[2018] UKUT 305 (TCC)

**Appeal numbers: UT/2017/0052-0057**

***CUSTOMS DUTY – classification – electric mobility scooters – Combined Nomenclature (CN) – heading 8703: motor vehicles principally designed for the transport of persons – heading 8713: carriages for disabled persons – whether headings are mutually exclusive – application of CJEU case law: Lecson Elektromobile and Invamed – HSENs and CNENs and other sources***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

**- and -**

**INVAMED GROUP LIMITED**
**INVACARE UK LIMITED**
**DAYS HEALTHCARE LIMITED**
**ELECTRIC MOBILITY EURO LIMITED**
**MEDICARE TECHNOLOGY LIMITED**
**SUNRISE MEDICAL LIMITED** **Respondents**

**TRIBUNAL: MR JUSTICE BIRSS**
**JUDGE ROGER BERNER**

**Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 10 – 12 July 2018**

**Kieron Beal QC, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants**

**Andrew Hitchmough QC and Jeremy White, instructed by Fieldfisher LLP, for the Respondents**

DECISION

1. This is the appeal of the Commissioners for HM Revenue and Customs ("HMRC") against a decision of the First-tier Tribunal ("FTT") (Judge Charles Hellier and Mrs Ruth Watts Davies) concerning the proper customs classification in the period 2004 to 2007 of a number of different types of mobility scooter. We set out, purely for identification purposes, a brief summary only of the technical specifications of the range of models considered by the FTT in Annex A to this decision, recognising that this is not a full specification.

2. The competing classifications under the Combined Nomenclature (CN) were:

(1) heading 8703: motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars; and

(2) heading 8713: carriages for disabled persons, whether or not motorised.

3. Classification under heading 8703 was contended for by HMRC whereas classification under heading 8713 was advocated by the respondents to this appeal, who were the appellants before the FTT, and which we shall describe collectively as "the Companies". The difference in classification is significant because at the relevant time goods classified under heading 8703 attracted an import duty of 10% whereas goods classified under heading 8713 attracted zero duty.

4. A hearing of the appeal before the FTT took place in July 2014. The FTT issued its decision on 13 November 2014 ("the First Decision"). It decided that it was not able to reach a decision on the appeals before it without further guidance from the Court of Justice of the European Union ("CJEU"). Accordingly, the FTT stayed the proceedings and referred to the CJEU the following questions:

> "1. Is the tribunal correct in construing the words "for disabled persons" [in heading 8713] as not meaning "only for" disabled persons?
>
> 2. What is the meaning of disabled person for the purposes of heading 8713: In particular: (1) is its meaning confined to a person who has a disability in addition to a limitation on his or her ability to walk or walk easily or does it include a person whose only limitation is on his or her ability to walk or walk easily? (2) Does "disabled" connote more than a marginal limitation on some ability? (3) Is a temporary limitation such as results from [a] broken leg capable of being a disability?
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> 3. Does the CNEN, in excluding scooters fitted with separate steering columns alter the meaning of heading 8713?
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> 4. Does the possibility of the use of a vehicle by a person without a disability affect the tariff classification if it can be said that the vehicles have separate features which alleviate the effects of a disability?

> 5. If suitability for use by non-disabled persons is a relevant consideration, to what extent should the disadvantages of such use also be a relevant consideration in determining such suitability?"

5. Following the judgment of the CJEU in *Invamed Group Limited and other companies v Revenue and Customs Commissioners* (Case C-198/15) (2016) ECLI:EU:C:2016:362 ("*Invamed CJEU*"), the FTT made a further decision, without a hearing but having received written submissions from the parties ("the Second Decision"). By the Second Decision the FTT concluded that the scooters may be classified under heading 8713 and that they were also clearly classifiable under heading 8703. Applying the general rules for the interpretation of the Combined Nomenclature ("the GIRs"), specifically GIR 3, the FTT held that the proper classification was under heading 8713. The companies' appeals were accordingly allowed.

6. With permission of the FTT in some respects and of this Tribunal in certain others, HMRC appeal against the Second Decision. However, to the extent that the Second Decision relies upon findings of fact or law made in the First Decision, HMRC also appeal against those findings.

**The FTT's material findings**

7. In its Second Decision, the FTT summarised, at [3], the findings it had made in its First Decision. So far as material to this appeal, those findings were:

(1) The scooters in question had the following four features:

(a) They were small, electrically powered vehicles with non-marking tyres and a tight turning circle. The FTT found that those features made the scooters capable of helping those who were limited in their ability to walk, or to walk in or to shops, on pavements or at home and compensated for that limitation. They were not features common to the generality of passenger vehicles. Whilst the scooters could be used by people without those limitations, using a scooter was more awkward than walking, so those features would not advantage such persons.

(b) They had low platforms, a high seat, were not enclosed and had no doors. These features, the FTT found, were also not features of the generality of passenger vehicles and were capable of assisting those subject to limitations on their ability independently to get into a car or a wheelchair. They afforded no extra ease to a person without such limitations.

(c) They had features – a wig-wag, a swivel seat and a bent or hinged tiller which did not compensate for a limitation on the ability to walk but conferred advantages on those with other limitations or those whose only limitation was on their ability to walk.

(d) They had features which made them safer or more comfortable, for example armrests, an adjustable height chair, a smooth ride and anti-

tipping wheels, which afforded no alleviation of the effects of any limitation on ability.

(2) Powered wheelchairs shared similar categories of features. The FTT noted in particular that joystick controls and footrests of a powered wheelchair did not aid mobility although they might alleviate limitations other than those on walking.

(3) The ability to use a vehicle for leisure activities did not mean that the vehicle was not for disabled persons. Indeed, the FTT found that the contrary was the case if the mobility limitation rendered the independent performance of such leisure activity unduly difficult and the vehicle was specifically designed to alleviate that difficulty.

(4) The scooters did not have the objective features of golf carts and snow vehicles and nor were golf carts and snow vehicles designed for the disabled.

(5) Many of the elderly and infirm use scooters. If actual use was of any value in determining CN classification, what mattered was whether those people could be described as disabled. If age and infirmity brought a non-marginal limitation on the ability to move, those of the elderly and infirm so afflicted could be described as disabled, and where they had such a limitation the scooters' design alleviated that limitation. But the design of the scooters afforded no assistance to persons with only a marginal limitation on walking ability because they were cumbersome in confined spaces. The FTT also noted that the speed limitation (to at most a fast walking speed) meant that the scooters afforded no material time advantage to someone who has no, or only a marginal, limitation on the ability to walk.

(6) To the extent that "disability" was synonymous with a limitation on the ability to walk, the FTT regarded the scooters as being specially designed for a person with that limitation.

**HMRC's appeal in summary**

8. HMRC's case on this appeal can be summarised in the following way:

(1) The FTT concluded (in its Second Decision at [56(1)] and [62]) that the scooters in issue were prima facie classifiable under heading 8703 and heading 8713 at the same time and thereby applied GIR Rule 3 as a tie-breaker provision. The FTT rightly found that the goods were classifiable under heading 8703, but wrongly failed to conclude that this necessarily precluded a classification under heading 8713 at the same time.

(2) The FTT wrongly found (in the Second Decision at [29]) that the CJEU in *Invamed CJEU* had not confirmed that the mobility scooters' classification was to be under heading 8703.

(3) The FTT wrongly found (Second Decision at [27]) that the FTT was not bound by the classification of mobility scooters given by the CJEU in *Lecson Elektromobile v Hauptzollamt Dortmund* (2010) ECLI:EU:C:2010:823 ("*Lecson*").

(4) The FTT adopted an erroneous construction of the test to be applied in the light of the *Invamed CJEU* ruling and/or mis-applied the actual test which the CJEU had set in that ruling. It applied a series of glosses to the proper construction of the tariff headings which were not sanctioned by the CJEU and are inconsistent with that construction.

(5) The FTT wrongly failed to apply or gave insufficient weight to a series of other non-binding guides to tariff classification without good justification for doing so. Those non-binding rulings should be followed unless they in some way alter or change the terms of the Common Customs Tariff itself.

(6) The FTT reached a conclusion on the issue of classification which was contrary to the only reasonable conclusion on the facts of the case. The decision is accordingly challenged on an *Edwards v Bairstow* (*Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14) basis.

**The Companies' case**

9. On this appeal the Companies supported the FTT's decisions.

**The law**

10. There was no dispute as to the legal basis for customs classification. That has conveniently, and authoritatively, been summarised by Lawrence Collins J (as he then was) in *Vtech Electronics (UK) plc v Customs and Excise Commissioners* [2003] EWHC 59 (Ch) at [6] – [12]; that summary, which we set out below, was recently approved by the Court of Appeal in *Hasbro European Trading BV v Revenue and Customs Commissioners* [2018] EWCA Civ 1221, per Newey LJ at [6]:

> "6. The Common Customs Tariff came into existence in 1968. By Article 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.
>
> 7. The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature ("CN") established by Article 1 of Council Regulation 2658/1987. The CN is established on the basis of the World Customs Organisation's Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party.
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> 8. Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes "to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System". The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.
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> 9. The CN, originally in Annex I to Regulation 2658/87, is re-issued annually: the version applicable to the present case is Annex I to

> Regulation 2204/99 (12.10.99 OJ L278). The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature ("CN subheadings"); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.
>
> 10. The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are "00" and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.
>
> 11. There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System ("HSENs"). The Community has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as CNENs.
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> 12. Binding Tariff Information is issued by the customs authorities of the Member States pursuant to Article 12 of the Common Customs Code (Council Regulation 2913/92/EEC) on request from a trader. They are called "BTIs", and such information is binding on the authorities in respect of the tariff classification of goods…"

11. The following material provisions are gratefully derived from Mr Beal's skeleton argument.

*The Community Customs Tariff*

12. The proper classification of goods entering the European Community is governed by the provisions of Council Regulation (EEC) No. 2658/87 of 23 July 1987 ("the Tariff Regulation").[1] Annex 1 to that Regulation sets out the Combined Nomenclature. The Annex is amended each year with effect from 1 January.

13. Article 1 of the Tariff Regulation provides that a "Combined Nomenclature" or CN shall be established by the Commission. Article 1(2) states that the CN shall comprise:

> (1) The harmonised system nomenclature;
>
> (2) Community sub-divisions to that nomenclature, referred to as CN subheadings;
>
> (3) Preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

14. Article 2 provides for the Commission to establish a further integrated tariff, referred to as the "Taric" for the purposes of including additional information specifically for the implementation of certain other Community measures.

[1] OJ [1987] L No. 256, 7.9.87, p. 1.

15. Article 5 of the Tariff Regulation requires the Commission and Member State to use the Taric for the application of EU measures concerning the importation and exportation of goods to and from the Union. Article 8 provides that the Customs Code Committee shall examine, either on its own initiative or on a reference from a Member State, any matter concerning either the combined nomenclature or Taric. Articles 9 and 10 together empower the Commission, assisted by the Customs Code Committee, to adopt measures in matters relating to the application of the CN and Taric, including the classification of goods and the creation of any explanatory notes.

16. The version of the tariff applicable as at January 2004 was Commission Regulation (EC) No 1789/2003 of 11 September 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff.[2] This Regulation entered into force on 1 January 2004, in accordance with Article 2 thereof.

17. The General Rules for the interpretation of the Combined Nomenclature ('GIRs') are contained in Section 1 of the Annex to the Tariff Regulation published in October each year. They set out guidelines for the interpretation of the tariff. Rule 1 of the GIRs states that "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."

18. GIR Rule 3 provides as follows:

> "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 affected 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;
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> (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."

19. GIR 6 states:

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[2] OJ [2003] L No 281, 30.10.2003, p. 1, as amended thereafter by Commission Regulation (EC) No 2344/2003 of 30 December 2003 amending Annex I to Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff, OJ [2003] L No. 346, 31.12.2003, p.38.

> "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 subheadings 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."

20. Chapter 87 of the CN at the material time covered vehicles other than railway or tramway rolling stock, together with parts and accessories thereof. The following headings were referred to in the contested review decisions of the Commissioners:

(1) CN Heading 8703: Motor cars and other motor vehicles principally designed for the transport of persons (other than those of headings 8702) including station wagons and racing cars.

(2) CN Heading 8713: Carriages for disabled persons, whether or not motorised or otherwise mechanically propelled. The specific heading for which the Companies contend is CN 8713 90 00 Other.

*HSENs and CNENs*

21. Guidance on the Tariff has been set out in the Explanatory Notes adopted by the Harmonised Commodity Description and Coding System under the auspices of the World Customs Organisation ('WCO'). These are referred to as the HSENs.

22. The HSENs in respect of heading 8713 explain that the heading covers carriages, wheelchairs, or similar vehicles, specially designed for the transport of disabled persons, whether or not fitted with means of mechanical propulsion. It is noted that heading 8713 excludes "normal vehicles simply adapted for use by disabled persons (for example, a motor car fitted with a hand-operated clutch, accelerator, etc (heading 87.03)".

23. The HSENs to heading 8703 contain the following text:

> "The heading also covers lightweight three-wheeled vehicles of simpler construction such as:
>
> . . .
>
> - those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery-powered electric motors. These vehicles are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle, as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel."

24. The EU has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as "CNENs".[3] The CNENs in respect of heading 8713 from 4 January 2005 have contained the following text:

> "8713 Carriages for disabled persons, whether or not motorised or otherwise mechanically propelled
>
> 8713 90 00 Other
>
> Motorised vehicles specifically designed for disabled persons are distinguishable from vehicles of heading 8703 mainly because they have:
>
> —a maximum speed of 10 km per hour, i.e. a fast walking pace;
>
> —a maximum width of 80 cm;
>
> —2 sets of wheels touching the ground;
>
> — special features to alleviate the disability (for example, footrests for stabilising the legs).
>
> Such vehicles may have:
>
> —an additional set of wheels (anti-tips);
>
> —steering and other controls (for example, a joystick) that are easy to manipulate; such controls are usually attached to one of the armrests; they are never in the form of a separate, adjustable steering column.
>
> This subheading includes electrically-driven vehicles similar to wheelchairs which are only for the transport of disabled people. They can have the following appearance

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[3] 2008/C 133/01, [2008] OJ C No. 133 p. 1.

25. The CNEN continued:

"However, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this subheading. They can have the following appearance and are classified in heading 8703:"

26. The legal status of CNENs and HSENs was not in dispute. In *Intermodal Transports BV v Staatssecretaris van Financiën* (Case C-495/03) [2005] ECR I-8151, the CJEU recognised, at [48], that the CNENs and HSENs were an important aid to the interpretation of the scope of the various tariff headings, albeit that they did not have legally binding force. The content of those notes will be ignored if it is incompatible with the provisions of the CN or if it alters the meaning of those provisions. The CJEU in *Olicom A/S v Skatteministeriet* (Case C-142/06) [2007] ECR I-6675 noted, at [17], that the CNENs were an important means of ensuring the uniform application of the Tariff and as such were to be regarded as useful aids to interpretation. In those cases where the CNENs or HSENs are not incompatible with the terms of the CN, the CJEU has indicated that a national court should follow them; or will follow them itself. Examples are *BAS Trucks BV v Staatssecretaris van Financiën* (Case C-400/05) [2007] ECR I-311, at [40] and *Bioforce GmbH v Oberfinanzdirektion München* (Case C-405/95) [1997] ECR I-2581, at [11].

**Discussion**

**Ground 1: incorrect application of GIR Rule 3**

27. In its Second Decision, at [56](1), the FTT described, as one of the principles it was applying, that if a scooter falls prima facie within heading 8703 and heading 8713, then it is to be classified under 8713. The FTT referred in this respect to the First Decision where, at [116] – [119], the FTT had concluded that, because the scooters were plainly motor vehicles and the existence and prominence of a seat and hand controls were objective features which indicated that they were principally designed for the transport of persons of some sort, the scooters could reasonably be regarded as falling within 8703. Because on application of either GIR 3(a) (the most specific) or GIR 3(c) (the last numerically) scooters that were also classifiable under heading 8713 would be so classified, the FTT concluded that the question was whether the scooters were prima facie classifiable under heading 8713. Having found

that the scooters were prima facie classifiable under heading 8713, the FTT concluded, in the Second Decision at [62] – [63], that the scooters were, by virtue of GIR 3, to be classified under heading 8713.

28. Mr Beal submitted that the FTT was right to find that the scooters were classifiable under heading 8703, but having done so wrongly failed to conclude that this necessarily precluded a classification under heading 8713 at the same time.

29. In support of his submission, Mr Beal referred us to *Revenue and Customs Commissioners v Flir Systems AB* [2009] EWHC 82 (Ch). That was a case where the products in question, thermal imagers, were held to be classifiable within both heading 9025 as electronic thermometers and under heading 9027 as instruments using optical radiations for measuring or checking quantities of heat. As neither was the more specific description, it was GIR 3(c) that operated as the tie-breaker in favour of heading 9027. In the High Court, on appeal from the VAT and Duties Tribunal, Henderson J (as he then was) described the GIRs, at [14], as a "hierarchical set of principles, and if the correct classification can be ascertained at a given stage it is unnecessary to proceed further."

30. The application of a hierarchical system does not support a submission that prima facie classification under one heading necessarily precludes classification under another. The hierarchical approach permits, as it did in *Flir Systems*, products to fall within two (or more) headings. One heading may be more specific than another, and if that is the case GIR 3(a) will operate as a tie-breaker. Otherwise, as in *Flir Systems*, it may be necessary to resort to GIR 3(c).

31. We do not accept, as Mr Beal submitted, that headings 8703 and 8713 are mutually exclusive. Mr Beal argued that support for that proposition could be derived from the fact that the CNENs and HSENs have notes which exclude the classification of products falling within one from being also included with another. But contrary to Mr Beal's argument, in our judgment, that serves to confirm that certain products might properly be classified under both headings. No express exclusions would be necessary if the headings were mutually exclusive.

32. Heading 8703 does not contain any express exclusion for vehicles classified under heading 8713; that may be contrasted with the express exclusion under heading 8703 for motor vehicles classified under heading 8702. Heading 8713 does not contain any express exclusion for vehicles classified under heading 8703. Heading 8713 excludes normal vehicles adapted for use by disabled persons, which are thus classified under heading 8703. But such vehicles are not specifically classified under heading 8703; they fall to be classified under that heading because they are so classifiable according to the general terms of that heading (in accordance with GIR 1). But for the specific exclusion from heading 8713, those products would prima facie be classifiable under that heading as well as under heading 8703. It is the exclusion from heading 8713 which renders those products as classified under heading 8703. The relationship between the two headings is not therefore one of mutual exclusivity.

33. Mr Beal sought to derive further support for his submission from a number of materials. He referred us to a WCO Opinion ("the WCO Opinion") published in the Official Journal of the European Union on 28 November 2001 (OJ [2001] C No 333, 28.11.2001, p. 1). In that Opinion, electric mobility scooters were classified under heading 8703. Classification was effected by reference to GIR 1 and 6. There was no reference to GIR 3. Nor, as Mr Beal submitted, is there any reference to GIR 3 in the CNENs, nor in the judgments of the CJEU in *Invamed CJEU* or *Lecson* or the reasons given for the EU Commission's customs classification (of electric mobility scooters as within heading 8703) in Commission Regulation (EC) No 718/2009 of 4 August 2009.

34. The omission from those judgments and materials of a reference to GIR 3 does not indicate that the headings 8703 and 8713 are mutually exclusive. That omission is not surprising. In the case of classifications of products under heading 8703, whether in the WCO Opinion or the Commission Regulation, those proceeded on the basis that classification under heading 8713 was excluded as the vehicle did not meet the terms of that heading. The CNENs provide guidance on the scope of subject headings, and not the operation of the GIRs in cases where a product may fall within the scope of two or more headings. Nor is it surprising, or indicative of mutual exclusivity, that the Court in *Invamed CJEU* and *Lecson* was able to provide guidance without resort to the GIRs. It is in our view evident that the real question in cases of this nature is whether the product falls within the more specific of the two headings. If it does, the operation of the GIRs will fix that as the appropriate heading. If it does not, then the more general heading will prevail. As the operation of the GIRs in such cases is uncontroversial, it is of no special note that the Court did not consider that it merited attention in those cases.

35. Mr Beal's submission is based on a construction of heading 8703, which applies to means of transport for persons in general, as necessarily excluding cases where the means of transport is for a specific category of persons, in the case of heading 8713 for disabled persons. We do not consider that is the correct construction. Mr Beal referred to *Invamed CJEU*, at [21], where the CJEU described the difference between the two headings in the following way:

> "… it is important to note, as regards headings 8703 and 8713 of the CN, the Court has already held that it is apparent from the wording of those headings that the difference between them results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons (see, judgment of 22 December 2010 in *Lecson Elektromobile*, C-12/10, EU:C:2010:823, paragraph 18)."

In our judgment, in that passage the Court is doing no more than emphasising that, according to their own terms, heading 8713 applies to a limited category of vehicles designed for the transport of persons which would otherwise be classified under heading 8703. Heading 8703 is not confined to means of transport that in all cases is designed for all persons: specialised transport vehicles, such as ambulances, prison vans and hearses are among those included in that heading. Heading 8703 is thus

applicable to means of transport generally, which can include vehicles classifiable under heading 8713, subject only to the application of the GIRs.

36. It is evident that this was the construction given by the FTT to the respective headings. The FTT took the view that heading 8703 was apt to include all vehicles for the transport of persons (except those specifically excluded under that heading), and that this included vehicles which might also be classified under heading 8713. We consider that the FTT was right. But if that were not the case, and the headings were properly to be regarded as mutually exclusive, it would not follow, as Mr Beal sought to argue, that the FTT's finding in the First Decision that the vehicles were principally designed for persons of some sort, and thus prima facie within heading 8703, meant that classification under heading 8713 would be excluded. That conclusion would have been based on a flawed understanding of the FTT, and would in those circumstances fall to be disregarded. Were the headings to be mutually exclusive, the FTT's conclusion, if correct, that the vehicles were designed solely for use by disabled persons would render the correct classification, according to GIR 1, as within heading 8713.

**Grounds 2, 3 and 4: incorrect application of the CJEU's rulings in *Lecson* and *Invamed CJEU***

*Lecson*

37. In *Lecson*, the issue was essentially the same as in this case. The electric mobility scooters in that case were materially the same as the scooters with which this appeal is concerned. They were described as follows (*Lecson*, at [12]):

> "According to the wording of the order for reference, electric mobility scooters are three or four-wheeled motor vehicles designed for the transport of one person. Depending on the type, these vehicles reach a maximum speed of 6 to 15 km/h. They are between 100 and 152 cm long and between 47 and 67 cm wide. They are manufactured in such a way that they always have a platform on which the driver can place his feet. Some of the vehicles also have a small additional axle, intended to serve as an anti-tipping system. The vehicles are operated by an adjustable steering column to which the steering and other controls for driving and braking, and often a metal basket, are attached."

38. There was a single question before the CJEU. It was: "Do the electric mobility scooters which are described more precisely in the order [for reference] fall within heading 8713 or heading 8703 of the [CN], as amended by Regulation (EC) No 1810/2004 …?"

39. The CJEU commenced its consideration of the question referred by pointing out, at [15], that the task of the Court on a request for a preliminary ruling is not to effect classification itself, but to give guidance to the national court on the criteria which will enable that court to classify the products. However, in order to give the national court a useful answer, the CJEU may, in a spirit of cooperation with national

courts, provide the national court with all the guidance that the CJEU deems necessary.

40. In relation to the question of classification, the Court, at [16], reiterated the general principle, derived from cases such as *Intermodal Transports BV v Staatssecretaris van Financiën* (Case C-495/03) [2005] ECR I-8151, at [47], that the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics as defined in the wording of the relevant heading of the CN and of the section or chapter notes. The Court also noted, at [17], the importance of the CNENs as an aid to the interpretation of the scope of the tariff headings, but that those explanatory notes did not have legally binding force (*Turbon International GmbH v Oberfinanzdirektion Koblenz* (C-250/05) [2006] ECR I-10531).

41. At [18], the Court said that it is apparent from the wording of headings 8703 and 8713 of the CN themselves that the difference between those headings results from the fact that heading 8703 covers means of transport in general, whereas heading 8713 applies specifically to means of transport for disabled persons.

42. The Court in *Lecson* did not explain what it meant for this purpose by "disabled persons". It considered the explanatory note to heading 8713, and found, at [19], that this clearly demonstrated that the decisive criterion for classification under that heading was "the special design of the vehicle to help disabled persons".

43. The Court regarded that as distinguishing electrically-driven vehicles similar to "electric wheelchairs" ("Elektrorollstühle") from the electric mobility scooters at issue in the main proceedings. Those electric wheelchairs were specifically designed for the transport of disabled persons, having characteristics such as, in particular, a maximum speed of 10 kph (which, the Court observed, may correspond to a fast walking pace), special features to alleviate the disability (for example, footrests for stabilising the legs) and steering and other controls (such as a joystick) which are easy to reach and manipulate and therefore are usually attached to the armrests.

44. By contrast, as the Court noted at [20], the explanatory note to heading 8713 states in the last paragraph that motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from that heading, and instead come under heading 8703. The products at issue in *Lecson* had such a separate, adjustable steering column (*Lecson*, at [21]). Furthermore, although those scooters had a platform, that platform did not constitute a support to stabilise the legs. It was also the case, the Court observed at [22], that although the anti-tipping system of the electric mobility scooters contributed to user comfort it did not include any specific feature aimed at aiding the use by disabled persons of the scooters. Finally, the Court noted, at [23], that the electric mobility scooters at issue could reach a speed exceeding 10 kph; they were able to go at up to 15 kph.

45. In view of those characteristics as a whole, the Court concluded, at [24], that the electric mobility scooters in question must be considered to be means of transport of persons falling within heading 8703 and not as vehicles for disabled persons for the purposes of heading 8713.

46. The Court made clear, at [25], that the mere fact that disabled persons might be able to use the mobility scooters at issue did not affect their classification under heading 8703. The Court said:

> "Finally, it should be added that the mere fact that those electric mobility scooters may be used, where appropriate, by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who for one reason or another prefer to travel short distances other than on foot, like, as the referring court indicates, golfers or persons going shopping."

47. The Court ruled as follows:

> "Heading 8703 of the Combined Nomenclature in Annex 1 to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, as amended by Commission Regulation (EC) No 1810/2004 of 7 September 2004 must be interpreted as covering three or four-wheeled vehicles designed for the transport of one person who is not necessarily a disabled person, powered by a battery-operated electric motor, reaching a maximum speed of 6 to 15 km/h and equipped with a separate, adjustable steering column, known as 'electric mobility scooters', such as those at issue in the main proceedings."

*Invamed CJEU*

48. In *Invamed CJEU*, on the reference from the FTT in this case, the Court reiterated the principles set out in *Lecson*. Thus, at [21], referring to *Lecson*, at [18], the Court confirmed that the difference between headings 8703 and 8713 results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons. The Court added, at [22], the established principle that the intended use of a product may constitute an objective criterion for classification if it is inherent in the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties.

49. At [23], the Court set out the question to be determined in any particular case by the national court:

> "… it is for the referring court, in the case in the main proceedings, to determine whether the vehicle at issue is intended, with regard to its characteristics and objective properties, to be used specifically by disabled persons, in which case such use must be classified as 'the main or logical use' of that type of vehicle."

It added, at [24], that the reference to "intended use" was not a reference to possible use, and that intended use was to be determined on the basis of the characteristics and objective properties of the product at the date of its import.

50. The Court repeated, at [25], what it had said in *Lecson* as to the irrelevance of actual use of the scooters by disabled persons. At [26], the Court considered the obverse case, holding that use by a non-disabled person of scooters which by reason of their original purpose were unsuitable for persons who do not suffer from disabilities was equally irrelevant. As those two passages must be considered together, we set them out in full:

> "25. Furthermore, it should be added that the Court has already held, in relation to the interpretation of heading 8703 of the CN, that the fact that electric mobility scooters may be used, where appropriate, by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who for one reason or another prefer to travel short distances other than on foot, like golfers or persons going shopping (judgment of 22 December 2010 in *Lecson Elektromobile*, C 12/10, EU:C:2010:823, paragraph 25).
>
> 26. That reasoning confirms, *a contrario*, that the fact that the vehicles at issue in the main proceedings may, in some circumstances, be used by non-disabled persons is irrelevant to the tariff classification of such vehicles under heading 8713 of the CN, since by reason of their original purpose, those vehicles are unsuitable for other persons who do not suffer disabilities."

51. The Court concluded in these respects at [27] that:

(1) the words "for disabled persons" in heading 8713 mean that the product is designed solely for disabled persons;

(2) the fact that a vehicle may be used by non-disabled persons is irrelevant to the classification under heading 8713 and

(3) the CNENs are not capable of amending the scope of the tariff headings of the CN.

52. The Court then went on to consider the separate question in the order for reference as to the proper interpretation of the words "disabled person" for the purpose of heading 8713. The Court said:

> "33. … it is common ground that the vehicles mentioned in heading 8713 of the CN are designed in order to be used to assist persons affected by a limitation on their ability to walk which may be classified, by its nature, as 'non-marginal'. As the Commission observed in its submissions, the intended use of those vehicles is not dependent on other limiting factors, such as the presence of certain physical or mental attributes of persons for whom those vehicles have been designed. Likewise, the duration of that limit on capacity is not specified and must, therefore, be regarded as being irrelevant. Furthermore, a teleological interpretation of a walking aid necessarily implies that that aid may be for a limited period.
>
> 34. Having regard to the foregoing considerations, the answer to the second question is that the words 'disabled persons' under heading

> 8713 of the CN must be interpreted as meaning that they designate persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant."

*Discussion of Grounds 2, 3 and 4*

53. Mr Beal submitted that the FTT had wrongly failed to accept that it was bound by the classification of mobility scooters given by the CJEU in *Lecson*, and that the FTT in its Second Decision at [29], had wrongly found that the CJEU in *Invamed CJEU* had not confirmed that the mobility scooters' classification was to be under heading 8703. He relied in particular on what the Court had said at [25], confirming what had been said in *Lecson*, also at [25].

54. In its Second Decision at [27], the FTT referred to Mr Beal's submission as to the effect of *Lecson*. It did not accept that the CJEU had "classified" the scooters in its judgment in that case. The FTT regarded the Court's judgment as having been confined to guidance that, in terms of the Court's ruling, vehicles designed for the transport of one person who is not necessarily a disabled person with particular features were covered by heading 8703 (and not by heading 8713).

55. Mr Beal accepted that, even if the CJEU's judgment in *Lecson* could be regarded as a classification of the scooters at issue in that case, such a classification could not be binding on the FTT. But he argued that the FTT had failed to apply the legal principles found by the Court in *Lecson* to apply to the construction of headings 8703 and 8713.

56. We agree with the FTT that *Lecson* was concerned with the giving of guidance to the national court and cannot be regarded as classifying the products in question. Each case must be considered according to its own circumstances and the objective characteristics of the particular products in question. That said, we agree with Mr Beal (and so much was common ground) that the national court must approach classification in accordance with the principles derived from the judgments of the CJEU.

57. Mr Beal referred to the reasons given by the Court in *Lecson* for distinguishing the mobility scooters at issue in that case from the type of electric wheelchair that, he said, fell within heading 8713. Those reasons were set out in [21] – [23] of *Lecson*, to which we have referred above. We do not consider that the distinctions drawn in *Lecson* between an electric wheelchair and a mobility scooter can constitute a principled dividing line between the two headings. At [19] in *Lecson*, the Court referred to the "special design of the vehicle to help disabled persons" as the decisive criterion for classification under heading 8713. That is the principle to be applied. It is correct that the Court went on to say that, applying that principle, electric wheelchairs should properly be regarded as falling within that heading. But the Court cannot be taken as confining that classification to such wheelchairs, especially given the broad construction given by the Court to "disability" in *Invamed CJEU*. In that context, the special design referred to by the Court in *Lecson* need only help persons who have a non-marginal limitation on their ability to walk, and it is not necessary

that the vehicle should have features which assist those with other disabilities: see *Invamed CJEU*, at [33].

58. As regards Mr Beal's submissions with respect to *Invamed CJEU*, at [28] - [29] of the Second Decision, the FTT said this:

> "28. Mr Beal says that in *Invamed [CJEU]* at [25] the court confirmed the that the appropriate classification of the scooters was 8703 even if the scooters may be used by or adapted for disabled persons.
>
> 29. We do not read paragraph [25] in this way. For the reasons already set out we regard that paragraph as part of a sequence starting at [24] in which the Court is correcting any misunderstanding that possible use is relevant. It confirms similar reasoning in *Lecson* but indicates that the same reasoning applies to the process of classification under 8713. (In the same way we do not regard [26] as confirming or agreeing with a conclusion that scooters fall within 8713.)"

59. We agree with the FTT in this respect. We do not regard the CJEU in *Invamed CJEU*, any more than in *Lecson*, to have confirmed the classification of the scooters at issue as being under heading 8703. As the FTT found, at [12] – [13], in these passages the Court in *Invamed CJEU* was addressing the particular question raised by the FTT as to the relevance of actual use. That, in our judgment, is confirmed by the reference made by the Court in *Invamed CJEU* not only to the irrelevance of actual use by a disabled person of a vehicle for general use which otherwise falls under heading 8703, but the corresponding irrelevance of the use by an able-bodied person of a vehicle specially designed to help disabled persons.

60. The question for this Tribunal therefore, as regards Grounds 2 and 3, is whether the FTT erred in law in its application of the legal principles established by, or reiterated by, *Lecson* and *Invamed CJEU*. Those principles may be summarised as follows:

> (1) The decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the relevant heading of the CN and of the section or chapter notes (*Lecson*, at [16]; *Invamed CJEU*, at [18]).
>
> (2) 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 (*Invamed CJEU*, at [22]).
>
> (3) The CNENs are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (*Lecson*, at [17]; *Invamed CJEU*, at [19]).
>
> (4) The difference between headings 8703 and 8713 results from the fact that heading 8703 covers means of transport in general, whereas heading 8713 applies specifically to means of transport for disabled persons (*Lecson*, at [18]; *Invamed CJEU*, at [21]).

(5) The decisive criterion for classification under heading 8713 is the special design of the vehicle to help disabled persons (*Lecson*, at [19]).

(6) The words "for disabled persons" in heading 8713 mean that the product is designed solely for disabled persons (*Invamed CJEU*, at [27]).

(7) The words "disabled persons" under heading 8713 mean persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant (*Invamed CJEU*, at [34]).

(8) The question for the national court is whether the vehicle at issue is intended, with regard to its characteristics and objective properties, to be used specifically by disabled persons. In that case, such use must be classified as the "main or logical use" of that type of vehicle (*Invamed CJEU*, at [23]). In that connection, we observe that the question is not what the main use is in practice, rather it is a conclusion to be drawn from answering the question of intended use.

(9) It is only the objectively derived intended use that is to be taken into account. Possible use is not taken into account. Thus, use by disabled persons of vehicles, whether or not adapted for such use, which are suitable for use by persons who do not suffer from a disability, but prefer to travel short distances other than on foot, like golfers or persons going shopping, is irrelevant to classification under heading 8713. Likewise, use by non-disabled persons of vehicles that, by reason of their original purpose, are unsuitable for persons who do not suffer disabilities, is also irrelevant to classification under heading 8713 (*Lecson*, at [25]; *Invamed CJEU*, at [24] – [26]).

61. In our view, the judgment of the CJEU in *Invamed CJEU* on the meaning of "disabled person" for the purpose of heading 8713 is an important development in the law. It is evident that the CNENs to that heading, which influenced the Court in *Lecson* and led to the distinction drawn in that case between, on the one hand, electric wheelchairs, with their special characteristics to alleviate certain disabilities other than a non-marginal limitation on the ability to walk, are predicated on an understanding of the meaning of disability which is narrower than the Court in *Invamed CJEU* has found it to be. The CJEU's judgment in *Lecson* must now be viewed in that context.

62. For a product to be classified as falling under heading 8713, it is accordingly sufficient if the non-marginal limit on a person's ability to walk that is the only limitation or disability that is catered for in the design. The intended use of the vehicle is not dependent on other limiting factors. It is not necessary, although it may be relevant in a given case, to look for objective characteristics that could alleviate or assist other, more extensive, disability, such for example footrests for stabilising the legs. The distinctions drawn in *Lecson* cannot therefore be taken as a form of checklist or as universally applicable.

63. The non-marginal limitation on the ability to walk, as described in *Invamed CJEU*, does not have to be permanent or have any expectation of permanence. It can be for a limited period, for example a limitation on the ability to walk caused by a

broken leg, broken ankle or other impediment that gives rise to a non-marginal limitation. The source of the impediment is irrelevant; a non-marginal limit on the ability to walk caused by a person being overweight would be covered.

64. Although the mere fact of actual use is not the issue, in our judgment actual use can have evidential relevance as showing the potential for such use in reality and that such a use is not merely theoretical. But such evidence of actual use does not determine the question of the design or purpose of the vehicle, which must be ascertained by reference to the objective characteristics and properties of the vehicle.

65. In our judgment, given the meaning of disability described by the CJEU in *Invamed CJEU*, the creation of a one-person scooter, capable of travelling only at around walking pace, or a brisk walking pace, that is of a small enough size to enable use on pavements and indoors, in other words to replicate mechanically a pedestrian must of its nature, or objective characteristics, be designed in order to assist persons with a non-marginal limit on their ability to walk.

66. That, however, is not sufficient to enable such vehicles to fall within heading 8713. In order to fall within the heading it must also be found that the vehicles in question are designed *solely* for those with such a limitation. In circumstances where such vehicles are equally capable of being used by persons generally, including by persons without any limit, or with only a marginal limit, on their ability to walk, the real question for a national court is whether the vehicles are also, by reference to their objective characteristics, designed for the use of such persons as well as for those who are disabled in that sense.

67. In our judgment, the question to be addressed is one of design, and it is unhelpful to attempt to paraphrase that test. In particular, although the CJEU itself has used suitability for use, or unsuitability for use, by persons with particular characteristics as a way of expressing its reasoning as to products to be included in one or other of headings 8703 and 8713 (see *Lecson*, at [25] and *Invamed CJEU* at [25] – [26]), that must in our respectful view be taken to show factors which might be considered in order to ascertain if a particular vehicle is "designed for use by" a particular group and not to introduce a different test or any gloss on the true test.

68. There are in our view two possible approaches to that question. Different approaches may be appropriate depending on the place in the spectrum of disability at which the circumstances of a particular case or a particular product fall to be considered. One approach is to look for additional objective features of the vehicle in question which tend towards a design for use by persons with a mobility impediment and away from able-bodied persons. Thus, the type of additional features to alleviate the disability (as then understood) (footrests for stabilising the legs, steering and other controls, such as a joystick, which are easy to reach and manipulate and are therefore attached to one of the armrests) referred to in the CNENs, and in *Lecson*, [19], which was decided before the meaning of "disability" was clarified by *Invamed CJEU*, would be material in determining that a vehicle, such as a powered wheelchair, incorporating such features, was designed solely for disabled persons.

69. That approach will not be applicable, however, to a circumstance where the objective characteristics of the vehicle are simply those of a motorised vehicle providing transport, at walking pace, for a person. Such a vehicle is capable of being used for that same purpose by an able-bodied person, and there is evidence of actual (and not merely theoretical) use by such persons. However, the absence of special design features for persons with greater disability than a non-marginal limit on the ability to walk does not rule out possible classification under heading 8713: *Invamed CJEU* [33]. There needs to be another analysis to ascertain whether the vehicle is designed for transport generally (both disabled and able-bodied as those terms are now understood) – in which case heading 8703 will be appropriate – or designed *solely* for use by persons with at least a non-marginal limitation on their ability to walk – in which case heading 8713 will be applicable.

70. The approach in such a case will be to determine whether there are characteristics of the vehicle which, although they do not detract from the prospective use by persons with a mobility limitation (because they do not outweigh the objectively identifiable benefits to such persons), do detract from use by able-bodied persons because they do – viewed objectively – outweigh the benefits to those persons of using a scooter as an alternative to walking (even if some people might still choose to use the scooters notwithstanding the perceived disadvantages).

71. In its Second Decision, at [59], where the FTT sets out why it has decided that the vehicles were not designed for able-bodied persons (or other than for the sole use by disabled persons), the FTT describes the test in terms of whether the features in question (which are described below) "make the vehicle more attractive to able-bodied persons". That followed from the FTT's application of the principle, which it described at [56](10) of the Second Decision, that a design feature helps disabled persons if it makes the vehicle attractive to, and available for use by, a person with a disability because of the nature of the disability when without that feature it would not be so attractive or available.

72. We do not demur from that principle, which we consider to be a useful approach to the question of design, but we do not consider the FTT was right to conclude at [59] that, because the design of the vehicle and those features which benefitted those with a non-marginal limitation on their ability to walk, did not benefit those without such a limitation when compared to walking, the scooters could not be said to have been designed for such able-bodied persons. That in our judgment is the wrong approach. Furthermore, we consider that the FTT was wrong, in its First Decision, at [178], to seek to identify whether particular features of the scooter afforded an extra ability or facility to able-bodied persons. In our judgment, where the core structure of the vehicle affords to an able-bodied person the same facility for mechanised travel as a disabled person, that fact without more would result in classification under heading 8703, because there could be no design distinction ascertainable from those objective characteristics between intended use by disabled persons as against able-bodied persons who may choose to use a scooter in preference to walking. It is not necessary to find something in addition to the ability to use the scooter instead of walking which aids or is an advantage to an able-bodied person in order to conclude that the scooter is designed for able-bodied persons as well as for disabled persons and so is not

designed solely for disabled persons. In seeking to identify such additional advantages, we consider that the FTT adopted the wrong approach.

73. In light of those errors of law on the part of the FTT, we consider that the FTT's decision must be set aside. In reaching that conclusion we have had regard to the submissions of Mr Hitchmough and Mr White, for Invamed, that the FTT was making a value judgment based on the evidence before it, and that an appeal tribunal should be cautious of interfering with such a judgment. We are conscious that on an appeal it is not a question whether we would have come to a different conclusion. But in this case we have decided that the FTT erred in its approach as a matter of law, and in those circumstances it is open to an appeal tribunal to disturb the value judgment reached by the FTT (see *Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990, per Jacob LJ at [7]). Having set aside the FTT's decision on that basis, there is no need for us to remit the case to the FTT, as the FTT has helpfully, in both its First Decision and its Second Decision, provided a full analysis of the facts and circumstances of the case. We shall therefore re-make the decision on the basis of our own conclusion as to the correct approach in law.

74. In our judgment, the true question in these circumstances is whether there are characteristics that detract sufficiently from use by able-bodied persons as to allow it to be concluded that the vehicles were not designed for use by such persons but were designed solely for persons with at least a non-marginal limitation on the ability to walk. The FTT identified three potential disadvantages:

(1) The vehicles were slow (the FTT found, in its Second Decision, at [59], that an able-bodied person would be able to move faster on his/her own two feet).

(2) The vehicles were not as flexible as being on two feet and/or were cumbersome when in a shop or a house or on a pavement (Second Decision, at [59]; First Decision, at [52]).

(3) There was some stigma or embarrassment in the use of such a vehicle (First Decision, at [60](12)).

75. However, considering these disadvantages more closely, we do not consider they are sufficient either individually or together to support the FTT's conclusion:

(1) We do not consider that a finding that the speed of the scooters was a disadvantage to an able-bodied person was one that was open to the FTT. The relatively slow speed of the scooter could not be a disadvantage of a vehicle intended to move only at a brisk walking pace. It is not in our view appropriate to make a comparison with any faster speed at which a person might be able to walk or run.

(2) As regards flexibility, we take the view that such a reduction in flexibility is not a significant or material disadvantage as compared with the benefits of being able to sit on a vehicle as opposed to having to walk. It is open to a user to sit on the vehicle when it is suitable to do so, but to get off if and when it

becomes more cumbersome. That is a matter of choice. There is no real disadvantage that there might be occasions when it would be preferable to be on foot. There is no finding that the cumbersome or inflexible nature of the vehicle would at all times have made the use of it materially disadvantageous. Set against the advantage of having motorised transport of this nature, even for the able-bodied, we do not consider that the inflexibility and cumbersome nature of the vehicle as found by the FTT can outweigh that advantage.

(3) As for the stigma or embarrassment in the use of the mobility scooter, the burden of the evidence was that, whilst stigma was a particular consideration in the case of the powered wheelchairs, this was less so in the case of the scooters (First Decision, at [60](9)). Indeed, scooters were regarded by persons with limited mobility, especially by the young, as more acceptable from this perspective than powered wheelchairs (First Decision, at [57(7)]). We do not consider that the degree of stigma attached to the use of a mobility scooter, which is – and is intended to be – materially less than it might be in the case of use for example of a powered wheelchair, could outweigh the ability for an able-bodied person who so chooses to be transported at walking pace without the physical effort of walking.

76. In those circumstances we conclude that there are no material countervailing disadvantages in the use by an able-bodied person of a mobility scooter, and that since the basic objective characteristics of such a scooter provide the same facility of mechanised movement to disabled and able-bodied persons alike, it must follow that viewed by reference to their objective characteristics the scooters are not designed solely for use by disabled persons and are not classifiable under heading 8713. They are motor vehicles principally designed for the transport of persons and fall as such to be classified under heading 8703.

**Ground 5: non-binding sources of tariff classification**

77. Having regard to our conclusion in relation to Grounds 2, 3 and 4, it is not necessary for us to address HMRC's submission that the FTT failed to apply or failed as a matter of law to give sufficient weight to a series of non-binding guides to tariff classification without good justification for doing so. Each of those sources, say HMRC, adopted by bodies which specialise in customs classification, continues to support HMRC's classification for mobility scooters under heading 8703 and not heading 8713. In light of our own determination, the conclusions reached in those sources are consistent with the classification we have arrived at. However, we should explain briefly why, had we not decided by reference to the language of the headings themselves and the relevant case law of the CJEU that, contrary to the FTT's conclusion, the scooters in question in this case were classified under heading 8703, we would not have found that the FTT had erred in law in its application of the non-binding sources referred to by HMRC.

78. The sources to which HMRC refer are:

(1) The HSENs. The HSENs for heading 8713 note that the heading covers carriages, wheelchairs or similar vehicles specially designed for the transport of

disabled persons, and it excludes normal vehicles simply adapted for use by disabled persons.

(2) The WCO Opinion. According to that Opinion, as we have described, electric mobility scooters were classified under heading 8703. That classification followed from the conclusion reached by the Harmonised System Committee ("HSC") on 26 November 2000, which rested largely on the view that such vehicles were essentially "normal vehicles simply adapted for use by invalids", within the exclusion set out in the explanatory notes; those normal vehicles were principally designed for the transport of persons to go shopping, fishing, to local golf courses etc. They were similar to golf carts of sub-heading 8703.10.

(3) The CNENs. We have described above the text of the CNENs. HMRC's case in this respect relied upon the factual similarity between the scooters at issue in this appeal and the mobility scooters described by the CNENs and the distinction drawn between those scooters and powered wheelchairs (as shown in the images appearing in the CNENs).

(4) Commission Regulation (EC) No 718/2009. That Regulation classified as within heading 8703 four-wheeled vehicles with an electric motor having characteristics of (a) a horizontal platform connecting the front and rear sections; (b) small wheels with anti-leak tyres; (c) an adjustable seat without armrests and grips whose height can be set in one of two positions; (d) a steering column (with a small control unit) that can be folded down; (e) two thumb-operated levers for accelerating, braking and reversing; (f) anti-tip wheels; (g) an electronic dual braking system; (h) a range of approximately 16 kms when fully-charged; and (h) a maximum speed of approximately 6.5 kph. The vehicle is designed for use at home, on footpaths and in public spaces, for activities such as shopping trips. HMRC's case is that this regulation should have been applied by the FTT by analogy to the similar products at issue in this case.

(5) Other BTIs issued by other Member States. Binding Tariff Informations classifying the same or similar products under heading 8703 have been issued by Sweden (valid from 12 September 2003 to 11 September 2009) and the Netherlands (valid from 22 September 2009 to 21 September 2015). HMRC point out that there should be a uniform approach to classification matters, referring in that respect to *Staatssecretaris van Financiën v Heuschen & Scrouff Oriental Foods Trading BV* (Case C-375/07) [2008] ECR I-8691, at [62] – [63].

79. It is common ground that none of these sources are binding, although the HSENs and the CNENs in particular do represent important aids to the interpretation of the scope of the various tariff headings. But, as the CJEU in *Invamed CJEU* confirmed, at [20], the content of the notes must be in accordance with the provisions of the CN and may not alter the meaning of the headings.

80. There is a common theme in the materials relied upon by HMRC which detracts from their value as aids to the interpretation of the headings in question or any reliance by way of analogy or maintaining a consistent approach. Each of the

materials relies to some extent on the distinction between a powered wheelchair and the mobility scooters at issue in this appeal, and applies a narrower interpretation of "invalid" or "disabled" than that which the CJEU in *Invamed CJEU* has now described. It is clear from *Invamed CJEU* that a powered wheelchair is not the benchmark for inclusion within heading 8713.

81. As the Court demonstrated in *Lecson*, in applying the decisive criterion for classification under heading 8713 of the special design for disabled persons, the CNENs focus on features for alleviating disabilities of a more extensive nature than the non-marginal limitation on the ability to walk. Limiting factors beyond that limitation are not, as now confirmed by *Invamed CJEU*, necessary for classification under heading 8713. The same approach is apparent in the HSENs.

82. As regards the WCO Opinion, it is apparent that within the HSC the view that was subsequently adopted for the purpose of the Opinion had prevailed over the contrary view of certain members of the Committee which was in part based on the term "invalid" within the meaning of heading 8713 not being restricted to sick or handicapped people. The view on which the WCO Opinion was based was therefore founded on an understanding of the meaning of "invalid" (and thus of "disabled") which is not in accord with the meaning now given by the CJEU in *Invamed CJEU*.

83. The same point can be explicitly seen in the Commission Regulation. That Regulation sets out its Reasons for classification (under heading 8703) of the relevant vehicles, including the following:

> "The vehicle is a special type of a vehicle for the transport of persons.
>
> Classification under heading 8713 is excluded as the vehicle is not specially designed for the transport of disabled persons **and it has no special features to alleviate a disability**. (See also the Harmonised System Explanatory Notes to heading 8713 and the Combined Nomenclature Explanatory Notes to subheading 8713 90 00.)" [Emphasis supplied]

The absence of special features to alleviate disability beyond that of a non-marginal limitation on the ability to walk is not a determining factor, as has been confirmed by the CJEU in *Invamed CJEU*. It is apparent therefore that the Regulation draws a distinction between those vehicles with special features to alleviate disability beyond that non-marginal limitation and that it contrasts electric mobility scooters against powered wheelchairs in the same manner, and on the basis of the same flawed understanding of the meaning of "disability", as the HSENs and the CNENs.

84. Finally, as the BTIs in question date from well before the CJEU's judgment in *Invamed CJEU*, and must be taken to have relied at least to some extent on the explanatory notes and other non-binding materials, we infer that those BTIs were also based, at least to some extent, on a meaning of "invalid" or "disability" that was narrower than the meaning given by the CJEU in *Invamed CJEU* and which must now fall to be applied.

85. The meaning of "disability" for this purpose is fundamental to the interpretation of the headings. Those headings thus fall to be construed in the light of authoritative guidance, such as the HSENs and the CNENs in particular, but with particular regard to the circumstance that such guidance was issued at a time when a narrower meaning was given to that term, and the term "invalid" before it that has now been determined to be the proper meaning in this context. In those circumstances, we do not consider that the FTT could be said to have erred in law in not placing such reliance upon the non-binding material as would have led it to determine that the scooters at issue should be classified on the basis of such material as under heading 8703 and not under heading 8713.

86. In our judgment, to the extent that the explanatory notes are premised on a meaning of "disability" that is narrower than that expressed in *Invamed CJEU*, those notes cannot inform the meaning of heading 8713. However, on the construction and application of that heading itself and heading 8703 which we have determined, the classification of electric mobility scooters of the type considered in those notes is consistent with our conclusion with respect to the scooters in this appeal. The notes therefore remain, despite the wider meaning to be afforded to "disability" as a consequence of *Invamed CJEU*, illustrative of the application of the respective headings.

**Ground 6: HMRC's *Edwards v Bairstow* challenge**

87. In light of our conclusion that the scooters are properly classified under heading 8703 and not heading 8713, it is not necessary for us to address the factual challenges mounted by HMRC. But in any event, on examination of those challenges, it does not seem to us that they were to any material extent challenges to the primary facts found by the FTT. The points raised largely focused on the FTT having failed to make a finding that the vehicles were designed solely for use by disabled persons. But that is a conclusion which is not one of primary fact, but one derived from an analysis of the primary facts concerning the objective characteristics of the scooters, an analysis that depends on the proper application of the law.

88. Such an analysis is not capable of challenge only on *Edwards v Bairstow* grounds. As we have described, the FTT's conclusion has, in our judgment, been vitiated by the errors of law we have identified. No *Edwards v Bairstow* challenge to the FTT's findings of fact is necessary. Accordingly, as the premise for HMRC's challenge under Ground 6 does not exist, it is unnecessary for us to consider that ground in any detail.

**Summary**

89. In summary our reasons for this decision are as follows:

**Ground 1**

(1) The FTT was correct as a matter of principle in its application of GIR 3. The two headings 8703 and 8713 are not mutually exclusive. It is possible in a

given case that a vehicle may fall under both headings. If so, GIR 3 would be applied to determine the appropriate heading.

**Grounds 2, 3 and 4**

(2) To be classified under 8713 the vehicle must be solely designed for disabled persons. In *Invamed CJEU,* the CJEU decided the term disabled in this context means a non-marginal limitation on the ability to walk. That is a wider definition than the narrow definition of disability applied before.

(3) The question of intended design is answered based on the objective characteristics of the product. Actual use is relevant evidence but not determinative.

(4) The question to be determined is not whether the vehicles are designed for disabled persons but rather whether they are designed solely for those persons and not for able-bodied persons as well.

(5) The FTT erred in principle in holding that if the design did not confer advantages compared to walking for the able-bodied, that indicated that the vehicle was not designed for able-bodied persons as well as disabled persons. The FTT also erred in its First Decision in looking for features which afforded extra advantages for the able-bodied.

(6) The design of these scooters allows an able-bodied person to use the scooter in preference to walking if they choose to. Where a vehicle's intended design affords the able-bodied person the same facility for mechanised travel as the disabled person then that, without more, would lead to classification under 8703.

(7) In such a case the right approach is to consider whether there are features which detract sufficiently from use by able-bodied persons in order to justify a conclusion that the vehicle was not designed for those persons as well as for disabled persons but was solely designed for disabled persons. The three disadvantages identified by the FTT were not sufficient to amount to material countervailing disadvantages. Therefore the vehicles had to be regarded as designed for able-bodied persons as well as for those who are disabled and as such those vehicles could not be correctly classified under heading 8713. The only classification they fall under is heading 8703.

**Ground 5**

(8) Although it is clear that numerous sources, such as the HSENs and CNENs, classify mobility scooters under heading 8703 rather than under heading 8713, those materials are non-binding. Not only that, they are based on a different, and narrower, approach to the definition of disability than the one provided for by the CJEU in *Invamed CJEU*. The FTT made no error of law in its consideration of those materials.

**Ground 6**

(9) It is unnecessary to consider HMRC's *Edwards v Bairstow* challenge.

**Decision**

90. HMRC's appeal is allowed. We have found that the FTT erred in law and we have set aside and re-made the FTT's decision so as to conclude that the electric mobility scooters that are the subject of this appeal are classified under heading 8703 of the Combined Nomenclature and not under heading 8713.

**Mr JUSTICE BIRSS**

**UPPER TRIBUNAL JUDGE ROGER BERNER**

**RELEASE DATE: 29 September 2018**

## ANNEX A

Technical specifications for the models considered by the FTT:

| Name | Model | Tech specs | Manual | Speed | Weight | Dimensions |
|---|---|---|---|---|---|---|
| Roma Medical | Altea (Pihsiang) | 7/J/2388 | 7/J/2404 | 6 kph | 32 kgs | 105 l x 55 w x 92 h |
| Roma Medical | Capri (Pihsiang) | 7/J/2420 | 7/J/2438 | 6 kph | 34 kgs | 96 l x 55 w x 90 h |
| Roma Medical | Whisper (Pihsiang) | 7/J/2450 | 7/J/2468 | 6.5 kph | 33 kgs | 102 l x 43 w x 87 h |
| Roma Medical | Cameo 3 (Pihsiang) | 7/J/2480 | 7/J/2510 | 6 kph | 43 kgs | 95 l x 56 w x 84 h |
| Roma Medical | Cameo 4 (Pihsiang) | 7/J/2530 | N/A | 6 kph | 43 kgs | 100 l x 56 w x 84 h |
| Roma Medical | Paris (Pihsiang) | 7/J/2546 | 7/J/2564 | 6 kph | 56 kgs | 105 l x 56 w x 88 h |
| Roma Medical | Napoli (Pihsiang) | 7/J/2586 | 7/J/2604 | 6 kph | 51 kgs | 109 l x 66 w x 92 h |
| Roma Medical | Sovereign 4 (Pihsiang) | 7/J/2616 | 7/J/2634 | 6 kph | 82 kgs | 125 l x 60 w x 94 h |
| Roma Medical | Perrero (Pihsiang) | 7/J/2654 | 7/J/2672 | 10 kph | 94 kgs | 128 l x 60 w x 121 h |
| Roma Medical | Deluxe (Pihsiang) | 7/J/2688 | 7/J/2708 | 6 kph | 80 kgs | 130 l x 58 w x 100 h |
| Roma Medical | Cadiz (Pihsiang) | 7/J/2728 | 7/J/2748 | 12 kph | 100 kgs | 130 l x 64 w x 112 h |
| Roma Medical | Torino | 7/J/2769 | 7/J/2787 | 12 kph | 140 kgs | 136 l x 68 w x 127 h |
| Roma Medical | Monza | 7/J/2807 | 7/J/2826 | 12 kph | 129 kgs | 145 l x 66 w x 110 h |
| Roma Medical | Milan | 7/J/2842 | 7/J/2862 | 13 kph | 140 kgs | 143 l x 70 w x 112 h |
| Roma Medical | Cordoba | 7/J/2874 | 7/J/2894 | 12 kph | 140 kgs | 130 l x 69 w x 130 h |
| Roma Medical | Traverso | 7/J/2914 | 7/J/2934 | 12 kph | 150 kgs | 160 l x 73 w x 162 h |
| Drive | Rio 3 | 8/J2/2950 | N/A | 6 kph | 37 kgs | 99 l x 55 w x 89 h |
| Sunrise | Little Star | 8/J2/2965 | N/A | 6 kph | 35 kgs | 96 l x 50 w **h |
| Sunrise | Little Gem | 8/J2/2967 | N/A | 6.4 kph | 40 kgs | 98 l x 58 w |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | x ** h |
| Sunrise | Pearl | 8/J2/2972 | 8/J2/2973 | 6 kph | 52 kgs | 103 l x 56 w x ** h |
| Sunrise | Sapphire | 8/J2/3011 | 8/J2/3015 | 6.4 kph | 79 kgs | 121 l x 59 w x ** h |
| Sunrise | Sapphire LS | 8/J2/3054 | N/A | 6 kph | 52 kgs | 122 l x 53 w x ** h |
| Sunrise | Emerald | 8/J2/3060 | 8/J2/3061 | 9.5 kph | 72 kgs | 122 l x 55 w x ** h |
| Sunrise | Diamond | 8/J2/3100 | N/A | 12.5 kph | 106 kgs | 130 l x 64 w x ** h |
| Sunrise | Elite XS | 8/J2/3102 | N/A | 12 kph | 87 kgs | 138 l x 67 w x ** h |
| Electric Mobility | Ultralite 355 XL | 8/J2/3104 | N/A | 6 kph | 44 kgs | 109 l x 52 w x 96 h |
| Electric Mobility | Liteway 3 | 8/J2/3105 | N/A | 6.4 kph | 48 kgs | 104 l x 55 w x 93 h |
| Electric Mobility | Liteway 4 | 8/J2/3106 | N/A | 6.4 kph | 48 kgs | 104 l x 55 w x 93 h |
| Electric Mobility | Liteway 6 | 8/J2/3107 | N/A | 9.6 kph | 63 kgs | 120 l x 59 w x 93 h |
| Electric Mobility | Liteway 8 | 8/J2/3108 | N/A | 12.4 kph | 82 kgs | 120 l x 59 w x 122 h |
| Electric Mobility | Rascal 388 | 8/J2/3109 | N/A | 6.4 kph | 87 kgs | 125 l x 54 w x 104 h |
| Electric Mobility | Rascal 388 XL | 8/J2/3110 | N/A | 9.8 kph | 85 kg | 125 l x 54 w x 110 h |
| Electric Mobility | Rascal 850 | 8/J2/3112 | N/A | 12.8 kph | 106 kg | 127 l x 65 w x 124 h |
| Electric Mobility | Rascal 600 T | 8/J2/3113 | N/A | 6.4 kph | 93 kg | 117 l x 64 w x 98 h |
| Electric Mobility | Rascal 600 F | 8/J2/3114 | N/A | 6.4 kph | 100 kg | 123 l x 64 w x 98 h |
| Electric Mobility | Rascal 889 | 8/J2/3115 | N/A | 12.8 kph | 149 kg | 146 l x 73 w x 131 h |
| Electric Mobility | Ultralite 380/480 | 8/J2/3117 | N/A | 6 kph | 37 kg | 96 l x 51 w x ** h |
| Invacare | Solar | 9/J3/3178 | 9/J3/3182 | 8 kph | 44 kgs | 105 l x 48 w x 68 h |
| Invacare | Lynx | 9/J3/3205 | 9/J3/3207 | 6 kph | 49 kgs | 101 l x 50 w x 82 h |
| Invacare | Leo | 9/J3/3265 | 9/J3/3269 | 8 kph | 83 kgs | 122 l x 59 w x 93 h |
| Invacare | Taurus | 9/J3/3336 | 9/J3/3340 | 8 kph | 84 kgs | 123 l x 57 w x 90 h |
| Invacare | Auriga | 9/J3/3362 | 9/J3/3368 | 6.4 kph | 88 kgs | 122 l x 61 w x 107 h |

| | | | | | | |
|---|---|---|---|---|---|---|
| Invacare | Orion | 9/J3/3431 | 9/J3/3435 | 10 kph | 71 kgs | 127 l x 63 w x 100 h |
| Invacare | Meteor | 9/J3/3500 | 9/J3/3505 | 12.8 kph | 132 kgs | 137 l x 65 w x 104 h |
| Invacare | Comet | 9/J3/3566 | 9/J3/3570 | 12.8 kph | 136 kgs | 147 l x 66 w x 99 h |
| Days Medical | Strider Maxi 4 | 8/J2/3167 | N/A | 12 kph | N/K | 144 l x 65 w x 119 h |
| Days Medical | Midi 4 Plus | 8/J2/3168 | N/A | 12 kph | N/K | 125 l x 62 w x 87 h |
| Days Medical | Midi 4 D | 8/J2/3169 | N/A | 6 kph | N/K | 117 l x 60 w x 48 h |
| Days Medical | Mini 4 | 8/J2/3170 | N/A | 6 kph | N/K | 110 l x 49 w x 91 h |
| Days Medical | Bootie 4 | 8/J2/3171 | N/A | 6 kph | N/K | 99 l x 51 w x 90 h |
| Days Medical | Bootie 3 | 8/J2/3172 | N/A | 6 kph | N/K | 94 l x 51 w x 90 h |
| Drive | Rio 3 Lite | 8/J2/2951 | N/A | 6 kph | 37 | 100 l x 55 w x 89 h |
| Drive | Rio 4 + | 8/J2/2953 | N/A | 6 kph | 47 | 104 l x 48 w x 88 h |
| Drive | Prism 4 | 8/J2/2955 | N/A | N/K | 48 | 104 l x 56 w x 83 h |
| Drive | Neo 4 | 8/J2/2958 | N/A | 6 kph | 80 | 126 l x 58 w x 100 h |
| Drive | Monami Vitesse 8 | 8/J2/2960 | N/A | 12 kph | 79 | 125 l x 57 w x 94 h |
| Drive | Mercury GT | 8/J2/2962 | N/A | 12 kph | 168 | 156 l x 74 w x 137 h |
| Drive | Regatta | 8/J2/2964 | N/A | 12 kph | 117 | 146 l x 67 w x 114 h |