



TC02109

Appeal number: TC/2011/05650

*TYPE OF TAX – customs duty tariff classification – whether Block-Up
Converter falls under category of base station - no*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

M & J COMMUNICATIONS LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE ALISON MCKENNA
SONIA GABLE**

Sitting in public at Bedford Square on 11 May 2012

John and Richard Osborne of M & J Communications Limited for the Appellant

**Suzanne Lambert of counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. This appeal concerns HMRC's decision, dated 27 June 2011, to reject the Appellant's request for an amendment to the customs tariff classification of a device known as a "Block-Up Converter". The Appellants contend for a classification which would attract a 0% duty whereas HMRC's decision was that its correct classification would attract a 3.7% duty.

2. M & J Communications is a family-owned satellite communications business run by Mr John Osborne and his son Mr Richard Osborne. A Block-Up Converter ("BUC") is a piece of electronic equipment, the function of which is to convert the frequency of blocks of data so that each block uses the right frequency for outward transmission via a satellite dish. More specifically, a BUC converts from lower to higher frequencies in order to transmit data via a satellite dish. A BUC also has an amplification function. The corresponding part of a satellite communications system which converts from higher to lower frequency for the reception (as opposed to the transmission) of data is called a Low-Noise Block Down Converter or an "LNB".

The Facts

3. The factual background to this appeal was not in dispute. On 21 January 2011 the Appellant's agent requested an amendment to the classification which had been entered onto the importation documentation and requested a consequent refund of duty. It was accepted by HMRC that at the point of entry the BUC had erroneously been categorised as attracting 14% customs duty but the parties did not agree as to the correct classification. The Appellant's agent asked for the BUC to be re-classified so as to attract 0% duty. The National Duty Repayment Centre replied to the effect that, whilst it was accepted that there had been an erroneous categorisation, it took the view that the correct categorisation was one attracting 3.7% duty. The Appellant requested a review of that decision which review upheld the decision of the National Duty Repayment Centre. The Reviewer's decision of 27 June 2011 is the decision now appealed to this Tribunal.

4. We understand there is no dispute that a refund is due to the Appellant in view of the original erroneous classification, although of course the refund may be higher than the amount HMRC agrees is due if the Appellant succeeds in this appeal. We were surprised to hear that a refund of the difference between 14% and 3.7% had not yet been made to the Appellant as it did not seem to us that this payment needed to have been withheld pending the determination of this appeal.

The Issue for the Tribunal

5. It follows that the issue for the Tribunal is a narrow technical one as to the correct classification of the BUC. The Tribunal was assisted by the expert evidence of David Sykes, called by the Respondents, and by the evidence of Richard Osborne, who told us he does not have any formal electrical engineering qualifications but has

long experience of communications systems gained through his work in the family company.

6. The Tribunal gave Mr Osborne an opportunity, in the form of a 30 minute adjournment, to speak to Mr Sykes in advance of the oral evidence. There had not
5 been any technical discussion before the hearing (as there would have been if both sides had presented formal expert evidence) so the Tribunal wished to give Mr Osborne an opportunity to identify the areas of agreement and of dispute between himself and Mr Sykes on the technical issues. At the conclusion of that helpful discussion it was clear that:

- 10 (1) They agreed that a BUC was not itself a complete base station;
- (2) They also agreed that a BUC is an integral part of a base station;
- (3) They disagreed that the BUC should be given the same classification as a base station because of its integral status within a base station (the Appellant's contention);
- 15 (4) They agreed that a BUC had the dual functions of conversion and amplification;
- (5) They disagreed that the amplification function was part of a BUC's essential character (the Appellant's contention) as opposed to being merely incidental to its main function of conversion.

20 *The Law*

7. Council Regulation (EEC) 2658/87 of 23 July 1987 on the Common Customs Tariff provides a standardised system of nomenclature ("Combined Nomenclature of the Harmonised System") in relation to the categories of import tariffs across the EEC, which is published as annex 1 to the Regulation.

25 8. Chapter 85 of the Common Customs Tariff includes heading 8517 which covers apparatus "for the transmission or reception of voice images or other data". Sub-heading 8517 61 00 90 is specifically entitled "Base Stations". The Explanatory Notes (which are persuasive but not legally binding) define "base stations" as follows:

30 The most common types of base stations are those for cellular networks, which receive and transmit radio waves to and from cellular telephones or to wired or wireless networks. Each base station covers a geographical area (a cell) If the user moves from one cell to another while telephoning, the call is automatically transferred from one cell to another without interruption.

35 9. Chapter 85 of the Common Customs Tariff also includes heading 8543 which refers to "electrical machinery and equipment and parts thereof" and to "other" electrical equipment (that is, not previously defined) at 8543 70 90 99.

40 10. Heading 8517 61 00 90 "base stations" attracts a 0% customs tariff and heading 8543 70 90 99 in respect of other electrical equipment attracts a 3.7% customs tariff by virtue of the published UK tariff list.

11. There are General Interpretative Rules for the Combined Nomenclature. These are set out in Section 1 of the Official Journal of the European Communities dated 28 October 2011. Paragraph 2(a) provides that:

5 Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule) presented
10 unassembled or disassembled.

The Evidence and Submissions

12. HMRC relied upon the expert report of David Anthony Sykes dated 9 March 2012. This had been served on the Appellant in the usual way. Mr Sykes is a Consultant Chartered Engineer specialising in IT and telecommunications. He has 25
15 years' experience in the application of electrical engineering and is a Member of the Institution of Engineering and Technology.

13. Mr Sykes' opinion, contained within his expert report and repeated in evidence before the Tribunal, was that a BUC does not fall within the 8517 category of apparatus for the transmission of data because it does not itself have a function of
20 transmitting or receiving data. He told the Tribunal that whilst a BUC is an integral part of a base station, it is not capable of transmitting in its own right. In order to constitute a base station, his view was that all the elements of a base station would need to be present, including an LNB (which has the opposite function of the BUC), a modem and an antenna or satellite dish. His opinion was that a BUC is not therefore
25 capable of categorisation as a base station in its own right and that it should be categorised as electrical apparatus under heading 8543.

14. Mr Sykes accepted Mr Osborne's suggestion that a base station would not work unless it included a BUC. He also accepted that the BUC provided amplification, which is necessary to facilitate the transmission of the data. However,
30 he regarded this as a subsidiary or incidental function of the BUC as its main function, in his view, was frequency conversion.

15. Mr Sykes referred to a Classification Opinion of the World Customs Organisation ("WCO") which classifies an LNB under heading 8543. As, he said, the LNB performs the function of the BUC in reverse, this was a good indication that
35 a BUC is appropriately to be classified under heading 8543.

16. The Appellant put to Mr Sykes in cross examination that a BUC had been classified by HMRC under heading 8517 as a base station ten years ago, but this was not accepted to be correct. The Appellant also put to Mr Sykes that if a base station could not operate without a BUC, then a BUC should be classified as a base station.
40 Mr Sykes did not accept this contention.

17. HMRC also relied upon the evidence of three Binding Tariff Information decisions from Germany (produced to us with translations) to the effect that BUCs fall under the 8517 heading. Ms Lambert also referred the Tribunal to the WCO classification of LNBS under heading 8543 which, she submitted, was indicative that
5 the same heading should be applied to a BUC as it performed the reverse function of an LNB.

18. Mr Richard Osborne gave evidence to the Tribunal that as a base station would not operate without a BUC, it falls within the classification as “part of” a base station. He emphasised that a BUC is a key, integral component of a base station. He also
10 told the Tribunal that amplification was a key component of a BUC and that if one did not need an enhanced level of amplification one could use a frequency converter without an amplification function. He said that all converters amplify to some extent but that the BUC has greater amplification, over and above the level required to compensate for loss through cables. He said that he had designed and built systems
15 which would not work unless there was an amplifier in them, so amplification became a key function of the BUC in addition to conversion.

19. Mr Osborne told the Tribunal that a company he deals with in Austria uses the base station classification for BUCs. He did not have any documentation in relation to this. He told the Tribunal that there has been inconsistent practice by HMRC in
20 relation to the classification of BUCs, however he did not have any documentary evidence to show us or specific examples in this respect. When cross examined by Ms Lambert, Mr Osborne accepted that a complete base station would need a modem and other components to operate. Ms Lambert asked Mr Osborne about the Wikipedia description of a BUC which the Appellant had produced in evidence. This
25 stated that:

BUCs are generally used in conjunction with low-noise block converters (LNB). The BUC, being an up-converting device, makes up the “transmit” side of the system, while the LNB is the down-converting device and makes up the “receive” side. An example of a
30 system utilizing both a BUC and an LNB is a VSAT system, used for bidirectional Internet access via satellite.

Mr Osborne commented on this to the effect that a VSAT system receives and transmits but the ability to receive data is not a defining feature of a base station; it is common to have systems that transmit only and do not receive, for example news
35 channels in remote locations only want to transmit their video footage and not receive data. In relation to the classification of an LNB by the WCO (see paragraph 15 above) Mr Osborne did not accept that the classification of an LNB should serve as a guide to the classification of a BUC as they are different equipment with different functions.

40 *The Tribunal’s Conclusion*

20. The Tribunal was grateful to Mr Sykes and to both Mr Osbornes for their assistance in explaining so clearly the features of a relatively obscure piece of

equipment. As noted above, the issue for the Tribunal turns upon the question of which heading of the Common Customs Tariff the BUC properly falls under.

21. Having considered all the evidence carefully, we take the view that HMRC was correct to refuse to reclassify the BUC as a base station under the 8517 heading and instead to classify it under the 8543 heading. Whilst we accept that a BUC is an integral feature of a base station, we accept Mr Sykes' expert opinion that it may not itself be categorised as a base station. We accepted Ms Lambert's submission that the BUC is not an unfinished or unassembled base station so as to fall within the interpretative provision referred to at paragraph 11 above because it does not have the essential character of a base station. We have had regard to the Binding Tariff Information decisions which we regard as an aid to interpretation of a system which is intended to operate in a uniform way, although we accept that that we are not bound to follow those decisions. We note that, although Mr Osborne told us he was aware of inconsistent classification decisions, he produced no evidence of these.

22. In so concluding, we reject Mr Osborne's submission that the 8517 heading can be applied to "parts of" a base station. The Common Nomenclature does not refer to "parts of" complete base stations and Mr Osborne's view on this point was not supported by any authority.

23. It does not seem to us that we need to decide whether amplification or conversion is the primary function of a BUC. This is because, even if we answered this issue in favour of the Appellant, it would not cause us to decide that a BUC may properly be categorised as a base station.

24. For all the above reasons we now dismiss this appeal. We express the hope that a swift payment of the refund of some £3500 that is due to the Appellant will now be made by HMRC.

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

ALISON MCKENNA
TRIBUNAL JUDGE

RELEASE DATE: 28 June 2012