[2013] UKUT 0169 (TCC)

Appeal number FTC/17/2012

Customs duty – classification of child seat for adult bicycle - whether First-tier Tribunal erred in failing to apply GIR 3(b)? - yes – did saddle give child seat its essential character – yes - should child seat be classified as a saddle? - yes - appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

SPRINT C.P.A. LIMITED

Respondent

Tribunal: Judge Greg Sinfield
Judge Edward Sadler

Sitting in public in London on 7 January 2013

Simon Charles, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

J D Lambdon for the Respondent

DECISION

Introduction

1. The Respondent (“Sprint”) imported a product known as the Top Tube Child Seat into the EU from China. In 2010, the Appellants ("HMRC") decided that the Top Tube Child Seat should be classified as a saddle for customs duty purposes and, accordingly, was subject to anti-dumping duty. HMRC issued a C18 Post Clearance Demand Note for £10,880.26 anti-dumping duty and £1,785.24 additional VAT. Sprint appealed to the First-tier Tribunal ("the FTT"). In a decision released on 14 November 2011, [2011] UKFTT 733 (TC), the FTT held that the Top Tube Child Seat was not a saddle and allowed Sprint's appeal. HMRC now appeal to the Upper Tribunal on the ground that the FTT failed to apply the correct principles when classifying the Top Tube Child Seat for customs duty purposes.

2. For the reasons given below, we consider that the FTT erred in not considering which component gives the Top Tube Child Seat its essential character. We consider that, on the basis of the FTT's findings of fact, it is the saddle on which the child sits while travelling on the bicycle with an adult that gives the Top Tube Child Seat its essential character. Accordingly, the Top Tube Child Seat should be classified as a saddle for customs duty purposes and we allow HMRC’s appeal.

Facts

3. The FTT described the Top Tube Child Seat in [10] of the decision as follows:

> "The Top Tube Child Seat is designed to carry children aged approximately 2-4 years old and up to 40lbs in weight. It comes boxed in kit form and is then assembled and attached to the bicycle. It consists of a small seat which can only be described as similar in shape and appearance to a saddle. It is of a plastic mould, covered by cushioning. Integrated into the moulding is a unique fitment mechanism by which it is clamped to the down tube of a ladies bicycle or the top tube of a gentleman’s. It is supplied with footrests and straps to accommodate and restrain the child’s feet, a safety belt and a metal backrest which is secured into the flanges of the seat moulding. The child will thus be seated in front of the cyclist, further restrained by the cyclist’s outstretched arms as he holds the handlebars."

4. At [19], the FTT found that the Top Tube Child Seat is a composite, the constituent parts being a seat, a backrest, a seatbelt, straps and footrests. At [20], the FTT found that that the seat component of the product is a saddle. The FTT's reasons for so finding were as follows.

> "Examining the objective characteristics and properties of the seat, in shape and design it is virtually identical to that of a saddle. It is triangular in shape, made of a plastic moulding and covered in a cushioning material. Its process of manufacture will be the same as for any other saddle. This saddle comes with its own unique fitment by which it clamps to one of the bicycle tubes.

> We accept that this fitment is not one that would be compatible with a conventional saddle but, in our view, this matters not. The nature of the fitment cannot detract from the essential properties of the seat itself. Equally, the fact that the saddle is static rather than adjustable is, to us, immaterial. The purpose for which this saddle is used does not require it to be adjustable but again this cannot prevent it from being seen as a saddle. We reject Mr Lambdon's distinction between a rider and a passenger. Whether the person sitting on this saddle is merely being carried or is actively propelling the cycle does not alter the properties or characteristics of what he is sitting on and it is these properties and characteristics which define the thing and which determine whether or not it is a saddle. Looking at the objective characteristics and properties, above all the appearance and shape, of the seat, it can only be defined for these purposes as a saddle."

5. The FTT then went on to find, at [21], that the saddle was one part of a larger, composite whole, namely a child seat. The FTT observed that the saddle was not manufactured to and, in terms of its practical use, could not stand alone. The FTT concluded that:

> "although the product includes, as one of its component parts, a saddle, the product itself is not a saddle and it is not a saddle that is imported."

Legislation

6. Council Regulation (EEC) No: 2658/87 of 23 July 1987, as amended, contained the Combined Nomenclature ("CN") which was in force at the relevant time and set out descriptions of goods and rates of duty applicable to those goods. Chapter 87 of the CN contained the following:

"8714	Parts and accessories of [a bicycle]
8714 95 00	Saddles
8714 99 90 89	Other"

7. The headings and sub-headings of the CN are to be interpreted in accordance with the General Rules for the Interpretation of the Nomenclature ("GIRs") set out in Section 1 of Part 1 of the CN. The GIRs have the force of law. The GIRs relevant to this appeal 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.
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> 2(a) 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 unassembled or disassembled.

2(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

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. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

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

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin."

FTT's decision

8. The FTT correctly stated that the issue for determination was the correct classification for customs duty purposes of the Top Tube Child Seat. As it was common ground that the Top Tube Child Seat fell within the CN heading 8714 as parts and accessories of a bicycle, the only point that fell to be decided was whether the Top Tube Child Seat was a "saddle" or "other". Mr Simon Charles, who appeared for HMRC before us and in the FTT, accepted that if the Top Tube Child Seat was not a saddle then it would fall under "other" and not be liable to anti-dumping duty.

9. It appears that much of the argument before the FTT, as before us, concerned what was the correct definition of a saddle and whether the Top Tube Child Seat fell within such a definition. The FTT found, at [20], that the seat component of the product was a saddle. It went on to find that the saddle was merely one part of a larger composite whole. The FTT concluded that, looking at the totality of what was imported, the Top Tube Child Seat was not a saddle. The FTT decided that the Top Tube Child Seat should be classified as '8714 99 90 89 - Other' and allowed Sprint's appeal.

Grounds of appeal

10. HMRC now appeals on two grounds, namely:

> 1. the FTT failed to apply Rule 3(b) of the GIRs or, if it did so, then it failed to apply the rule properly; and/or
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> 2. the FTT erred in basing its decision on the totality of what was imported.

Discussion

11. The FTT found, at [20], that the seat component of the Top Tube Child Seat was a saddle. That was a finding of fact. The different roles of the first instance courts and tribunals, such as the FTT, and the appellate courts and tribunals, such as the Upper Tribunal, were explained by Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14. That case concerned an appeal from the General Commissioners who were predecessors to the FTT. In a well-known passage, Lord Radcliffe stated:

> "As I see it, the reason why the Courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado."

12. It follows that, in approaching the question of whether the FTT was entitled to make a finding of fact, we should exercise an appropriate degree of caution. To adapt another well-known observation of Lord Radcliffe in *Edwards v Bairstow*, we should not interfere with a finding of fact by the FTT simply because we might have reached a different conclusion but only where we are satisfied that the facts found are such that no person acting judicially and properly instructed as to the relevant law could

have come to the determination reached. In this case, it seems to us that the FTT was entitled to find that the seat component of the Top Tube Child Seat was a saddle and, although before us Mr Lambdon argued (as he had argued before the FTT) that the product lacks some of the defining characteristics of a saddle, we conclude that there are no grounds on which we could disturb the FTT's finding on this matter.

13. The FTT, at [19], found that the Top Tube Child Seat is a composite product whose constituent parts are a saddle, a backrest, a seatbelt, straps and footrests. The last sentence of GIR 2(b) provides that goods consisting of more than one material or substance must be classified according to the principles of GIR 3. GIR 3(b) provides that composite goods consisting of different materials or made up of different components are to be classified as if they consist of the component which gives them their essential character. The FTT does not mention GIR 3(b) in its decision. In our view, the failure to consider GIR 3(b) in the decision is an error of law in the circumstances of this case.

14. As Mr Charles frankly admitted, HMRC did not refer to GIR 3(b) in their statement of case or skeleton argument. Mr Charles said that this was because GIR 3(b) did not appear to be relevant until the hearing before the FTT when it became clear that Sprint's primary case was that the Top Tube Child Seat was a bicycle accessory. Mr Charles said that the focus of the argument until the hearing was whether the product was a seat or a saddle. We regard this as unsatisfactory as it must have been clear to HMRC from the first examination of the Top Tube Child Seat that it was imported as a kit of various parts and it should have been obvious that GIR 3(b) was in point. Mr Charles told us that the FTT was taken to GIR 3(b) in the course of argument. As GIR 3(b) was not referred to until the hearing, it is unsurprising that the FTT was not referred to the case of *HMRC v Epson Telford Ltd* [2008] EWCA Civ 567 which gives valuable guidance on how to approach the classification of composite products. Had the relevance of GIR 3(b) to this case been identified in HMRC's statement of case both Sprint and the FTT would have been alerted, well before the hearing, to the scope of the issue to be determined by the FTT and the principles to be applied to reach the correct determination in the light of the facts as found.

15. Section 12(1) of the Tribunals, Courts and Enforcement Act 2007 provides that if we find that the FTT made an error on a point of law then we may set aside the FTT's decision. We consider that the failure to consider GIR 3(b) was a serious omission and, as a consequence, the FTT's decision must be set aside. If we set aside the decision, section 12(2) of the 2007 Act provides that we must either remit the matter to the FTT for a fresh hearing or substitute our own decision for that of the FTT. If there were a need for further findings of fact which we did not feel able to make, we would have to remit the matter for reconsideration. In this case, we consider that the findings of fact made by the FTT (which, as we have said above, we see no ground to disturb) enable us to remake the decision without remitting the matter to the FTT for a further hearing. For reasons expanded on below, we consider that had the FTT in this case been referred to *Epson Telford* then, on the basis of the facts found, it would inevitably have come to a different conclusion.

16. Under GIR 3(b), a composite product is classified according to the component that gives it its essential character. In *Epson Telford*, Sir John Chadwick set out the two tests developed by the Court of Justice of the European Union ("CJEU") for the identification of the essential character of goods.

17. At [41] of *Epson Telford*, Sir John Chadwick referred to the approach taken by the CJEU in Case C 288/99 *VauDe Sport* [2001] ECR I-3683 namely that in order to identify which material or component gives a product its essential character, it is necessary to determine whether the product would retain its characteristic properties if one or other of its constituents were removed from it. He called this the Dispensable Constituent Test.

18. At [42] of *Epson Telford*, Sir John Chadwick stated:

> "At paragraph 21 of its judgment in Case C-250/05, *Turbon International GmbH v Oberfinanzdirektion Koblenz* [2006] ECR I-10531 ("*Turbon II*"), the Court of Justice referred to the *VauDe Sport* test. But, as I have already pointed out, it did so in terms which suggested that that test was not seen by the Court as exclusive or mandatory. Rather, it was one (amongst other) ways in which the essential character of the goods might be determined. At the risk of unnecessary repetition, I set out the context which makes that clear:
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> > '21. Under that general rule [GIR 3(b)], in carrying out the tariff classification of goods it is necessary to identify, from among the materials of which they are composed, the one which gives them their essential character. This may be done by determining whether the goods would retain their characteristic properties if one or other of their constituents were removed from them (*Sportex*, paragraph 8; see also *VauDe Sport*, paragraph 25, and *Turbon International*, paragraph 26).
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> > 22. In the same way, as stated by paragraph VIII of the explanatory note to the HS on general rule 3(b), the factor which determines the essential character of the goods may, depending on the type of goods, be determined for example, by the nature of the material or component, its bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.'
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> It is, I think, plain that, in reaching its conclusion that the ink must be regarded as determining the essential character of a G1 ink cartridge, the Court chose not to apply the *VauDe Sport* test:
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> > '23. Even if an ink cartridge, such as that at issue in the main proceedings, is constructed in such a way that the printer does not function in the absence of that cartridge, the fact remains that the ink contained in the cartridge is the most important factor for the purpose of using the goods at issue. In fact, the ink cartridge is not inserted in

the printer in order to make the printer itself function but specifically to supply it with ink. …'"

Sir John Chadwick referred to the identification of the "the role of a constituent material in relation to the use of the goods" as the Purpose-based Test.

19. It is clear that both the Dispensable Constituent Test and the Purpose-based Test should be considered – see [37] and [38] of the CJEU's judgment in Case C-558/11 *SIA Kurcums Metal v Valsts ieņēmumu dienests* 15 November 2012. If no material or component gives the composite goods their essential character then GIR 3(b) has no application and GIR 3(c) must be considered (see [40] of *SIA Kurcums Metal*).

20. As the FTT found at [10], the Top Tube Child Seat is designed to carry a child of approximately 2 to 4 years old on a bicycle ridden by an adult. The Top Tube Child Seat consists of a saddle on which the child sits with straps and footrests to restrain the child and a mechanism to enable the saddle to be securely fixed to the bicycle. These components are the constituents of the Top Tube Child Seat.

21. We do not find that the Dispensable Constituent Test is of any assistance in determining which component gives the Top Tube Child Seat its essential character. It is difficult to say that the product would retain its characteristic properties if any of its constituent components were removed. It seems to us, on the basis of the FTT's findings, that the characteristic properties of the Top Tube Child Seat are that it allows a small child to be transported safely on a bicycle ridden by an adult. The Top Tube Child Seat would not retain those characteristic properties if any of the saddle, the restraints or the fixing mechanism were removed. Without the saddle, the child could not sit on the bicycle; without the restraints, the child could not be safely seated on the saddle; and without the fixing mechanism, the saddle could not be secured to the bicycle.

22. In our view, the Purpose-based Test is more relevant in this case. We consider that the role of the saddle in relation to the use of the goods is, to apply the reasoning of the CJEU in *Turbon II* at [23], the most important factor for the purpose of using the Top Tube Child Seat. Although the mechanism for securely attaching the saddle to the bicycle is an indispensable part of the Top Tube Child Seat, the saddle on which the child sits is the most important factor in transporting the child. The importance of this function is also shown in the name of the Top Tube Child Seat, which emphasises that the primary purpose of the product is to provide a seat for a child. Our view is that the component which gives the Top Tube Child Seat its essential character is the saddle on which the child sits while travelling on the bicycle with an adult.

23. The FTT reached the conclusion that, looking at the totality of the Top Tube Child Seat, it was not a saddle. The FTT did not apply the correct approach to classification as prescribed by GIR 3(b). We make no criticism of the FTT for this because it had only been referred to GIR 3(b) in oral argument and was not referred to *Epson Telford.* We consider that, had it been referred to *Epson Telford,* the FTT would inevitably, on the basis of the facts found, have come to the conclusion that it is

the saddle that gives the Top Tube Child Seat its essential character and classified it accordingly.

Decision

24. For the reasons set out above, we conclude that the decision of the FTT must be set aside. Our decision, in substitution for that of the FTT, is that the saddle gives the Top Tube Child Seat its essential character and, applying GIR 3(b), it should be classified as a saddle for customs duty purposes. Accordingly, HMRC's appeal against the decision of the FTT must be allowed.

Greg Sinfield

Upper Tribunal Judge

Edward Sadler

Upper Tribunal Judge

Release date: 17 April 2013