



[2019] UKFTT 651 (TC)

TC07426

CUSTOMS DUTY – Binding Tariff Informations – classification – fluid and blanket warming cabinets used in hospitals – classified as medical furniture under CN heading 9402 – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Appeal number: TC/2018/05993

BETWEEN

CENTRAL MEDICAL SUPPLIES LIMITED

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 16 September 2019

Mr Simon Branson, Technical Manager for the Appellant

Ms Karen Powell of HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. The appellant carries on business as a manufacturer and supplier of medical equipment. The appeal concerns the correct classification for customs duty purposes of fluid warming cabinets and blanket warming cabinets which are manufactured by a company in Wisconsin, USA and imported into the UK by the appellant.

2. In 2018 the appellant applied for Binding Tariff Informations (“BTIs”) in relation to the two products. A BTI provides a customs classification which is binding on the customs authorities as against the importer who obtains it until it expires or is revoked or annulled. HMRC issued BTIs to the appellant on 10 April 2018 and 23 May 2018 whereby the fluid warming cabinets and the blanket warming cabinets were classified to customs heading 8419 89 98 00 of the Combined Nomenclature (“CN”). The CN is the system used to classify imported products for customs duty purposes and imposes a common customs tariff on imports from outside the EU. It is based in part on the Convention on the Harmonised Commodity Description and Coding System (“the Harmonised System” or “HS”).

3. I understand that the customs duty payable on the products on importation pursuant to the customs heading in the BTIs is 3.4%. The appellant challenged the BTIs. They were both confirmed in a statutory review dated 5 September 2018, following which the appellant appealed to this tribunal.

4. HMRC maintain that the customs classifications in the BTIs under Chapter 84 of the CN, heading 8419 are correct. The appellant contends that appropriate customs headings are either under Chapter 90, heading 9018 or Chapter 94, heading 9402 where no customs duty would be payable on importation. The competing headings under Chapters 84, 90 and 94, including the Chapter headings for ease of reference, are as follows:

Chapter 84

Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof.

8419 Machinery, plant or laboratory equipment, whether or not electrically heated (excluding furnaces, ovens and other equipment of heading 8514), for the treatment of materials by a process involving a change of temperature such as heating, cooking, roasting, distilling, rectifying, sterilizing, pasteurizing, steaming, drying, evaporating, vaporising, condensing or cooling, other than machinery or plant of a kind used for domestic purposes; instantaneous or storage water heaters, non-electric.

Chapter 90

Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.

9018 Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight-testing instruments.

Chapter 94

Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated name-plates and the like; prefabricated buildings.

9402 Medical, surgical, dental or veterinary furniture (for example, operating tables, examination tables, hospital beds with mechanical fittings, dentists' chairs); barbers' chairs and similar chairs, having rotating as well as both reclining and elevating movements; parts of the foregoing articles.

5. I set out below the relevant legal framework within which classification decisions must be made, my findings of fact in relation to the products being imported by the appellant and the reasons for my decision as to the correct classification of the products.

LEGAL FRAMEWORK

6. I start by considering the legal framework of classification, including the General Rules for the Interpretation of the Nomenclature (“GIRs”). The GIRs have the force of law and the relevant GIRs for present purposes are as follows:

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

...

3. When by application of Rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description...

...

(c) When goods cannot be classified by reference to 3(a) or 3(b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

...

6. 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.”

7. The reference to notes is to explanatory notes of the CN, known as CNENs, or the HS, known as HSEnS.

8. It is well established that classification involves identifying and classifying goods by reference to their objective characteristics at the time of importation. The approach to classification issues was summarised by Arden LJ in *Amoena (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs* [2015] EWCA Civ 25 as follows:

“ 53. I start with the general approach to interpretation of the CN.

54. It is clear from the Opinion of Advocate General Kokott in *Uroplasty* that the court must apply a structured approach. At the first stage it must determine the intended use and material composition of the article. Next the court must make a provisional classification by reference to section and chapter headings. Then the court must make a combined examination of the headings and Notes, applying GIRs 2 to 5 in case of conflict. The interpretation of the headings and EN should be consistent with the HS. Finally the article must be placed under the appropriate subheading. The relevant paragraphs in the Opinion are as follows:

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

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

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

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

40 According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (see, in particular, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; Case C-445/04 *Possehl Erzkontor* [2005] ECR I-0000, paragraph 19; and Case C-500/04 *Proxxon* [2006] ECR I-0000, paragraph 21).

41 The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope (see, in particular, Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 28, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17, and *Proxxon* paragraph 22).

42 For the purposes of classification under the appropriate heading, it is important, finally, to recall that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective

characteristics and properties (see *Krings* paragraph 30, *Ikegami*, paragraph 23, and *Proxxon*, paragraph 31).”

9. BTI’s given in the UK or by other member states in relation to the same or similar products should also be taken into account in the interests of legal certainty, but they are not binding.

FINDINGS OF FACT

10. Based on the oral and documentary evidence before me I make the following findings of fact.

11. The appellant manufactures and supplies medical equipment. Its customers are mainly NHS hospitals, but also private hospitals and some veterinary practices. It has some 36 employees including sales staff and service engineers. The main part of its business is the supply of equipment for thermal management of patients. Over the last few years the appellant has imported the warming cabinets from the USA and supplied them to over 30 hospitals.

12. The appellant has also had a relationship for many years with a Swedish supplier of similar products. There was some email correspondence between the appellant and the Swedish supplier in relation to the relevant customs code for warming cabinets which suggested that the Swedish customs authorities had advised that supplier to use heading 9018 which may be described in shorthand as “medical appliances”. I did not find the email chain very helpful or clear and I am not satisfied that I can place any real weight on its contents.

13. The two types of warming cabinets are very similar in appearance and operation. They are rectangular cabinets with a white coated steel exterior, glass doors, interior shelves and baskets and incorporate low energy warming technology. They are portable and have an adjustable temperature range with audio and visual alarms. They come in various heights, all with a width of approximately 22” and depth of approximately 35”. Smaller versions can be placed on countertops. Larger versions contain up to 54 one-litre bottles (or bags) of fluid or 60-70 blankets, with the option of casters. Smaller versions contain up to 8 one-litre bottles (or bags) of fluid or 6 blankets, and have rubber feet. They can be stacked one on top of another. Variations of the products include cabinets which have one door for fluids and another door below for blankets.

14. Fluid warming cabinets are used to warm irrigation or injection fluids which are obtained from cold storage and then warmed in the cabinet before being administered. They are used in various hospital contexts including operating theatres and intensive care units. The fluid warming cabinets have a fan which ensures consistent temperature throughout the cabinet.

15. Blanket warming cabinets are used to warm blankets to help prevent hypothermia in a patient. Warm blankets are often used to provide warmth for patients who have undergone surgery, pursuant to guidelines from the National Institute for Health and Care Excellence (NICE). They are also used to provide warmth for newly delivered babies. The operation manual for the blanket warming cabinets indicates that blankets stored in the cabinet should be rotated daily to prevent discolouration.

16. The operation manuals for both warming cabinets contain a warning as follows:

“ DANGER – DO NOT use this warming appliance in the presence of flammable anesthetic mixture (with air or with oxygen or nitrous oxide). THIS COULD RISK AN EXPLOSION”

17. The manufacturer also produces another product called the ivNow which is a modular intravenous fluid warmer. It can be placed on countertops, mounted to the wall or attached to mobile equipment or pole stands. It holds between 1-3 litre bags of fluid. This appeal does not relate to this product, although the product was referred to in the evidence and in submissions.

18. The manufacturer operates to ISO standards for the “design, engineer, manufacture, servicing and market of warming equipment for the medical device industry”. The products are also “CE marked” indicating conformity with health, safety, and environmental protection standards for products sold within the European Economic Area. The declaration of conformity refers to an EU product Class I of the relevant EU Directive which covers “medical devices” not coming into contact with patients. The description of the products in the manufacturer’s declaration of conformity is as follows:

“These units typically consist of a cabinet with appropriate racks, a heating system, temperature controls, and overheat alarms. Multipurpose warming units may be used to warm solutions ... and blankets.”

19. It is not suggested that the warming cabinets have any intended use other than in a medical context and I so find. The products themselves do not come into direct contact with patients.

20. The USA manufacturer obtained a BTI for the warming cabinets from HMRC on 14 December 2006. The products were classified to heading 9402, which may be described in shorthand as “medical furniture”. This was said to be in accordance with GIR 1 and the HSEs for heading 9402. The appellant relied on that BTI when importing the products from the USA. When that BTI expired in December 2012 the appellant assumed that classification to heading 9402 remained appropriate.

21. It appears that the BTI issued in December 2006 was issued following a previous BTI which classified the products to heading 8419, which may be described in shorthand as “heating machinery”. The appellant had asked for a review of that decision which was successful and led to the previous BTI being revoked and replaced by the December 2006 BTI. In the review letter, the reviewer considered that the products were to be regarded as furniture designed specially for medical or surgical appliances.

22. My attention was drawn to other BTIs issued by customs authorities in Germany and the UK where products have been classified to heading 8419 as heating machinery:

(1) A German BTI classifying what is described as a “rectangular housing with external door” having a cooling and heating function to store a blood bag and platelet bag at a constant temperature. There was no photograph of the product.

(2) A German BTI classifying what appears to be a small desktop unit with a heating function to store individual bags of infusion solutions at a constant temperature. The product was classified to 8419 on the basis that the heating device determined the character of the product as a whole. A photograph shows that the product certainly does not give the appearance of furniture and looks similar to the ivNow product.

(3) A UK BTI classifying a “slimline heater mobile device specifically designed to be used for heating thermoformable splint and brace products for the veterinary industry”.

REASONS

23. The appellant's case is that the warming cabinets are either "instruments and appliances used in medical ... sciences" under heading 9018. In the alternative they are "medical ... furniture" under heading 9402. The appellant relies on GIRs 1, 3 and 6.

24. The respondents' case is that the products are "machinery ... for the treatment of materials by a process involving a change of temperature such as heating ..." under heading 8419. The respondents rely on GIRs 1 and 6 and also relevant HSEs.

25. Having identified the objective characteristics and intended use of the products I must consider whether the products prima facie fall within the headings relied upon by the parties. The possible classifications involve competing headings at the same level or hierarchy. I must then go on to consider whether a definitive classification can be reached taking into account the headings and any CNENs or HSEs. In the present case there are no relevant CNENs. If there are conflicts between the competing headings I must have recourse to Rules 2 to 5 of the GIRs.

26. I should say at this stage that I do not consider the other BTIs issued in Germany and the UK assist in classification of the warming cabinets. The first German BTI does not contain a clear description of the products and in any event is simply the view of the German customs authority. The second German BTI and the UK BTI appear to be for very different products.

27. I am satisfied that the warming cabinets prima facie fall within headings 9018 and 9402 relied on by the appellant, and within heading 8419 relied on by the respondents.

28. Heading 9018 covers "instruments and appliances used in medical ... sciences". I was referred to the HSEs for heading 9018 which state as follows:

"This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (e.g., by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc. Instruments and appliances for anatomical or autoptic work, dissection, etc., are also included, as are, under certain conditions, instruments and appliances for dental laboratories (see Part (II) below). The instruments of the heading may be made of any material (including precious metals).

The heading does not cover:

...

(r) Medical or surgical furniture, including that for veterinary use (operating tables, examination tables, hospital beds), dentists chairs not incorporating dental appliances of this heading, etc. (heading 94.02).

..."

29. The Notes go on to identify a large number of specific instruments and appliances which do fall within the heading. Ms Powell submitted that the common characteristic of all the specifically identified instruments and appliances is that they are "used" in medical science, in the sense that they are applied directly to the patient. In other words, the heading is limited to instruments and appliances used directly in the course of some form of medical procedure. She submitted that the warming cabinets could not be described as being "used" in that sense.

30. I note the specific exclusion at paragraph (r) for medical furniture. The HSEN expressly states that medical or surgical furniture is not covered by the heading, but falls within heading 9402. It may be argued therefore that but for this exclusion, medical or surgical furniture at least might be considered to fall within heading 9018. That would suggest that the respondents' construction of the heading requiring appliances to have direct contact with a patient was unduly narrow.

31. Ms Powell referred me to the decision of the CJEU in *'Oliver Medical' SIA v Valsts ieņēmumu dienests* (Case C-547/13) which was a classification case also involving heading 9018. It concerned certain laser devices and accessories used for dermatological treatments, and one issue was whether they were intended for medical use. The CJEU noted Council Directive 93/42/EEC which made provision for medical devices, as a general rule, to bear the CE mark indicating conformity with the provisions of that Directive. The Directive contained a definition of "medical devices" for that purpose as follows:

"'medical device' means any instrument, apparatus, appliance, software, material or other article, whether used alone or in combination, including the software intended by its manufacturer to be used specifically for diagnostic and/or therapeutic purposes and necessary for its proper application, intended by the manufacturer to be used for human beings for the purpose of:

- diagnosis, prevention, monitoring, treatment or alleviation of disease,
- diagnosis, monitoring, treatment, alleviation of or compensation for an injury or handicap,
- investigation, replacement or modification of the anatomy or of a physiological process,
- control of conception,

and which does not achieve its principal intended action in or on the human body by pharmacological, immunological or metabolic means, but which may be assisted in its function by such means;"

32. The CJEU considered whether the products were intended for medical use. As to the significance of a CE mark it stated as follows:

"53. The fact that a product bears a CE mark certifying the conformity of a medical device with the provisions of Directive 93/42 constitutes one factor among others to be taken into consideration in that regard. None the less, since Directive 93/42 pursues objectives different from those of the CN and in order to maintain the coherence between the interpretation of the CN and that of the HS, which is established by an international convention to which the European Union is a contracting party, the fact that a product bears a CE mark cannot be decisive as regards an assessment of whether it is intended for medical use within the meaning of heading 9018 of the CN."

33. The warming cabinets have a CE mark pursuant to Directive 93/42 which identifies them as medical devices for the purposes of that Directive. It is not decisive for the purposes of classification under heading 9018. In any event it is not in dispute that the warming cabinets are medical devices for those purposes or that their intended use established by their objective characteristics is in a medical context. In the circumstances I do not consider that the existence of a CE mark or indeed the judgment of the CJEU assists in relation to the classification issue in this case.

34. Taking into account the terms of the heading, and the terms of the HSEN as a whole, on balance I am satisfied that the word "used" as it appears in the heading is to be narrowly

construed as the respondents submit. It follows that an appliance which is not used directly for some form of medical procedure does not fall within this heading.

35. Certain types of medical furniture such as operating tables and examination tables would fall within the heading because they come into direct contact with patients during medical procedures. However, they are specifically excluded by paragraph (r) of the HSEN.

36. I am satisfied therefore that the warming cabinets do not fall within the terms of heading 9108, even though their intended use is in a medical context. Even if they were prima facie included, for the reasons which follow they are medical furniture and would be expressly excluded.

37. Heading 9402 covers “medical ... furniture”. Examples are given in the heading, such as operating tables and examination tables. The HSEs for this heading identify 12 types of furniture which are included within the heading, such as various types of specially designed tables and beds. Item (11) is as follows:

“(11) Small tables, table-cupboards and the like, whether or not on wheels (trolleys), of a type specially designed for instruments or bandages, medical or surgical supplies or anaesthetic equipment; instrument sterilising trolleys; special disinfection wash-basins, self-opening sterile dressing boxes (generally on wheels) and waste bins for soiled dressings (whether or not on wheels); bottle-holders, irrigator or douche carriers and the like, whether or not on pivoting castors; special instrument or dressing cabinets and cases.”

38. The Notes go on to state:

“ It should be noted that this group is restricted to furniture of a type specially designed for medical, surgical, dental or veterinary use; furniture for general use not having such characteristics is therefore excluded.”

39. It is not disputed that the warming cabinets are specially designed for medical use. However, the respondents say that the heating functions of the products give the products their fundamental characteristic. In other words, they are heating devices, rather than items of furniture. In support of that submission the respondents rely on the nature of the products themselves and also the warning in the operation manual, not to use the warming cabinets in the presence of flammable anaesthetic mixture. The respondents say that furniture is “inanimate” in the sense that it does not react with its surroundings and can be placed wherever it is needed. I am not sure that is an appropriate word to describe furniture in this context, but in any event the respondents say that the heating function of the warming cabinets causes them to lose their character as simple cabinet furniture.

40. By way of comparison Ms Powell referred me to heading 8516 which covers various electric heating appliances such as water heaters, space heaters, hair dryers and “other electro-thermic appliances”. It was not suggested that this was a potential heading for the warming cabinets. However, the HSEs for this heading provide that it covers all electro-thermic appliances normally used in the household. Importantly, the Notes provide that:

(1) This heading excludes “electro-thermic appliances which are not normally used in the household (heading 8419, etc)”, and

(2) This heading excludes “Furniture (eg linen cupboards and serving trollies) equipped with heating elements (Chapter 94)”.

41. It might be said that this supports the appellant's submission that the warming cupboards may properly be described as "furniture", falling within 9402. In other words, what would otherwise be furniture retains its characteristic as furniture even when it incorporates a heating element. However, Ms Powell submitted that in the case of linen cupboards and serving trollies equipped with heating elements, the heating element is a subsidiary aspect of the product. In the case of the warming cabinets, the heating element is the primary characteristic.

42. I do not accept that submission.

43. There was no evidence before me as to how long fluids or blankets would be stored in the warming cabinets. In the case of the fluid warming cabinets, I understand fluids are brought from cold-storage and stored in the cabinet in the relevant hospital department or room, which suggests relatively short term storage. In relation to blankets, the operation manual indicates that blankets stored in the cabinet should be rotated daily to prevent discolouration. That suggests the possibility of longer term storage. However, neither party suggested that the warming cabinets should be treated differently for classification purposes.

44. Based on the evidence available and the objective characteristics of the warming cabinets I am satisfied that they fulfil two functions. They provide a storage function which characterises them as furniture, and they provide a heating function which characterises them as machinery or appliances. I do not consider that the latter function is so dominant that the warming cabinets can be said to lose their character as furniture. In my view the warming cabinets have dual functions of storage and warming.

45. In the circumstances, and in the context of the headings and the HSENs as a whole, I am satisfied that the warming cabinets may properly be described as medical furniture within heading 9402.

46. Heading 8419 covers "machinery ... for the treatment of materials by a process involving a change of temperature such as heating...". Ms Powell pointed out that it has a sub-heading under 8419.20 for "Medical, surgical or laboratory sterilisers". However, I am concerned with construing headings at the same level, without comparison to the sub-headings.

47. The HSENs for heading 8419 identify a number of items which are not included in the heading and which fall under different headings. These include electro-thermic domestic appliances which fall under heading 8516 referred to above. The HSEN goes on to state as follows:

" With these exceptions, the heading covers machinery and plant designed to submit materials (solid, liquid or gaseous) to a heating or cooling process in order to cause a simple change of temperature, or to cause a transformation of the materials resulting principally from the temperature change (e.g., heating, cooking, roasting, distilling, rectifying, sterilising, pasteurising, steaming, drying, evaporating, vaporising, condensing or cooling processes). But the heading excludes machinery and plant in which the heating or cooling, even if essential, is merely a secondary function designed to facilitate the main mechanical function of the machine or plant, e.g., machines for coating biscuits, etc., with chocolate, and conches (heading 84.38), washing machines (heading 84.50 or 84.51), machines for spreading and tamping bituminous road-surfacing materials (heading 84.79).

...

The heading includes a very wide range of machinery and plant of the types described below.

(I) HEATING OR COOLING PLANT AND MACHINERY

This group covers plant of general use in many industries for the simple treatment of materials by heating, boiling, cooking, concentration, evaporation, vaporisation, cooling, etc. They include:

(A) ...

(B) ...

The following are examples of machinery and plant which, subject to the provisions referred to above, are covered by Part (I) of this Explanatory Note:

(1) ...

(17) Specialised heating or cooking apparatus which are not normally used in the household (e.g., counter-type coffee percolators, tea or milk urns, steam kettles, etc., used in restaurants, canteens, etc.; steam-heated cookers, hot-plates, **warming cupboards**, drying cabinets, etc.; deep-fat friers).”

Emphasis added

48. The respondents submit that the warming cupboards clearly fall within heading 8419, in that they are machinery for the treatment of materials (fluids or blankets) by a process of heating. This is confirmed by the HSEs which provide that it covers plant of general use in many industries and expressly covers specialised heating apparatus not normally used in the household, including warming cupboards.

49. I am satisfied that in the context of the headings and the HSEs as a whole, the warming cabinets may properly be described as machinery or plant for the treatment of materials by a process such as heating within heading 8419.

50. The HSEs are not legally binding but they do provide guidance which I must take into account. It is not clear what is meant by the term “warming cupboards” in this HSE and there is no indication as to how this reference to “warming cupboards” might relate to the headings covering medical furniture. It does appear that all the items referred to in item (17) above are kitchen appliances used in a commercial context, which suggests that the reference to warming cupboards is not apt to include the products we are concerned with, namely medical warming cupboards. I do not consider that this HSE requires the warming cabinets in this case to be classified under heading 8419. The guidance offered by the HSE is not sufficiently clear to resolve the conflict which exists between classification of the warming cabinets under this heading or heading 9402.

51. On a combined examination of the wording of the headings and the explanatory notes it is not possible for me to reach a definitive classification. Prima facie, the warming cabinets are classifiable under headings 8419 and 9402 and GIR 3 is therefore engaged.

52. Ms Powell submitted that if GIR 3 is engaged then by virtue of GIR 3(a) heading 8419 provides the most specific description.

53. The difficulty with applying GIR3(a) in the present circumstances is that the description in heading 8419 is specific regarding one function of the warming cabinets, namely the treatment of materials by a process involving a change of temperature such as heating. In

contrast, the description in heading 9402 is specific as to the context in which the warming cabinets are used, namely a medical context and the functionality of the warming cabinets for storage and as furniture. The competing headings are therefore specific in relation to different characteristics and in my view it cannot be said that either of the headings provides the most specific description.

54. In the circumstances I must therefore have regard to GIR 3(c) which is known as the “tie-breaker”. The result is that the warming cabinets are to be classified under the heading which occurs last in numerical order among those which equally merit consideration. In the present circumstances that is classification under heading 9402 as medical furniture.

CONCLUSION

55. For the reasons given above the warming cabinets are to be classified under heading 9402 as medical furniture and the appeal is therefore allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

56. 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.

**JONATHAN CANNAN
TRIBUNAL JUDGE**

RELEASE DATE: 29 OCTOBER 2019