TC02389

Appeal number: TC/2011/07762

CUSTOMS DUTY - tariff classification – headings 8528594020 & 8528594090 – DVD video monitors on car headrests for viewing by rear seat passengers - attachment to headrests by Velcro straps – GIRs and Section Notes – practice in other EU states – meaning of 'suitable for incorporation' – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PORTABLE MULTIMEDIA LIMITED
(formerly stated to be Voyager Systems Limited)

Appellant

- and -

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

TRIBUNAL: JUDGE MALACHY CORNWELL-KELLY
MRS SUSAN HEWETT OBE

Sitting in public at 45 Bedford Square London on 13 & 14 November 2012

Mr Stephen Cock of the Customs Consultancy Limited for the appellant importer

Mr Oliver Conolly instructed by the Solicitor for Her Majesty's Revenue & Customs for the respondent commissioners

DECISION

1 This is an appeal concerning the customs duty applicable to a DVD player used in cars by being strapped to the back of the front seat headrest and viewed by the passengers in the rear of the car. In procedural terms, it appeared to concern the issue and revocation of a Binding Tariff Information (referred to as a BTI) issued by the commissioners to "Voyager Systems". A BTI is an officially stated tariff classification on the faith of which goods can be imported by the person to whom it is addressed in the knowledge that there will be no subsequent dispute about the duty rate.

2 It emerged early in the proceedings that although the appeal had been stated to be lodged by a company called "Voyager Systems Limited" no company of that name in fact existed, and that "Voyager Systems" was simply a trading or brand name that the importer used. It followed that the appeal should have been lodged by the importer, Portable Multimedia Limited, and that the same company should have been named as the applicant for, and the addressee of, the BTI. That had not been done and it thus appeared clear that the BTI as issued to "Voyager Systems" was invalid and could not therefore be the subject of an appeal.

3 In order to remedy these procedural defects, on the application of Portable Multimedia Limited, and with the consent of the commissioners, we made the following directions:

- Under rule 9(1)(a), to substitute Portable Multimedia Limited for Voyager Systems Limited in the notice of appeal dated 21 September 2011;

- Under rule 5(3)(c), to amend the grounds of appeal to seek the determination of the tribunal on the decision of the commissioners on 15 September 2011 that the importer's product "Click and Go 7 Duo" was dutiable under tariff heading 8528594090, and not under heading 8528594020 as the importer had contended.

The legislation

4 Article 20 of the Community Customs Code, Regulation 2913/92, provides:-

> 1. Duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities.
>
> 2. The other measures prescribed by Community provisions governing specific fields relating to trade in goods shall, where appropriate, be applied according to the tariff classification of those goods.
>
> 3. The Customs Tariff of the European Communities shall comprise:

(a) the combined nomenclature of goods;

(b) any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by Community provisions governing specific fields with a view to the application of tariff measures relating to trade in goods;

(c) the rates and other items of charge normally applicable to goods covered by the combined nomenclature as regards:

- customs duties; and,

- agricultural levies and other import charges laid down under the common agricultural policy or under the specific arrangements applicable to certain goods resulting from the processing of agricultural products.

(d) the preferential tariff measures contained in agreements which the Community has concluded with certain countries or groups of countries and which provide for the granting of preferential tariff treatment;

(e) preferential tariff measures adopted unilaterally by the Community in respect of certain countries, groups of countries or territories;

(f) autonomous suspensive measures providing for a reduction in or relief from import duties chargeable on certain goods;

(g) other tariff measures provided for by other Community legislation.

4. Without prejudice to the rules on flat-rate charges, the measures referred to in paragraph 3 (d), (e) and (f) shall apply at the declarant's request instead of those provided for in subparagraph (c) where the goods concerned fulfil the conditions laid down by those first-mentioned measures. An application may be made after the event provided that the relevant conditions are fulfilled.

5. Where application of the measures referred to in paragraph 3 (d), (e) and (f) is restricted to a certain volume of imports, it shall cease:

(a) in the case of tariff quotas, as soon as the stipulated limit on the volume of imports is reached;

(b) in the case of tariff ceilings, by ruling of the Commission.

6. The tariff classification of goods shall be the determination, according to the rules in force, of:

(a) the subheading of the combined nomenclature or the subheading of any other nomenclature referred to in paragraph 3 (b); or

> (b) the subheading of any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by Community provisions governing specific fields with a view to the application of measures other than tariff measures relating to trade in goods, under which the aforesaid goods are to be classified.

5 Thus, at Community level the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature (the 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 has three elements:

> (a) the nomenclature of the internationally recognised Harmonised System (the HS);
>
> (b) Community subdivisions to that nomenclature; and
>
> (c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

6 The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the HS, while the two following digits identify the CN subheadings. Where there is no Community subheading, these two digits are "00". These can be used to identify subcategories of products to benefit from a suspension or quota. The CN itself contains General Rules of Interpretation (GIRs) for the nomenclature. These general rules are mandatory and hierarchical.

7 GIR 1 provides:

> The titles of sections, chapters and subchapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

8 GIRs 2, 3, 4 & 5 are agreed not to be relevant to this case.

9 GIR 6 provides:

> For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and mutatis mutandis to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.

10 Headings and subheadings of the CN are accompanied by the 'legal notes', which are legally binding. Note 3 to Section XVI, in which the relevant heading appears, states that:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

11 It is common ground that the product under appeal is classified either under heading 8528594020 or under 8528594090 thus:

8528	Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus
	-Cathode-ray tube monitors
	-Other monitors
8528 51	- Of a kind solely or principally used in an automatic data- - processing system of heading 8471
8528 59	- -Other
	- - -Colour
8528 59 40	- - - -With a screen of the liquid crystal display (LCD) technology
8528 59 40 20 ▼	- Liquid crystal display colour video monitor having a DC input - voltage of 7 V or more but not exceeding 30 V, with a diagonal - measurement of the screen of 33.2 cm or less, suitable for the - (sic) incorporation into goods of chapters 84 to 90 and 94 -
8528 59 40 90 ▼	- - - - -Other

12 The classification 8528594020 benefits from total duty suspension, whereas that at 8528594090 is dutiable at 14%. The precise interpretation of the heading 8528594020, which is introduced into the tariff as a duty suspension code by Council Regulation 1344/2011, is therefore decisive in this appeal as the importer contends that its product falls within that heading and not within heading 8528594090. It is agreed that the product falls within the duty suspension heading 8528594020, provided that the words "suitable for the incorporation into goods of chapters 84 to 90 and 94" apply to it. (The chapters referred to here include motor cars.)

Facts

13 We received evidence in documentary form and witness evidence from Mr Robert Grant, for 12 years responsible in the importer's business for marketing and, from a sales perspective, for product design and

development, and from Mr David Harris, for 21 years in the Tariff Classification Service of the commissioners. We regarded both witnesses as honest and reliable. We find the following facts proved, at least on the balance of probabilities.

14 In addition, the product under appeal, which is fastened to the car headrest with Velcro straps, was demonstrated to us as was a product identical with that under appeal except that it is fastened to the headrest by screw-tightened clamps round the two stanchions supporting it. This second type is the subject of a BTI classifying it under the duty suspension heading 8528594020. For convenience, we will refer to the product under appeal as the 'Velcro version', and to its alternative benefitting from duty suspension as the 'stanchion version'.

15 The Velcro version consists of Velcro straps bound round the headrests of the front seats and holding thus in place what is called a bracket, or back plate, into which a monitor containing a DVD can be slotted. This apparatus is then connected via wiring to the cigarette lighter socket at the front of the car, from which it derives its power. The monitor and DVD can very simply be removed and taken away when the car is not in use, and would normally be so in order to prevent theft or to be used in another car; a carry-case is supplied for the purpose. Everything is the same with the stanchion version except that it is screw-attached to the stanchions by clamps, the screws being tightened with an Allen key also supplied. When the two versions were attached and detached from a single headrest in front of us the operation took no more than ten seconds in the case of the Velcro version and forty to fifty seconds in the case of the stanchion version.

16 In both cases, the product has two monitors, one monitor being called the master and the second one the slave, which means that the first has the essential equipment to read and display the DVD inside it and the second merely displays the DVD in tandem with the first. The two are connected by a detachable wire and can have headphones to avoid distracting the driver. The products are therefore suited to the in-car entertainment of children sitting in the rear passenger seats, and watching the same DVD.

17 The wiring connecting the product to the power supply in the cigarette lighter can either be strung loosely from the headrests to the lighter or, if the user so wishes, it can be concealed inside the covering of the seat and under the carpet in the front, or be attached by magnetic clips. The wiring is itself detachable from the product, and its removal is therefore optional when the monitors are removed for the reasons mentioned. All told, there is thus potentially a high degree of flexibility in the product's use, it being possible completely to remove or install the Velcro version with its two monitors and wiring to the power supply in as little as one minute; in the case of the stanchion version, the same operation could be completed within two minutes. No skill or technical ability need be required.

18 If the user wishes, the products can of course be left *in situ* indefinitely with the wiring being concealed or secured and they can thus in practice acquire a degree of permanency in the vehicle; whether or not that is the case with the wiring, Mr Harris for the Revenue accepted that leaving the mounts (i.e. the back plates) on the headrest at all times would be usual. A second set of connecting wires and back plates is available to enable the product to be swapped from one car to another more easily, indicating that some buyers install the connecting wires in a manner which makes it relatively time-consuming or impractical to remove them. In the case of Renault cars, the wiring can be installed by the manufacturer before delivery, or more generally it may be installed by a retailer such as Halfords, but the evidence does not permit us to say in what proportion of cases such installation of the wiring occurs.

19 Both versions have been extensively safety tested with a view to ensuring that they will not come loose or cause injury to the rear seat passengers in the event of a crash, and they are the only products of their kind on the market to have been so tested.

20 Surveys show that in 75% of cases the product is used predominantly for operation in cars in the ways we have described. The product can be and is operated elsewhere, for example in the home, but fewer than 1% of sales are with the necessary accessory for home use and for technical reasons only one of the two screens can normally be in use. The product is not easily suitable for use in trains or in aircraft, though in about 6% of sales batteries are supplied indicating some usage outside the car. The Velcro version is suitable in 95% of cars, while the stanchion version can (on account of the variations in design of the headrests) be used in only 70% of cars.

21 Evidence was adduced of the views of the customs administrations in France and Germany, and the view of the European Commission. The French view was that both products should be classified under heading 8528594090, and that view was supported by the Commission.

22 The German customs administration took the view that the stanchion version qualified for heading 8528594020, but agreed with HMRC that the Velcro version would come under heading 8528594090. Even after a professional translation of one communication from the German customs had been obtained, it was unclear why they had added that they considered that a comparable product with a single screen and using Velcro straps, called the Click9Uno, could be classified under 8528594020; Mr Grant's evidence was that, apart from its single screen, he believed it was identical to the Velcro version under appeal.

23 The difference between the two appeared to relate to the German administration's view of the way the mounting and power supply of the Click9Uno were installed, describing them as "permanent", but there was not sufficient evidence about the Click9Uno for us to make a finding that it

is on all fours with the product under appeal. The result of this evidence is then that the Commission and the French administration agree with HMRC's contested classification, and that the German administration appears to do so also but that their opinion is not completely certain.

Submissions

24 Mr Cock, for the importer, submitted that the issue for determination was the narrow one of whether the product should be classified within heading 8528594020 which is free of duty or the residual category of "*Other*" under heading 8528594090 subject to customs duty at 14%. Much of Mr Cock's submission and approach to the case generally was on the basis that there was nothing of substance to distinguish the Velcro version from the stanchion version and, as has been seen, we were given evidence about both. Nonetheless, only the Velcro version is before the tribunal and it is not open to us to offer a view on whether the stanchion version has been correctly classified under heading 8528594020 or whether the BTIs purportedly issued have been inconsistent.

25 We note Mr Cock's submissions therefore only in so far as they relate to the Velcro product and we resist being drawn into a comparison between the classifications the commissioners have accorded the two versions. With that *caveat*, the case for the importer rests on two principal arguments.

26 The first is that the product fits squarely within the terms of the heading "Liquid crystal display colour video monitor having a DC input voltage of 7 V or more but not exceeding 30 V, with a diagonal measurement of the screen of 33.2 cm or less, suitable for the incorporation into goods of chapters 84 to 90 and 94", since that is the principal intended use. This is clear from the detailed evidence on the product, which shows that it is intended mainly to be used in cars and is marketed primarily for incorporation into cars. While it is possible for the product to be put to alternative uses elsewhere than in cars, this is not the intended main use.

27 The second argument is that there is nothing in the terms of the heading, the subheadings or the explanatory notes which provides that the product is disqualified from classification as a liquid crystal display colour video monitor suitable for the incorporation into goods of chapters 84-90 and 94.

28 In case C-395/93 *Neckermann v Hauptzollamt Frankfurt-am-Main* [1994] ECR I-4034 the classification question at issue related to goods claimed to be women's or girls' knitted garments (pyjamas), which customs had classified as upper garments and trousers. The Court held, at [7] – [9]:

> 7 In the absence of such a definition [of pyjamas in the tariff], the objective characteristic of pyjamas, which is capable of distinguishing it from other ensembles, can be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear.

> 8 If that objective characteristic can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas.
>
> 9 It follows that, for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which it is intended.

29 In case C-309/98 *Holz Geenen v Oberfinanzdirektion München* [2000] ECR I-1992, the issue concerned the classification of certain builders' merchandise and the Court observed at [14] – [15]:

> 14 It is settled case law that, in the interests of legal certainty and for ease of verification, 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. The explanatory notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the Customs Cooperation Council ('the HSENs'), may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see case C-405/97 *Mövenpick Deutschland v Haupzollamt Bremen* [1999] ECR I-2397 paragraph 18).
>
> 15 In addition, the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties - see case C-459/93 *Thyssen Haniel Logistic* [1995] ECR I-1381, paragraph 13).

30 Thus, if a product has a main use, the fact that it can also be used (and is sometimes used) for alternative purposes is legally irrelevant. This well-established principle has been applied repeatedly both by the Court of Justice and by the Tax Tribunal in order to determine customs classification.

31 In case T-243/01 *Sony Computer Entertainment Limited v Commission* [2003] ECR II-4195 the Court, applying the reasoning in *Neckermann*, said at [111] to [113]:

> 111 Such reasoning can also be applied to a case such as this one. Thus, in the absence of a definition of " video games" for the purposes of subheading 9504 10, it is appropriate to consider as video games any products which are intended to be used, exclusively or mainly, for playing video games, even though they might be used for other purposes.
>
> 112 It is, moreover, undeniable that, both by the manner in which the PlayStation®2 is imported, sold and presented to the public and by the

> way it is configured, it is intended to be used mainly for playing video games, even though, as is apparent from the contested regulation, it may also be used for other purposes, such as playing video DVDs and audio CDs, in addition to automatic data processing.
>
> 113 This finding is corroborated by numerous documents, in particular the brochures and other promotional information relating to the PlayStation®2 which the parties have produced in these proceedings. Those documents show clearly that the PlayStation®2 is marketed and sold to consumers mainly as a video game console, even though it may also be put to other uses. In addition, the various answers given by the applicant during the presentation of the PlayStation®2 to the Nomenclature Committee on 27 February 2001 show that consumers perceive the PlayStation®2 mainly as a game console, even though it may be put to other uses.

32 The same doctrine is apparent from case C-467/03 *Ikegami Electronics v Oberfinanzdirektion Nürnberg* [2005] ECR I-2409 at [23] - [26] and from *Anagram International Inc v Inspecteur van de Belastingdienst Rotterdam* [2006] ECR I-6765 at [20] – [21].

33 A recent illustration of application of these principles by the tribunal is provided by the decision in *RMS Communications Limited v RCC* TC00681 concerning the tariff classification of the third generation iPod Nano. At [68] the tribunal observed:

> 68 It is clear from *Sony* that we must look at the objectively determined intended use when considering the product's objective characteristics. Indeed, when considering its objective characteristics we don't really see what else could be considered other than its (objectively determined) intended use as the question of its primary function.

34 The main intended use of a product is therefore to be assessed by its objective characteristics and the way in which it is marketed or promoted. Customer perception and use is relevant in this regard. Applying those principles to this case, the evidence shows that the product is intended to be incorporated and used in cars. That is reflected in objective characteristics, namely the way in which it is mounted and supplied with power, that the limited screen size makes the monitors suitable for close viewing only, the use of headphones and that they are crash tested for safety purposes. The primary use in cars is also reflected in what the product does not have viz: it is not generally supplied with mains power supplies or battery packs.

35 The intended main use of the product as an in-car DVD player is also reflected both in its actual use and the way in which it is marketed and promoted:

- As seen in the survey of purchasers, which shows that in excess of 75% of owners predominantly use it in cars.

- In-store in Halfords, Tesco and Currys/PC World, where it is displayed on headrests.

- Online, for example with Amazon, where the material clearly shows the product used in a vehicle setting.

- In national newspapers and trade publications where the results of crash testing are used as a unique selling point.

36 It is possible for the product also to be used in alternative applications but it is plain that the principal actual use is in-car. There is nothing whatsoever in the wording of the CN subheading 8528594020 or the section or chapter notes of the CN, which contains any directions, let alone requirements, as to the need to incorporate the product permanently. Turning to the non-legally binding guidance of the explanatory notes, neither the HSENs nor the CNENs propose any requirement that the product must be permanently incorporated.

37 The European Commission has highlighted the divergent rulings that have been issued within the Community in relation to in-car DVD players. This appears to stem from translation difficulties, associated with the use of the expression incorporated. Some Member States, notably France, include in-car DVD players within subheading 8528594020 only when they are imbedded into a headrest or another part of the car. At the same time, other Member States, such as the UK, allow in-car DVD players within subheading 8528594020 on a less restrictive basis when there is a possibility temporarily to remove the devices from fixed support.

38 Mr Cock also submitted that the European Commission was currently taking steps to alter the terms of subheading 8528594020 in order to eliminate such difficulties and in so doing had acknowledged that the term 'incorporated' does not limit subheading 8528594020 to permanently fixed in-car DVD players. (There was, however, no evidence before us about this development and it would not, in any event, be of more than peripheral relevance to the matter under appeal.)

39 For the commissioners, Mr Conolly based his case on five separate arguments.

40 Firstly, he emphasised that the main issue was simply the meaning to be given to the term 'incorporation'. The commissioners accepted that the main intended use of the product is use in a car but that is not the question before the tribunal: the question before the Tribunal is whether the product is "suitable for the incorporation into" cars and thus meets the requirement of heading 8528594020**.** All sorts of products may be intended to be used mainly in cars, without being suitable for incorporation into cars**.** Instead, it is necessary to consider whether, when the product is attached by means of

Velcro straps to the headrest of a car, it is "incorporated into" the car as a result.

41 The commissioners' case is that when the product is attached to a headrest it is not incorporated into the car. The back-plate is only fixed to the headrest with Velcro straps, and is thus easily removable from it. The fact that the DVD player is easily removable for both security reasons and also to enable viewing in places other than the car is a strong indicator to the contrary**.** This is particularly so, given that it is the classification of the DVD player that determines that of the product as a whole**.**

42 The following is the definition of the term "incorporation" in the *Shorter Oxford English Dictionary*:

> The action of incorporating two or more things, or one thing with another; the process or condition of being incorporated.

43 This leads to the meaning of the verb "incorporate" which is:

> 1. Combine or unite into one body or uniform substance; mix together.
>
> 2. Put (one thing) in, or into another to form one whole; include, absorb."

44 The dictionary definitions bring out the following connotations of an object A being incorporated into another object B:

(i) the result must have a certain unity (it must form "one body" or "uniform substance");

(ii) whilst it does not necessarily follow from such incorporation that A is physically inseparable from B following its integration therein (although this may well be the case), it will mostly be the case that the identity of A is altered (if only slightly) by the incorporation of B into it (the resulting entity will have "absorbed" B so as to form a new "whole");

(iii) in accordance with the connotation of absorption into a new whole, an object can be said to be incorporated *in* or *into* another, in contrast to being attached *to* it.

45 Thus, the product cannot be described as a matter of customary meaning as "incorporated into" a car as a result of being affixed merely with Velcro straps: see *Skatteministeriet v Imexpo Trading* [2004] ECR I-9275 at [17]:

> 17 In the present case, plastic chairmats such as those at issue in the main proceedings can be regarded as floor coverings. They are, in fact, carpets of various shapes, one purpose of which is to protect floor coverings. First, the customary meaning of the word 'covering' is something that covers something else to protect or strengthen it and, second, a covering which covers a floor covering must itself be

> regarded as a floor covering. The wording of chapter 57 of the Combined Nomenclature, entitled 'carpets and other textile floor coverings', as well as the analogous wording of several headings in that chapter confirms that a carpet must, in principle, be regarded as a floor covering.

46 The use of Velcro straps in the design of the product is such that it is easy to remove it quickly and with minimum effort. It would thus on the face of it appeal to customers who for example have two cars and wish to switch the product from one car to another regularly. Even if the intended use of the product is relevant to its classification, the commissioners submit that the Velcro straps themselves indicate that there is an intention to enable easy removal, such as to negate "suitability for incorporation", but it is not contended that the test necessarily implies that the incorporation must be permanent.

47 Mr Conolly's second argument was that it is necessary to have regard to the purpose of the suspension codes. The European Commission's *Communication from the Commission concerning autonomous tariff suspensions and quotas* (2011/ C-363/02, OJ 13/12/2011) explains the rationale behind the provision of suspension codes, and highlights the nature of the products expected to fall within their ambit:

> 2.5.1. The aim of tariff suspensions is to enable Union enterprises to use raw materials, semi-finished goods or components not available or produced within the Union, with the exception of 'finished' products.
>
> 2.5.2. Notwithstanding paragraphs 2.5.3 and 2.5.4, for the purposes of this communication, 'finished goods' are commodities that exhibit one or more of the following characteristics:
> -are ready for sale to the end-user, to be packed or not within the Union for retail sale,
> -are disassembled finished goods,
> -will not undergo any substantial processing or transformation, or
> -have already the essential character of the complete or finished product.
>
> 2.5.3. As Union producers are converting increasingly to assembling products requiring parts that are already highly technical [sic] sophisticated, some of the parts required are used without major modification and could therefore be considered as 'finished' products. Nevertheless tariff suspensions could, in certain cases, be granted for 'finished' products used as components in the final product, provided the added value of such an assembly operation is sufficiently high.
>
> 2.7. Autonomous tariff suspensions and quotas are destined for firms producing in the Union. Where the use of the product is confined to a particular purpose, this will be monitored with the procedures governing the control of end use.

48 Mr Conolly admitted that this document is not legally binding on the tribunal but he said that it is plain that the product under appeal is clearly a

stand-alone product sold direct to the end-consumer, and does not constitute raw materials for an in-built DVD in a car; heading 8528594020 was thus not intended to apply to products of this type. In response to questions from the tribunal, Mr Conolly agreed that this communication – whatever its status in this appeal – makes it difficult to understand why either the Velcro version or the stanchion version should benefit from duty suspension.

49 The third proposition put forward for the commissioners was that the concept of 'inherent use' was a necessary element of 'intended use'. To demonstrate this, Mr Conolly cited the Opinion of the Advocate General in *Ikegami Electronics v Oberfinanzdirektion Nürnberg* [2005] ECR I-2409, at 2400 [35] – [36] to the effect that the two criteria for classification are material composition and intended use, the latter to be determined by reference to objective criteria. In the light of this, the passage from *RMS* cited by Mr Cock was not authority for the primacy of intended use *simpliciter*. The concept of 'intended use' was to be restricted to cases in which such use is inherent in the product – see the observation of the Court of Justice in *Thyssen* at [13]:

> In this connection it should be noted that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see the judgment in case 36/71 *Henck* [1972] ECR 187, at paragraph 4).

50 This formulation was repeated by the Court in *Holz Geenen v Oberfinanzdirektion München* [2000] ECR I-1992 at [15] and applied by the tribunal in *Photron Europe v RCC* TC01194 at [80]. Against that background, it was important to note that heading 8528594020 contained no suggestion of the inherent use of the product and therefore that the argument from its intended use only could not be sustained.

51 Fourthly, the tribunal should be aware of the position adopted by other EU states. In *Intermodal Transports v Staatssecretaris van Financien* [2005] ECR I-8191 the Court observed at [34]:

> 34 The fact that the customs authorities of another Member State have issued to a person not a party to the dispute before such a court a BTI for specific goods, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of

> the CN, taking account, in particular, of the three criteria in the preceding paragraph.[1]

52 Thus, account should be taken of the fact that the Commission, France and Germany all regarded the Velcro version of the product as falling under heading 8528594090. There was no evidence as to the opinions of other EU administrations.

53 Finally, Mr Conolly addressed us on a brief decision by the tribunal in *Spot Technology v RCC* TC00300 which had only just come to light.

54 This decision related to the classification of a rear-view monitor, linked to a camera at the back of a vehicle, which clipped over the rear-view mirror and enabled the driver to see what would be seen by a person looking out of the rear window of the car. The importer claimed that the device was dutiable under heading 8528594020 as suitable for incorporation into a motor vehicle. The issue was thus very close to that in the present case but the test of 'incorporation' was not debated, the commissioners apparently having conceded that it was met. The decision is not easy to follow and Mr Conolly submitted that we could derive little or nothing from it. The appeal was decided by reference to the suitability of the device for incorporation into goods of chapter 70.

55 In reply, Mr Cock accepted that the decision is hard to interpret but he pointed out that in recording the parties' submissions the tribunal had specifically stated that the commissioners had accepted that the product was "suitable for incorporation into goods of chapter 70 (which includes rear-view mirrors)" which implied that clipping it onto a rear-view mirror satisfied the incorporation test. No material difference could be seen between that method of attachment and the Velcro straps used to attach the product under appeal.

Conclusions

56 The first step is to identify the item to be classified, given that the product has four components: (i) the wiring which connects to the car's cigarette lighter and provides the power supply, (ii) the backplate with its Velcro straps which attach it to a headrest, (iii) the first DVD monitor which slots into the backplate and (iv) the second DVD monitor which is connected to the first one and which reproduces its visual display. In this respect, Note 3 to Section XVI requires that:

> Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if

[1] The preceding paragraph referred to concerned the criteria for references to the Court of Justice by national courts of last instance.

consisting only of that component or as being that machine which performs the principal function.

57 In the case of the Click and Go 7 Duo it is apparent that none of the components could function without the others, except for the second monitor, component (iv), which is connected to component (iii) by a detachable wire and could be excluded from the ensemble if desired. Component (i), the wiring, cannot be said to perform the principal function, which leaves components (ii) and (iii). The backplate and the first monitor form together the essential parts of the equipment which give it its character and usefulness and which function interdependently. The product must therefore be taken as "consisting only" of the backplate and the first monitor taken together as a composite unit.

58 Secondly, we have found as a fact that the product is mainly intended and sold for use in cars though it can be, and is, also used elsewhere. The authorities, however, show that use intention is only relevant if the inherent use of the product is consistent with the intended use. In this case, it is in the nature of the product much more feasible to use it in a motor vehicle than it is to use it elsewhere, the evidence confirming that the alternative uses are well in the minority. It is therefore inherently suited to use in motor cars and is in general intended to be so used. It thus satisfies the test of being suitable for *use* in goods of chapters 84-90 and 94.

59 The third question is whether the product is "suitable for incorporation"[2] into a motor car. The legislative texts offer no definition of 'incorporation' or any suggestion as to how the term should be interpreted and there is accordingly no reason to understand the words other than in the normal use of language. Reference to the dictionary meaning of the word 'incorporation' leads unavoidably to the conclusion that some significant degree of integration of the device into the vehicle is meant. The thing incorporated must in some real sense become part and parcel of the vehicle itself, and not merely something used in the car and attached to its fixtures only to the extent necessary to avoid it becoming dangerous in the event of a collision or inconvenient to use.

60 The evidence points to component (i), the wiring, as being the most likely component to be integrated into the vehicle in view of the fact that it can be inserted into the fabric of the interior in such a way that it cannot easily be removed and may become something of a fixture. But apart from the lack of evidence that this is typically – as opposed to often - the case in the use of the product, the decisive consideration is that the wiring does not give this product its essential character or perform its principal function. The degree of integration of the wiring alone cannot be determinative.

[2] The expression 'the incorporation' in the text of heading 8528594090 was accepted by both parties to be no more than a clumsy rendering in English and effectively to mean simply 'incorporation'.

61 The evidence shows that while leaving the backplates attached to the headrest may be usual, the DVD monitors are often removed when the car is not in use, either for security purposes or for use elsewhere. It cannot be said that on this account the backplates and the monitors, which together perform the principal function of the product and give it its essential character, are in any sense made part and parcel of the car. Leaving the backplate attached to the headrest with Velcro straps to facilitate the rapid mounting of the DVD monitor when it is wanted for use does not integrate or absorb these items into the vehicle; it merely secures them against inconvenient or dangerous movement.

62 Our primary conclusion is therefore that the product is not suitable for incorporation into a motor car, which is the item of goods in question in this case. Is that conclusion inconsistent with the practice of other Member States or the apparent purpose of the tariff suspension?

63 The evidence of the practice of other states is very limited, given that there are 26 other Member States of the European Union to be taken into account. Nevertheless, it appears that the two states of which we have knowledge adopt the assessment of the Velcro version of the product which commends itself to us, as does the Commission.

64 The Communication from the Commission cited by Mr Conolly is likewise supportive of that conclusion, suggesting as it does that the tariff suspension headings are intended to promote a useful or significant economic activity after importation in regard to the process of the incorporation required. There is hardly any suggestion of such activity here, save in what must be considered to be unusual cases where the retailer or the car manufacturer installs the product in the vehicle. While consistency with these non-binding and secondary sources of interpretation is not required for our decision, the absence of inconsistency with them points additionally towards it.

65 It has to be acknowledged that our decision appears to be at odds with the decision of the tribunal in *Spot Technology* where the 'incorporation' of a product which was merely clipped on to a feature of the car, the rear-view mirror, was accepted by the commissioners. It is difficult to distinguish that case from this, but it must be noted that the decision of the tribunal in *Spot Technology* is unusually brief, not to say terse, and that there is no recorded debate about what has become the central issue in the present appeal. The commissioners are not estopped however from raising the issue here by reason only of their not having raised it in *Spot Technology* and we must respectfully dissent from the tribunal's conclusion in that decision.

66 The commissioners' decision in their letter to the appellant of 15 September 2011 that the product under appeal falls under heading 8528594090 is correct and the appeal does not therefore succeed.

Further appeal rights

67 This document contains the 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 no 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.

MALACHY CORNWELL-KELLY
TRIBUNAL JUDGE

RELEASE DATE: 27 November 2012