[2017] UKUT 98 (TCC)

Appeal number: UT/2016/0114

CUSTOMS DUTY – cardiotocography belts – appeal against decision of FTT that belts were not accessories of a heart monitor – argument based on intended use – unappealed conclusion of FTT as to relevance of intended use - appeal bound to fail

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

GRAPHIC CONTROLS LIMITED **Appellant**

- and -

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

TRIBUNAL: MR JUSTICE NEWEY
JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Rolls Building, London EC4 on 22 February 2017

Tim Brown, instructed by Francis Clark LLP, for the Appellant

Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This is the appeal of Graphic Controls Limited ("GCL") against the decision of the First-tier Tribunal (Judge Short and Mr Haarer) ("FTT") released on 19 April 2016 by which the FTT dismissed GCL's appeal against the decision of HMRC to issue a Binding Tariff Information (BTI) which provided a commodity code classification for GCL's product "Cardiotocography belts", described by the FTT as Cardio Belts.

2. The appeal proceeds by way of permission given by this Tribunal (Judge Sinfield).

Background

3. As the FTT described it at [8] of its decision, the Cardio Belt is used to secure a monitor to read a baby's heartbeat during labour and childbirth, described by the FTT as a "Cardio Monitor". A more detailed description was provided in a letter from GCL to HMRC dated 18 September 2014 whereby GCL had sought a review of HMRC's decision to issue the BTI:

> "These belts are specifically designed to work with the Fetal Transducer Systems and most systems use wireless electrodes to monitor both the babies' heart beat and the contractions. Therefore these electrodes have to move in line with the baby as it engages and descends through the birth canal. These belts are comfortable and have multiple holes to enable different sized patients to use them, the properties of the belt also allow the electrodes to be used under water and with patients that perspire during labour. The belts can be shifted within seconds to maintain a constant link to the machine. By using the belts with the wireless electrodes it gives the patient the freedom of movement required when in labour."

4. There were a number of agreed facts, including that the purpose of the Cardio Belt was to ensure that the heart monitor was held and retained in the optimum position on a patient's body in order to read and register an unborn child's heartbeats. The FTT heard evidence from Mr Stephen Saunders, the sales and marketing director of GCL, and it was able to physically examine examples of two Cardio Belts.

5. On the basis of the evidence, the FTT made, at [48], the following short findings of fact:

> "(1) As stand-alone items there is nothing in the physical appearance of the Cardio Belts to indicate that they can only be used to secure Cardio Monitors.
>
> (2) The Cardio Belts are intended to ensure that the Cardio Monitors read and display an unborn [baby's] heart rate as effectively as possible.

> (3) It would be possible to achieve the same result as that achieved by the Cardio Belts when used with the Cardio Monitors through other means, manually holding the monitor or using tape to secure it, but this would be less effective.
>
> (4) The Cardio Monitors would still function as electronic sensors without the application of the Cardio Belts but it would be harder to distinguish a baby's heart rate and there would be a higher likelihood that the Cardio Monitor would stop displaying readings."

6. The BTI issued by HMRC on 22 August 2014 and upheld on review on 12 February 2015 gave the Cardio Belt a commodity code of 6307 9010 00. Chapter 63 of the Combined Nomenclature ("CN") is "Other made up textile articles; sets; worn clothing and worn textile articles; rags". Subheading 6307 9010 00 is "other knitted and crocheted articles". The effect of that classification is that the Cardio Belt would be subject to customs duty at the rate of 12%.

7. GCL contended that the Cardio Belt should be categorised under Chapter 90 of the Combined Nomenclature as "Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments or apparatus and parts or accessories thereof", and under subheading 9018 1910 00: "instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphy apparatus, other electro-medical apparatus and sight-testing instruments". Were that the proper classification, the duty would be at 0%.

The FTT's decision

8. Having made findings as to the intended use of the Cardio Belts, the FTT first considered the extent to which it was possible to take account of their intended purpose as well as their physical characteristics. It had been referred, by Mr Pritchard appearing below for HMRC, to the classic statement of principle, consistently applied by the Court of Justice of the European Union ("CJEU") that:

> "It is settled case-law of the Court that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case 145/81 *Wünsche* [1982] ECR 2493, paragraph 12; Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38; and Case C-310/06 *FTS International* [2007] ECR I-6749, paragraph 27)." (*Metherma GmbH & Co KG v Hauptzollamt Düsseldorf* (Case C-403/07) [2008] ECR I-8921, para 46.)

9. The FTT, at [49], referred to the judgment of the CJEU in *British Sky Broadcasting Group plc and another v Revenue and Customs Commissioners* (Joined Cases C-288/09 and C-289/09) [2011] STC 1519, at [76]:

> "It should be recalled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the

> basis of the product's objective characteristics and properties (see *Holz Geenen GmbH v Oberfinanzdirektion München* (Case C-309/98) [2000] ECR I-1975, para 15; *Deutsche Nichimen GmbH v Hauptzollamt Düsseldorf* (Case C-201/99) [2001] ECR I-2701, para 20; and *RUMA GmbH v Oberfinanzdirektion Nurnberg* (Case C-183/06) [2007] ECR I-1559, para 36)."

10. The FTT found, at [53], that there was nothing in the objective character of the Cardio Belts which made their inherent character, identified as use only with Cardio Monitors, apparent. Having considered the examples of Cardio Belts produced in evidence, the FTT concluded that it would not have been possible to conclude, without the further information which the FTT had received, that their intended purpose was only for the specific medical procedure envisaged. The FTT said:

> "They appeared as two strips of light textile material which, while their appearance suggested some medical purpose, provided nothing to suggest exactly what that purpose was: in our view they could have been used for any number of tasks which involved securing items of clothing or equipment."

11. The FTT concluded, at [54], that GCL "fails the test set out in *BSkyB* because we do not consider that it is inherent in the characteristics of the Cardio Belts that they are used only with the Cardio Monitors".

12. The FTT then went on to consider whether the Cardio Belts were parts or accessories of the medical apparatus comprising the Cardio Monitors, so as to fall within Chapter 90 of the CN. For the reasons given by the FTT, it decided that the Cardio Belts were neither parts nor accessories. It decided instead that the most accurate description of the Cardio Belts was that in Note 15 to 6307 9010 00, namely the category of belt used for professional purposes.

The appeal

13. Permission to appeal was given by Judge Sinfield in this Tribunal on 22 July 2016. GCL's grounds of appeal were limited to a number of submissions that the FTT had made errors of law in its determination whether the Cardio Belt was to be classified as an accessory. It was argued, first, that the FTT had, at [61], wrongly stated part of the test, derived from the CJEU's judgment in *Unomedical A/S v Skatteministeriet* (Case C-152/10) [2011] ECR I-5433, at [29], to determine whether a product is an accessory of another machine; secondly that the FTT had, at [62], wrongly considered only whether the Cardio Belt enabled the monitor to perform additional functions and not whether it performed a particular service relative to the main function of the monitor; thirdly that the FTT's comparison with the position of the ink cartridges in *Turbon International GmbH v Oberfinanzdirektion Koblenz* (C-276/00) [2002] ECR I-1389 had been inapt; and finally that the FTT's finding, at [61], that the belts "just makes it easier to operate the machine to read an unborn baby's heart rate" meant that it was clear that the belts performed a particular service relative to the function of the monitors and the FTT's decision that the belts were not accessories of the monitors was thus irrational or perverse.

14. As Judge Sinfield accepted in giving permission to appeal, the question in this case of the status of the Cardio Belts, and whether they were accessories of the Cardio Monitors, is an arguable question of law arising out of the FTT's decision, having regard in particular to the recent judgment of the Supreme Court in *Amoena (UK) Ltd v Revenue and Customs Commissioners* [2016] UKSC 41, [2016] 1 WLR 2904.

15. On the other hand, no application for permission to appeal was made in respect of the FTT's decision that the belts were not parts of the monitors, nor importantly in respect of the conclusions reached by the FTT in respect of the taking account of the intended purpose of the belts by reference to the objective characteristics and properties.

16. That latter omission produces an obstacle for GCL. The difficulty is, as Mr Pritchard in our view rightly submitted, if the intended use of the Cardio Belts is not an objective criterion for classification, that purpose is not relevant to be taken into account in assessing whether the belts fall within the meaning of accessories in Chapter 90. That was the finding of the FTT at [54], rejecting the argument of Mr Brown for CGL, who also appeared below, recited by the FTT at [32], that the intended use of the belts with the monitors was part of their objective characterisation. There is no appeal against that finding of the FTT.

17. Mr Brown accepted that no ground of appeal had been raised in respect of that finding of the FTT. He pointed out, however, that the FTT had gone on to consider, by reference to the intended use of the Cardio Belt, the whole question whether the belts were parts or accessories. That was why the focus of the appeal had been on the FTT's treatment of the accessories issue.

18. We do not consider that the fact that the FTT dealt with the accessories issue, and reached a conclusion on that issue, can affect the position. There are many reasons why a tribunal might consider it appropriate to deal with all the issues raised by the parties even though, in view of the tribunal's conclusions on one or more, others might be regarded as moot. Tribunals regularly do so if mindful of the possibility of an appeal. The FTT in this case did not explain why, having reached its conclusion that CGL had not satisfied the test in *BSkyB* with respect to the intended use of the belts, it nonetheless went on to consider the parts and accessories issues. But the absence of an explanation does not affect the approach that must be adopted in this Tribunal.

19. The position is that there can be no argument in this Tribunal that the FTT erred in law in concluding that the intended use of the Cardio Belts was not inherent in the objective characteristics of the belts, and in consequence it cannot be argued that the intended use of the belts is an objective criterion for classification. CGL's case that the belts are accessories of the monitors rests solely on that intended use. Once that use is identified as being outside the scope of the objective characteristics and properties of the belts, it cannot be a criterion for the classification of the belts for customs purposes, and is thus irrelevant to the accessories issue. That, in accordance with the overriding principle explained in *Metherma* and many other cases, is

decisive, and has the consequence that CGL's case cannot succeed. This appeal, accordingly, is bound to fail.

20. We reach that conclusion with some regret having heard argument on the accessories issue, which to our minds does raise some significant and arguable points. But it would not be appropriate for us to make any observations on the accessories issue which, for the reasons we have explained, cannot affect the outcome of this case. Nothing we have said on either that issue, or the substantive issue whether the intended use is or is not an objective criterion for classification, should be taken as endorsing one way or another any of the conclusions of the FTT or any of the rival submissions of the parties.

Decision

21. We dismiss this appeal.

MR JUSTICE NEWEY
UPPER TRIBUNAL JUDGE ROGER BERNER

RELEASE DATE: 10 March 2017