[2017] UKUT 61 (TCC)

Appeal number: UT/2016/0039

CUSTOMS DUTY– Combined Nomenclature – whether Gas Alert Micro 5 falls within Heading 8531 or 9026-held 9026 applies-alternative submissions that Heading 9027 applies not admitted-appeal allowed

UPPER TRIBUNAL
TAX AND CHANCERYCHAMBER

HONEYWELL ANALYTICS LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Timothy Herrington
Judge Nicholas Aleksander

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 15 December 2016

Valentina Sloane, Counsel, for the Appellant

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Honeywell Analytics Limited ("Honeywell") against a decision of the First-tier Tribunal ("FTT") (Judge Thomas and Mr David Batten) released on 20 November 2015 (the "Decision").

2. The FTT dismissed Honeywell's appeal against HMRC's issuing of a Binding Tariff Information ("BTI") which classified a device called a Gas Alert Micro (the "Device") under heading 8531 80 95 of the Combined Nomenclature ("CN") for the purposes of EU customs duties.

3. The FTT found that the Device had the following objective characteristics:

(1) it is a gas monitoring device, which detects and measures a number of potentially dangerous toxic gases;

(2) it has visual, vibrating and audible alarms; and

(3) the measurements of the gases can be logged and the Device is able to store months of measurement data on a removable memory card.

4. HMRC classified the device under Heading 8531 of the CN, which covers "Electric sound or visual signalling apparatus (for example bells, sirens, indicator panels, burglar or fire alarms)." Honeywell contends that because an objective characteristic of the Device is the function of displaying measurements it also falls under Heading 9026 which covers "Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases". Honeywell contends that because the Notes for the Section of the CN within which Heading 8531 falls states that that Section does not cover articles within Chapter 90 of the CN the Device should be classified under Heading 9026.

5. The basis of the Decision was that while the Device does measure the level of gases, it is not an instrument for doing that and accordingly the Device was correctly classified under Heading 8531.

6. Permission to appeal against the Decision was granted by Judge Bishopp on 4 April 2016.

The facts

7. The relevant facts, which are set out in detail at [14] to [42] of the Decision can be summarised as follows.

8. Honeywell designs, manufactures and sells gas detection solutions. In its request for a review of HMRC's decision on the BTI Honeywell described the Device as follows:

> "The product is a gas monitoring device which is carried on the person (portable) and used by people who work in confined spaces and may have reason to come into contact with high levels of potentially dangerous toxic gases.
>
> The product (as described in the technical specification) detects the following gases and provides a 'parts per million' (PPM) LCD readout of each of these gases in real time (i.e. on a continuing basis): H2S, CO2, SO2, PH3, NH3, HCN, CL2, ClO2, O3 and combustibles.
>
> The units contains [sic] both audible, visible and a vibration alert mechanism."

9. The technical literature available online in relation to the Device, as set out at [17] of the Decision, under the heading "Protect yourself" stated that the Device could simultaneously monitor and display up to five atmospheric hazards.

10. Based on the factual evidence provided by Mr Christopher Townsend of Honeywell, which was accepted by the FTT, the FTT found that the Device detected whether there were gases at all in the relevant space entered into by the person wearing the Device and that, if there were, the level detected may or may not be dangerous. The alarm indications could be disabled at the discretion of the user, although Mr Townsend agreed that it was not best practice to disable the detection sensors in a gaseous environment.

11. The FTT also found that levels of gas building up on the filters on the Device cause electrical currents to be generated which are proportionate to the level of the gas. Those currents are measured and displayed on the LCD screen on the Device. Optionally the user may lock the readings and the Device stores several months of continuous data on a removable memory card. When a calibrated level of gases is reached the Device will show the word "ALARM" on the LCD screen which becomes backlit and displays the ambient gas readings. It will flash, make a sound and vibrate.

12. The FTT made the following findings as to the contents of the Device and how it works at [37] of the Decision:

> "From the facts that we have found as to the contents of the device and the way it works, and from the appellant's written and Mr Townsend's oral description of it, we find that the Gas Alert Micro 5 has the characteristics and properties of an alerting device. Those characteristics and properties include the ability of the device to detect pre-calibrated levels of dangerous gases and the three different alarms together with the LCD screen display when a predetermined level of gas is reached. The ability to disable one or more alarms does not alter that."

13. The FTT made the following findings as to the functions and use of the Device at [38] and [39] of the Decision:

> "38. We also find that the intended use, and actual use, of the device is the alerting of its wearer to the presence of noxious levels of gas in a confined space and it does that by at least one and usually two or three different types of alarm signal, visual, audible and vibrating. Put another way, in answer to the question:

"What is the device for?" we find that it is to do that alerting. And we find that alerting is the only thing the device is intended to be used for.

39. We also find that one of the things the device does in order to be able to give its alerts is measuring (and as we have said HMRC do not dispute that measuring is one of the device's "functions"). It measures the quantity of gas (in ppm) and it also measures by reference to time, so that it can, depending on how it is calibrated, give alerts when a selected gas is present at a given level or range of levels over a given period. But we find that the measurement is a means to an end, not an end in itself: measurement is not its intended use."

The Law

14. The legal principles to be applied when determining classification under the CN were common ground.

15. The relevant section, chapter, heading and subheading relating to Heading 8531 is:

"Section XVI - machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

Chapter 85 - electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

8531 - Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530. 20

8531 80 - Other apparatus.

8531 80 95 – Other."

16. One of the Notes in section XVI is relevant in this case. It provides:

"1. This section does not cover:

…

(m) articles of Chapter 90;

…"

17. Explanatory Notes known as Harmonised System Explanatory Notes ("HSENs") published by the World Customs Organisation can also be an aid to the interpretation of the headings of the CN. The relevant HSEN in this case is:

"85.31(G) Electric vapour or gas alarms, consisting of a detector and a sound or visual alarm, to warn of the presence of hazardous gaseous mixtures (e.g. natural gas, methane)."

18. The relevant section, chapter, heading and subheading relating to Heading 9026 is:

"Section XVIII - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof.

Chapter 90 - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.

9026 - Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032.

9026 80 – Other instruments or apparatus.

9026 80 20 - Electronic."

19. The relevant HSEN is:

"90.26 Apart from instruments or apparatus more specifically covered by other headings of the Nomenclature such as:

(a) Pressure reducing valves and thermostatically controlled valves (heading 84.81)

(b) Anemometers (wind gauges) and hydrological level gauges (heading 90.15)

(c) Thermometers, pyrometers, barometers, hygrometers and psychrometers (heading 90.25)

(d) Instruments and apparatus for physical or chemical analysis, etc. (heading 90.27)

this heading covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids or gases.

Measuring or checking apparatus generally incorporates an element sensitive to variations in the quantity to be measured (e.g. Bourdon tube, diaphragm, bellow, semiconductors) moving a needle or pointer. In some devices the variations are converted into electric signals."

20. The relevant heading and subheading relating to Heading 9027 is:

"9027- Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound, or light (including exposure meters); microtomes.

9027 10 - Gas or smoke analysis apparatus

9027 10 10 - Electronic."

21. The HSEN to Heading 9027 includes the following:

"(8) Gas or smoke analysis apparatus. These are used to analyse combustible gases or combustion by-products (burnt gases) in coke ovens, gas producers, blast furnaces, etc., in particular, for determining their content of carbon dioxide, carbon monoxide, oxygen, hydrogen, nitrogen or hydrocarbons. Electrical gas or smoke analysis apparatus are mainly for determining and measuring the content of the following gases: carbon dioxide, carbon monoxide and hydrogen, oxygen, hydrogen, sulphur dioxide, ammonia."

22. We also set out the relevant parts of the general rules for the interpretation of the CN (the "GIRs"):

"Classification of goods in the Combined Nomenclature shall be governed by the following principles:

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. 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.

…"

23. The Court of Justice of the European Union (formerly the Court of Justice of the European Communities) ("CJEU") has set out the principles to be applied when determining classification under the CN. These principles as derived from the relevant judgements of the CJEU were well summarised by the FTT at [70] of the Decision as follows:

(1) in the interests of legal certainty and ease of verification by Customs officials, the decisive criterion for the classification of goods for 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;

(2) 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; and

(3) the CNEN and HSEN are an important aid for interpreting the scope of the 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.

24. The only matter we would wish to add to that summary is that the CJEU has consistently made clear that, in the interests of legal certainty and ease of verification, the product must be assessed on the basis of the objective characteristics present at the time of its presentation for customs clearance. Accordingly, marketing materials and a product's targeted use are not to be taken into account. That is best illustrated by the following passage from the Advocate General's opinion in Case C- 376/07 *Kamino International Logistics BV v Staatssecretaris van Financien* [2009] at [72] to [75] of the opinion:

"72. In my view, there is no doubt that the technical characteristics of the product constitute the fundamental criterion to be taken into account in that connection. In the case of the monitors at issue, it will plainly be characteristics like the resolution, the screen aspect ratio (the width of the screen in relation to its height), the available connectors, the possibility of adjusting the height and screen tilt angle, the presence of certain specific ergonomic features designed to facilitate close 'desktop' use and so forth, which the national court will have to analyse in order to determine whether or not the product is normally used in connection with an automatic data-processing system.

> 73. The possibility of taking account of the product's intended commercial use, in other words its 'target' use, in order to determine its normal use, seems to me to be more problematical. In my view, that option should be excluded.
>
> 74. It is in fact clear that if significance is attached to elements such as the product's declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. In a variety of fields, instances of products which are surreptitiously presented as being intended for uses other than their real use, in order, for example, to circumvent sales bans or rule out producer liability, are in fact anything but infrequent, even though the relevant public is actually perfectly well aware of the real intended use of the products in question.
>
> 75. The position set out above seems to me, moreover, to be consistent with the case-law of the Court which, while in principle accepting the possibility of taking a product's intended use into account in order to determine its customs classification, has, nevertheless, stressed that that intended use must be based on specific and objective criteria".

The Decision

25. At [77] of the Decision, the FTT referred to its findings at [37] and [38] "that the essential characteristics and properties and the only intended use (and in fact the only conceivable actual use) of the device is as an instrument for alerting its operator by visual, audible and vibrating signals to the presence of a dangerous build up or absolute level of particular hazardous gases and other noxious substances."

26. Accordingly, the FTT held at [78] that Heading 8531 described accurately and clearly the essential characteristics and properties and the use (the only intended use) of the Device. Having referred to the wording of Heading 9206, the FTT then held at [80]:

> "In our view while the device is an instrument that does measure "the … level … of gases", it is not a instrument for doing that. As we say in paragraph 40, no employer would send an operator into a confined space with this device to measure the level of dangerous gases without the alerting functions being operative. We consider that the items listed in Heading 9026 are ones whose only function and use is to measure the level etc of gas etc."

27. In support of this finding, the FTT drew support at [81] from Case C-218/89 *Shimadzu Europa Gmbh v Oberfinanzdirektion Berlin*, a case to which we will return later.

28. The FTT then dealt with the distinction argued by Honeywell between a "gas detector" ("GD") and a "gas measuring instrument" ("GMI"), namely that the difference between the two is that a GMI is able to do more than simply detect the presence of gas that is present and can provide measurement of the amount of the level of the gas that is present. Honeywell had also described in its evidence how an example of a gas detector, a carbon monoxide detector which did not indicate the level of concentration of the gas to the user, would activate an alarm if a dangerous concentration of carbon monoxide was detected.

29. The FTT found at [92]:

> "We do not see either that it follows, as the appellant seems to argue, from the fact that a CO detector does not indicate the level of concentration of the gas to the user, and is a GD, that *therefore* a device that *does* indicate the level to the user is a GMI. We imagine that in any case an operator wearing the Gas Alert Micro 5 is not going to be scanning the small LCD screen to find out if the levels of gas are dangerous: they will use the alarm functions for that purpose. Any measurements the device makes that may be of interest to the operator's employer will we presume be scrutinised when the operator has come out of the confined space or will be examined and analysed on a computer into which the device's memory card has been transferred."

30. Consequently, the FTT arrived at a definitive classification of the device without looking at the GIRs: see [94] of the Decision. It did, however, briefly consider how it would have applied GIR 3 had it found it necessary to do so. It said at [95]:

> "…. We find it difficult to say whether either heading is more accurate than the other (it must be remembered that we are now in the realms of deeming heading 9026 to apply) so we pass from GIR 3(a) to GIR 3(b). Here we consider that what gives the device its essential character is the alerting components. We would therefore find for 8531 on the basis of GIR 3(b). But this (on the hypothesis that 9026 applies) may be subject to the operation of Rule 1(m) of Chapter 85."

31. The FTT sought further support for its conclusion by reference to HSEN (G) to Heading 8531. It said at [97]:

> "This is an accurate description of the device and what it is for. Methane is of course one of the gases that the device can be set up to detect. The HSEN reinforces our view that 8531 is the correct classification. It cannot determine the classification, and for that reason we do not need to decide whether the appellant is correct to say that this HSEN and one relating to heading 9027 (not, it should be noted, 9026) are inconsistent with the CN (which is fortunate because we do not fully understand the point the appellant is making) ...."

32. Finally, the FTT dealt with the argument that if the Device fell within both Headings then Note 1 (m) of section 85 would apply with the result that it would have to be classified under Heading 9026. It said at [100]:

> "…. were we to have decided that the device could fall within both 9026 and 8531 then it seems that Note 1(m) of section 85 would apply. We add that *Flir Systems VDT* at [12] on which the appellant relies certainly suggests that Note 1(m) would apply in the either/or case at GIR 1 level, but the remarks in that case about Note 1(m) could be read as being obiter, as the eventual decision on section 85 was that it does not apply even at GIR 1 level, so the decision in that case was a decision at GIR 3 level between two headings in Chapter 90 (see [13]). But since we have said that the device does not fall within 9026, there is nothing to which Note 1(m) can apply."

Grounds of Appeal and issues to be determined

33. On 7 April 2016 Judge Bishopp granted permission to appeal on three grounds which can be summarised as follows:

(1) The FTT was wrong to find that measurement was not an intended use of the Device. Honeywell contends that insofar as those findings, at [38] and [39] of the Decision are correctly characterised as findings of fact, those findings are perverse. In those paragraphs, the FTT also found that the Device did measure quantities of gas and given those findings, the FTT acted perversely in finding that the Device did not have measurement as one of its intended uses.

(2) The FTT wrongly adopted a restrictive interpretation of the scope of Heading 9026 by finding that the items listed in Heading 9026 were ones whose only function and use is to measure the level etc of gas etc, thus repeating the error identified at (1) above in relation to the intended use of the Device.

(3) The FTT was wrong in failing to decide that if the Device fell prima facie within both Heading 8531 and Heading 9026, the correct classification was Heading 8531. The FTT relied on GIR 3 (b) which is not of any application, since it applies only where there are two or more components rather than multiple functions.

34. In a letter dated 6 May 2016 to the Upper Tribunal, HMRC indicated that it would not put in a response to the grounds of appeal and stated that it would seek to uphold the FTT's decision for the reasons it gave.

35. However, in an email dated 17 November 2016, less than one month before the hearing of this appeal, HMRC stated that if the products in dispute cannot be classified under Heading 8531, "we do not consider that Heading 9026 is appropriate. We think instead (and have thought since 2014) that the products would naturally fall into Heading 9027."

36. This argument was developed for the first time in Mr McGurk's skeleton argument for this appeal. In summary, Mr McGurk contends, relying on HSEN (8) to Heading 9027 the Device could be classified as a "gas analysis apparatus". He submits that this would be the more appropriate classification for the Device than Heading 9026 since the Device is not principally designed to check a variable but to undertake physical and/or chemical analysis of the environment in which it is used. Heading 9027 would also be more appropriate given its concern not just with measuring gas but quantifying the amount of gas present whereas Heading 9026 does not involve any sort of quantification over and above measurement; quantification assumes that the measurements taken are placed on a scale that additionally informs the user about the amount/composition of the gas present within the environment in question. The HSEN to Heading 9026 makes it clear that instruments and apparatus for physical or chemical analysis are not covered by that Heading.

37. Mr McGurk accepts that the issue was not dealt with in HMRC's response to the Notice of Appeal, which would be the appropriate time for it to have been raised. The reason why it was being raised at this late stage, we were told, was because

HMRC, having read the Decision, came to the conclusion that Heading 9027 is more relevant than Heading 9026. Mr McGurk submits that there is no need for any further evidence to be obtained in order to deal with this new argument at this stage; the existing evidence demonstrates that the Device had an analytical function as contemplated by Heading 9027 rather than merely measuring the level of dangerous gases. He also submits that Honeywell relied on the HSEN to Heading 9027 to some extent, and there was some discussion of it before the FTT, as demonstrated by [97] of the Decision. Mr McGurk also refers to the fact that paragraph 31 of HMRC's statement of case refer to the fact that similar devices which do not have an alarm function and purpose, namely instruments and apparatus for physical or chemical analysis which do not incorporate an alarm, fall under Heading 9027. However, HMRC made no case under Heading 9027 in its skeleton argument before the FTT.

38. Miss Sloane submitted that the arguments on Heading 9027 were not raised before the FTT and HMRC should not be permitted to raise them now. It cannot be said that the argument was relied on in the statement of case which relied entirely on the contention that the Device fell within Heading 8531 and sought to rebut Honeywell's arguments that it fell within Heading 9026. Paragraph 31 of the statement of case did not make an alternative argument for Heading 9027 but in effect merely stated that Heading 9027 was more restrictive.

39. As submitted by Miss Sloane, the test for whether an appellant should be permitted to raise on appeal a point that was not raised before the FTT is as set out at [40] of the Upper Tribunal's decision in *Manduca v HMRC* [2015] UKUT 262 (TCC) where the Tribunal summarised the effect of previous authorities as follows:

> (1) the test is that the court or tribunal must be satisfied that the other party will not be at risk of prejudice if the new point is allowed to be argued because it might have adduced other evidence at trial, or otherwise conducted the case differently; and
>
> (2) permission to raise a new point should not be given lightly unless there is a point of law which does not involve any further evidence and which involves little variation in the case which the party has already had to meet.

40. In our view these conditions are not satisfied in this case. Honeywell relied entirely on the evidence of Mr Townsend. It is clear from his witness statement that his evidence is addressed entirely to the question as to whether the Device is an instrument for detecting the presence of the gas and then triggering an alarm rather than a device which is able to measure the level of a gas. None of his evidence is addressed to the further question as to whether the Device has a function beyond measurement, namely an analytical function. Whilst we cannot determine definitively whether any further evidence from Mr Townsend would have been of assistance on the question, we have to say that had that question been clearly put in HMRC's statement of case then it is likely that Mr Townsend would have sought to address it in his evidence.

41. We accept Miss Sloane's submission that the statement of case does not raise Heading 9027 as an issue. In our view the case may well have been conducted

differently by Honeywell had the issue been fairly and squarely raised and Mr Townsend's evidence would have been expanded to deal with the point. The Heading 9027 issue would not be restricted to a point of law not involving further evidence and it would involve a significant variation to the case which Honeywell had to meet before the FTT.

42. Furthermore, HMRC had an adequate opportunity to raise this issue in a response to the notice of appeal. The notice of appeal was given a considerable time after HMRC says it formed the view that Heading 9207 would be more appropriate than Heading 9026 should Heading 8531 be held not to apply. It was inappropriate for the issue to be left as late as Mr McGurk's skeleton argument which was filed after that of Miss Sloane in this case, so she had no opportunity of dealing with it in her own skeleton.

43. For these reasons, we refuse permission for the Heading 9027 issue to be argued on this appeal and say no more about it.

44. It appears to us from Honeywell's grounds of appeal that we should approach the issues we need to determine as follows:

(1) We need to determine whether the FTT's findings at [38] and [39] of the Decision purely involve findings of fact, or whether they involve questions of law. If we decide that those paragraphs did purely involve findings of fact, then they cannot be challenged unless the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal which is an error of law (Lord Radcliffe in *Edwards v Bairstow* [1956] AC 14 at 36). Putting that principle another way, we would need to be satisfied that the findings made by the FTT at [38] and [39] were ones which the FTT was not entitled to make. If there was no evidence, or the evidence was to the contrary effect, the FTT would not be so entitled.

(2) If we find that the findings involved questions of law, either by application of the *Edwards v Bairstow* principle or otherwise, we shall need to determine whether the FTT was wrong as a matter of law to determine that the Device did not have measurement as one of its uses.

(3) If we find that the FTT was wrong on that point, we then need to consider whether the FTT was wrong in concluding that Heading 9026 was restricted to those devices whose only function was to measure the level of gas.

(4) If we find that the FTT was wrong on both the above points, we then need to consider whether it was wrong to conclude that if the Device prima facie fell within both Heading 8531 and Heading 9026, then the more appropriate heading was Heading 8531.

Discussion

45. We shall deal with each of the four issues summarised at [42] above as follows.

Issues 1 to 3: the FTT's findings as to the intended use of the Device

46. These issues are closely linked and it is convenient to deal with them together.

47. Mr McGurk submits that the FTT was entitled to conclude that measurement was not, for the Device, an end in itself and accordingly did not act perversely in finding that the Device did not have measurement as one of its intended uses. The objective properties or characteristics of the Device clearly indicated that its measuring capabilities were designed for the principal purpose of warning or alerting users as to dangerous levels of gas and accordingly the FTT's findings to that effect are unimpeachable. Mr McGurk observes that since Heading 9026 is concerned with instruments whose principal purpose is to take measurements for the sake of measuring, that took the Device outside heading 9026 and accordingly the only conclusion the FTT reached as regards intended use was that, as was clear from the Device's objective characteristics, measuring for the sake of generating measurements was not one of its intended uses. As the evidence made clear, the principal characteristic of the Device was measurement for the purpose of warning users of the presence of dangerous levels of gas. The fact that the data stored by the Device could be used and examined later does not detract from the FTT's conclusion.

48. Mr McGurk submits that the FTT did not adopt a restrictive interpretation of the scope of Heading 9026. The FTT was right to rely on the reasoning of the CJEU in *Shimadzu* that because the devices in question in that case had a further purpose beyond the measurement of electrical quantities it could not be said that their very purpose was measurement of electrical quantities. Mr McGurk submits that the CJEU was merely recognising that there is a category of measuring devices which measure for the sake of measurement.

49. In our view the FTT's findings at [38] and [39] of the Decision are not pure findings of fact but are part of its reasoning as to ascertaining the objective characteristics and properties of the Device and its intended use. In any event the comments of Lord Carnwath in *HMRC v Pendragon plc & Ors* [2015] UKSC 37 at [49] to [51] are particularly apposite in a case such as this. In our view what the FTT was doing at [38] and [39] of the Decision was making an evaluation of the primary findings of fact it had previously made in the Decision. We should therefore adopt a more flexible approach as to whether the making of those findings involved questions of law.

50. The FTT made findings at [38] and [39] as to the inherent use of the Device based on its earlier findings of fact, particularly those summarised at [10] and [11] above. That is apparent from the first sentence of [37] of the Decision which starts "From the facts that we have found as to the contents of the device and the way it works…" On that basis, in our view, the findings in those paragraphs involved questions of law and we are entitled to consider whether the FTT erred in the approach it took in coming to the conclusion it did at [80] of the Decision, namely that the Device is not an instrument for measuring the level of gases and that the items listed in Heading 9026 are ones whose only function and use is to measure the level of gases.

51. Our conclusion is that the FTT did err in the approach it took. It had made clear findings, as described at [11] above, that the Device took measurements of gases which were displayed on the LCD screen on the Device which were stored on a removable memory card. In those circumstances, prima facie the FTT had made a finding that the Device fell within the scope of Heading 9026 as well as Heading 8531. As Miss Sloane observed, that finding differentiated the Device from a device such as a burglar, fire or smoke alarm, clearly falling within Heading 8531 and which did not display measurements. We therefore accept Miss Sloane's further submission that based on the findings of fact made by the FTT, displaying measurements is an objective characteristic of the Device.

52. That being the case, the FTT was then bound to follow the approach set out in the GIRs. The starting point is GIR 1 which required the FTT to determine the correct classification according to the terms of the headings and any relative section or chapter notes. Where, as in this case, the application of the headings indicate that the product falls prima facie within more than one heading, GIR 3 (a) should then be applied, unless the matter is resolved through the application of the relevant section or chapter notes, a matter to which we will return.

53. However, in effect the FTT made its determination without going through that process. The FTT went in a different direction and found that the measurement display was a means to an end, not an end in itself and therefore concluded that measurement was not an intended use, the only use being for alerting.

54. In our view that finding was made on the basis of nothing more than an assumption as to the use to which the Device would be put. In our view in making that finding the FTT made a finding that went beyond an assessment of the objective characteristics and properties of the Device by reference to its inherent character. It did not confine its findings to the technical characteristics of the Device as it should have done: see the passages from *Kamino* set out at [24] above.

55. In making this error, the FTT may have been unduly influenced by the heading to the technical literature available in relation to the Device which, as referred to at [9] above, ("Protect yourself") indicated that the primary use of the Device was as an alert to the presence of dangerous gases in the space in which the Device was being worn.

56. It would also appear that the FTT was strongly influenced by the judgment in *Shimadzu.* The product in that case was a device which carried out measurements and checks of electrical quantities, namely voltage, to present and process chromatograms. The question was whether that product should be classified under the subheading 9030 81 90 as an instrument with recording devices for measuring or checking electrical quantities or whether the appropriate subheading was 8471 20, which refers, inter-alia, to digital automatic data-processing machines.

57. The CJEU said at [12] of its judgment, that only apparatus "whose very purpose is to carry out checks on electrical quantities" can be regarded as apparatus for checking such quantities." It held at [13]:

> "It follows that pieces of apparatus like those at issue in the main proceedings, which according to the information supplied by the Bundesfinanzhof, are intended not to measure or check electrical quantities but, on the basis of measuring and checking an electrical quantity, namely voltage, to present and process chromatograms, cannot be classified as "instruments and apparatus for measuring or checking electrical quantities.""

58. The FTT referred to this reasoning at [81] of the Decision and said at [82] that the "very purpose" of the Device was to measure levels of gas.

59. However, in our view the characteristics of the product in *Shimadzu* can be distinguished from those of the Device. The reasoning of the CJEU is short but the Advocate General's reasoning in his opinion on that case is fuller. At [10] of his opinion he refers to the fact that the apparatus carried out a measurement of electrical signals. He then states:

> "The electrical measurements are not, however, displayed but are used for other purposes. It cannot therefore be held that those instruments are apparatus for measuring electrical quantities falling under Heading 9030…"

60. Similarly, at [11], the Advocate General states that it cannot be held that the instruments were intended for "checking electrical quantities precisely because their function was not to check the existence of electrical quantities and determine their characteristics."

61. In our view, as Miss Sloane submitted, this equates the position of the device in *Shimadzu* with that of a smoke alarm which measures levels of smoke but is only doing so for the purpose of signalling its presence. In the case of the Device, there is a display so that in addition to signalling the presence of dangerous levels of gas, those levels can be measured. Measurement is therefore clearly a separate purpose, unlike the position in *Shimadzu*, otherwise there would be no reason to have the display.

62. It therefore follows in our view that the FTT was wrong to make the assumptions it did at [92] of the Decision where it "imagined" that somebody wearing the Device would not be scanning the display to find out the levels of gas and that the measurements "we presume" would be scrutinised and examined later.

63. We therefore reject Mr McGurk submissions that Heading 9026 is to be restricted to measuring apparatus whose principal purpose is to measure for the sake of measurement alone. There is nothing in the wording of the Heading which suggests that measurement has to be the "principal" purpose. Insofar as the correct interpretation of the Heading indicates that it covers instruments which perform functions in addition to measuring and which might fall within the scope of another Heading, the appropriate classification can be determined by reference to the relevant Notes and GIRs.

64. For these reasons, we conclude that the FTT was wrong to have decided that the Device did not have measurement as one of its uses and was wrong to conclude that

Heading 9026 was restricted to those devices whose only function was to measure the level of gas.

65. During the course of his oral submissions, Mr McGurk developed a new argument, which did not form part of his skeleton argument, as to why the Device could not fall within Heading 9026.

66. Mr McGurk submitted that Heading 9026 is concerned only with devices which measure or check "process variables" of liquids or gases. He relies upon the HSEN to the Heading which states that it covers "instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids or gases. These "process variables", he submits, are concerned with how gas occupies, or moves within, a space whereas the Device is not measuring a process variable, but is identifying the gases and measuring their concentration within a space. In other words, Heading 9026 is concerned with instruments measuring (for example) the quantity of gas in a gasometer or other storage vessel - the heading is not concerned with instruments which identify gases or measure their concentrations.

67. We reject these submissions. It is quite clear that the whole case was argued before the FTT on the basis that the meaning of "level" included the composition and concentration of gases in a particular environment. Heading 9026 refers to "flow, level, pressure or other variables of liquids or gases" so there is no implication there that "variables" is confined to "process variables". The examples then given of instruments and apparatus for measuring or checking the level of gases, including indicators for the quantity of gas in a gasometer, is not exhaustive of the kind of instrument falling within the scope of the Heading.

Issue 4: the appropriate Heading

68. We have found at [51] above that the Device prima facie falls within the scope of both Heading 8531 and Heading 9026. The FTT accepted at [100] of the Decision that if it had decided that the Device could fall within both Headings, then Note 1 (m) would apply. In our view inevitably that is the correct conclusion because the Note is absolutely clear in its terms that Section XVI of the CN of which Chapter 85 and therefore Heading 8531 forms part does not cover articles of Chapter 90, of which Heading 9026 forms part. Consequently, the Device must be classified under Heading 9026. This classification can therefore be achieved without further reference to the GIRs. We did not take Mr McGurk to argue otherwise.

69. Consequently, we do not need to express a view on the findings of the FTT at [95] of the Decision as to the position if it had needed to apply GIR 3. In our view the FTT was wrong in its conclusion that GIR 3 (b) would apply. As Miss Sloane correctly submitted, that provision applies only where there are two or more components to a device, not where a device has multiple functions. In our view it would be difficult to say, applying GIR 3 (a), which of the two headings provides the most specific description and it is therefore likely that the matter would have to be determined by the application of the "tie-breaker" in GIR 3 (c).

Conclusion

70. We have found that the making of the Decision has involved the making of errors on points of law. In our view those errors are sufficiently material that we should exercise our powers under s 12 of the Tribunals, Courts & Enforcement Act 2007 and set aside the Decision. As we are of the view that no further findings of fact are necessary, the appropriate course to take is to remake the decision rather than remit it to the FTT. From our analysis, it is apparent that the application of the correct legal test leads inevitably to the conclusion that the Device should be classified under Heading 9026. Accordingly, we remake the Decision by setting aside the BTI and substituting it with the correct classification, namely 90 26 80 20.

Disposition

71. The appeal is allowed.

TIMOTHY HERRINGTON **NICHOLAS ALEKSANDER**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 10 March 2017