. Mr Grubb was of the opinion that bed linen incorporated goods *that you actually slept on* but did, quite fairly concede that bed linen could incorporate items that decorated a bed.
103. Mr Grubb and Mr Adair produced their catalogues and extracts from other websites depicting beds made up with European pillows, cushions, neck rolls and doonas displaying their covers for these items. The goods were all of made from cotton, cotton blend or man-made fibres, either plain or printed. Many were highly decorative and adorned. Those items would mainly be taken off the bed and a person would sleep only on the standard pillows and under the doona displayed. Indeed, in some of the photographs there were so many items displayed in situ that the bed itself was barely recognisable.
104. Those photographs and other material depicting bedroom scenes are indicative of the use of covered goods in contemporary bedrooms. It reflects the trends to which Mr Adair referred and is consistent also with the finding of Deputy President McMahon in *Rapee* in 1990. It indicates to me that the *trend* is continuing.

105. The Abode catalogue appended to the statement of Mr Adair, in addition to depicting and describing European pillows and pillowcases, specifically describes the ideal fill weight/density for sleeping (pages 56, 58, 59 and 61). The Linen House and Aura catalogues depict and identify European pillows and neck rolls and their respective covers. The catalogues also have text describing the cloth and decorative features. Almost every photograph depicts the goods on a bed as a set or collection. European pillows and cushions are separately described. Copies of the products of many online retailers were copied and annexed to the statement of Mr O'Connor (a senior officer of the Respondent) and Mr Adair. The web address of many of those retailers would indicate they are based in Australia (some of those pages also being from the Applicant's web site). Their merchandise is consistently described and/or depicted as European pillows and neck rolls or bolsters. There are many pages devoted to photographs of cushions of various sizes and shapes with covers that are highly textured. Their dimensions were frequently recorded. None of them were 65 x 65 cm. Photographs of them indicated they were of various shapes - square, rectangular and round. By reference to other items around them none were the size of a European pillow.
106. I could not find any photographs of or text referring to a U-shaped pillow. I remain satisfied however, for reasons which appear below that the covers for that item can be classified as bed linen.
107. I am also satisfied that the covers for European pillows and neck rolls fall into the category of bed linen and therefore, properly classified to heading 6302. The European pillows and neck rolls in issue in this review are principally or entirely used in bedrooms. Irrespective of the cloth or fibres used to make these products, they are understood and described by manufacturers, retailers and consumers as *linen*. For the purposes of the subheadings to 6302, the covers are *bed linen*, plain and printed and of cotton and of man-made fibres.
108. Most of the attention in this review was towards European pillows and to a lesser extent to neck rolls. The other cover in issue was for a U-shaped pillow. It is used by persons for resting or for breastfeeding by mothers. A U-shaped pillow would be principally used

on a bed but not for sleeping. That it is not used for sleeping does not detract from its identification or classification. The use on a bed is consistent with the evidence of Mr Elsworth and Mr Adair. It is constructed of the same cloth and thread count as many of the other bed linen products exhibited in this review. It should also be classified to heading 6302.

DECISION

109. The decision under review is affirmed.

I certify that the preceding 109 (one hundred and nine) paragraphs are a true copy of the reasons for the decision herein of Mr John Handley, Senior Member.

.....[sgd].....

Associate

Dated 24 February 2012

Date(s) of hearing	10 August 2011
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