TC01194

Appeal number: LON/2008/7049
LON/2007/7031

CUSTOMS DUTIES – tariff classification under Combined Nomenclature – high speed camera – whether "digital camera" under subheading 8525 80 30 or "video camera recorders – only able to record sound and images taken by the television camera" under subheading 8525 80 91 – repayment claim by Appellant – claim by Appellant that binding tariff information wrongly classified goods – camera properly classified as "digital camera" – appeal allowed

FIRST-TIER TRIBUNAL

TAX

PHOTRON EUROPE LIMITED **Appellant**

- and -

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

TRIBUNAL: EDWARD SADLER (TRIBUNAL JUDGE)
DAVID E WILLIAMS CTA

Sitting in public at 45 Bedford Square, London WC1 on 8 to 10 March 2011

Valentina Sloane, counsel, instructed by Arle House Limited, advisers, for the Appellant

Andrew Macnab, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Photron Europe Limited ("the Appellant") against two decisions of The Commissioners for Her Majesty's Revenue and Customs ("the Commissioners") relating to the tariff classification, for the purposes of customs duties, of specialist high speed camera products imported into the European Union by the Appellant.

2. In summary, the Commissioners contend that the cameras in question fall to be classified for customs duty purposes as video camera recorders, and that accordingly customs duty at the rate of 4.9 per cent is payable on import; the Appellant contends that the cameras fall to be classified as digital cameras, so that no customs duty is payable on import of the cameras. We are required to determine which of these classifications is correct, from which will follow our determination as to whether or not the two decisions made by the Commissioners stand.

3. The two decisions of the Commissioners against which the Appellant appeals are as follows:

(1) On 2 February 2007 the Appellant applied to the National Duty Repayment Centre of the Commissioners claiming repayment of customs duty paid on the importation of the Appellant's Fastcam APX range of cameras during the period 27 October 2004 to 30 August 2006. On 22 February 2007 the Commissioners informed the Appellant that the repayment claim would not be allowed pending the outcome of discussions by the Customs Code Committee on the correct tariff classification of the cameras (the Customs Code Committee is the body, with representatives from the customs authorities of each member state, which formulates the views of the European Union on product classification). At the request of the Appellant that decision was reviewed by the Commissioners, and that review resulted in the Commissioners, on 4 April 2007, upholding the original decision.

(2) On 30 July 2007 the Appellant applied to the Commissioners for a binding tariff information ("BTI") in respect of two cameras (the 1024 PCI Fastcam-X and the 512 PCI Fastcam-X models), submitting that the correct tariff classification was as "digital cameras" under subheading 8525 80 30 of the Combined Nomenclature classification. On 16 November 2007 Mr David Harris of the Tariff Classification office of the Customs and International Duty Liability office of the Commissioners informed the Appellant that the Commissioners were classifying the cameras under subheading 8525 80 91 of the Combined Nomenclature classification as "video camera recorders – only able to record sound and images taken by the television camera" and BTI notifications on that basis were issued by the Commissioners on 16 November 2007. The Appellant applied for that decision of the Commissioners to be reviewed, and since the Commissioners were unable to complete the review within the statutory review period, the original decision was deemed to have been confirmed. The Appellant's appeal is against that deemed confirmed decision.

4. Under the relevant provisions of the Finance Act 1994 as it applies to a case such as this where proceedings were commenced prior to 1 April 2009, the tribunal has full appellate jurisdiction (and not merely a supervisory jurisdiction) in relation to the matters under appeal in this case, which allows us to quash the decisions in question of the Commissioners and to substitute our own decision.

5. In summary our decision is as follows:

(1) The correct tariff classification of the Appellant's Fastcam cameras which are the subject of this case is under the Combined Nomenclature classification heading 8525 80 30 ("Digital cameras");

(2) Accordingly, we allow the Appellant's appeal against the decision of the Commissioners (paragraph 3(1) above) not to allow repayment of customs duty paid by the Appellant on the importation of the Appellant's Fastcam APX range of cameras during the period 27 October 2004 to 30 August 2006, and we direct that such duty is repaid forthwith;

(3) We also allow the Appellant's appeal against the decision of the Commissioners (paragraph 3(2) above) to issue BTI notifications on 16 November 2007 classifying the Fastcam cameras in question under heading 8525 80 91 of the Combined Nomenclature classification, and we direct that the Commissioners issue in substitution BTI notifications classifying the Fastcam cameras in question under the subheading 8525 80 30 of the Combined Nomenclature classification**,** such substituted notifications to take effect from the same effective date, and to run for the same period, as the original notifications.

The relevant law

6. The parties are in agreement as to the law which is to be applied in this case. Within the European Union there is a harmonised system of customs duties applicable to all member states, so that we look to European Union law in determining a matter of the correct classification for customs duty purposes of imported goods. Since the European Union is a party to the International Convention on the Harmonised Commodity Description and Coding System, the basis of classification is derived from wider international law, but it is not necessary to look beyond the classification provided for in the relevant European Union Council Regulations.

7. Article 1 of Council Regulation 2658/87 and Article 20.3 of Council Regulation 2913/92 provide for the rates of customs duties payable on goods imported into the European Union to be determined on the basis of the Combined Nomenclature ("CN"), which is a system whereby all products are classified under headings and sub-headings, and each classification is given an eight-digit number or code (or, in some instances, but not the present, a ten-digit number). For each such classification it is specified whether the goods are free of duty or, if not free of duty, the rate at which customs duty is payable applied to the value of the imported goods in that classification.

8. Article 12 of Council Regulation 2913/92 requires customs authorities in member states to issue a BTI upon the written request of an importer determining the tariff

classification of the goods specified and described in such a request and such BTI binds customs authorities in all member states for a period of six years provided that the importer who holds the BTI can prove that the goods imported correspond in every respect to the goods described in the BTI. A BTI is annulled where it is based on inaccurate or incomplete information supplied by the applicant importer. A BTI ceases to be valid in certain circumstances, for example where there is a change in the relevant CN classification or where it is no longer compatible with the interpretation of the relevant CN classification by reason of a ruling of the European Court of Justice or an amendment to the explanatory notes to the CN classification in question. Thus the BTI gives an importer the assurance that, for a six-year period, he can import the goods described in the BTI into any member state within a specified CN classification (and therefore at a specified rate of duty, or free of duty) without having to re-visit on each occasion of import the question of the correct tariff classification of the goods.

9. The CN is amended from time to time. Prior to January 2007 the CN classified video cameras and digital cameras within Chapter 85 of the CN, under the CN code 8525 40 with the sub-heading "Still image video cameras and other video camera recorders; digital cameras". Within this sub-heading there was further classification: "Still image video cameras; digital cameras – digital cameras" were given the CN code 8525 40 11, and were free of duty; "Other video camera recorders – only able to record sound and images taken by the television camera" were given the CN code 8525 40 91. (As we mention below, in October 2006 the Netherlands customs authorities issued a BTI to the Appellant determining that one of their Fastcam camera models was classified within 8525 40 11.)

10. With effect from 1 January 2007 Commission Regulation 1549/2006 amended Chapter 85 of the CN. Chapter 85 has the heading: "Electrical Machinery and Equipment and part thereof; Sound Recorders and Reproducers, Television Image and Sound Recorders and Reproducers, and parts and accessories of such articles". The sub-heading "Television cameras, digital cameras and video camera recorders" is classified under the CN code 8525 80, and within that sub-heading there is further sub-classification, with "Digital cameras" given the CN code 8525 80 30 (free of duty) and "Video camera recorders – only able to record sound and images taken by the television camera" given the CN code 8525 80 91 (with duty at the rate of 4.9 per cent). It should be noted that there is a further sub-classification: "Video camera recorders – other" given the CN code 8525 80 91 (with duty at the rate of 14 per cent), but it is not the Commissioners' case that the Appellant's products fall within this classification. (Neither party contends that there is any material significance, for the purposes of this appeal, in the changes taking effect from 1 January 2007.)

11. Chapter 85 of the CN falls within Section XVI of the CN (Machinery and Mechanical Appliances; Electrical Equipment). Each Section has Notes which must be applied in the process of classifying goods within that Section according to the CN codes. Note 3 of Section XVI is as follows:

> "Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other

> machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function."

12. Further, Section I of the CN specifies the "General rules for the interpretation of the Combined Nomenclature" (the "GIRs"). The GIRs must be applied in the process of classifying goods according to the CN codes. In the present case the parties are agreed that the only relevant rules in the GIRs are Rule 1 and Rule 6.

13. Rule 1 of the GIRs is as follows:

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

14. Rule 6 of the GIRs is as follows:

> "For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

15. The European Commission issues Explanatory Notes to the CN (known as "CNENs") which are published in the Official Journal of the European Union. They do not have the force of law and cannot alter the meaning of the CN classifications, but are regarded as an important aid to the interpretation of the meaning and scope of the classification headings to which they relate. On 23 October 2007 the European Commission issued the following Explanatory Notes in relation to subheadings 8525 80 30 (Digital cameras) and 8525 80 91 (Video camera recorders):

> "**8525 80 30 Digital Cameras**
>
> Digital cameras of this subheading are always capable of still image recording, whether on the internal storage medium or on interchangeable media.
>
> Most cameras of this subheading have the design of a traditional photographic camera and do not have a foldable viewfinder.
>
> These cameras may also have video-capture capability to record sequences of video. Cameras remain classified in this subheading unless they are capable, using the maximum storage capacity, of recording, in a quality of 800 x 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video.
>
> Compared to the video camera recorders of subheadings 8525 80 91 and 8525 80 99, many digital cameras (when functioning as video cameras) do not offer an optical zoom function during video recording.

Unaffected by the storage capacity, some cameras automatically terminate the recording of video after a certain period of time.

8525 80 91 and 8525 80 99 Video camera recorders

Video camera recorders of these subheadings are always capable of recording sequences of video, whether on an internal storage medium or on interchangeable media.

In general, the digital video camera recorders of these subheadings have the design which differs from digital cameras of subheading 8525 80 30. They often have a foldable viewfinder and are frequently presented together with a remote control. They always offer an optical zoom function during video recording.

These digital video camera recorders may also have still image recording capability.

Digital cameras are excluded from these subheadings if they are not capable, using the maximum storage capacity, of recording, in a quality of 800 x 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video"

16. On 19 October 2007 (and published on 23 October 2007, together with the CNEN quoted above) the European Commission issued a Regulation (1231/2007) which classified certain specific goods under the particular CN codes set out in the Regulation, with reasons for the classification. Included in the Regulation are two products described as digital cameras for capturing and recording high quality still images, each also with the ability to record video (in one case for up to 11 minutes and in the other for up to 42 minutes, in each case at 30 frames per second). Both cameras are classified as digital cameras under code 8525 80 30 on the basis that the principal function of the cameras is the capturing and recording of still images (with reference to Note 3 of Section XVI). By contrast, a digital video camera equipped with a foldable viewfinder and a microphone input and an audio-video output, which could record still images and up to 120 minutes of video at 30 frames per second is classified as a video camera recorder under code 8525 80 91, on the basis that its principal function is the capturing and recording of video (including sound) and that it has an optical zoom function which can be used during video recording.

The background events to the Appellant's appeals and subsequent matters

17. It is helpful to an understanding of this case to know of the events which led to the Appellant's appeals and of the subsequent (and consequential) action on the part of the Commissioners and the Customs Code Committee. In our view certain of the procedures adopted by the Commissioners are open to criticism, a matter which we return to following the reasons given for our decision (see paragraphs 100 to 103 below).

18. On 13 October 2006, upon a request made to them by the Appellant, the Netherlands customs authorities issued a BTI classifying the Appellant's high speed cameras (model Ultima Fastcam APX-RS) as a digital camera (free of duty) under

code 8525 40 11 (this was on the basis of classification codes before the amendment to Chapter 85 of the CN effective from 1 January 2007).

19. Prior to the issuing of the BTI, the Appellant had (mistakenly) imported its high speed cameras into the UK under the code classification for television cameras (dutiable at the rate of 4.9 per cent). After the BTI was issued the Appellant claimed from the Commissioners repayment of the duty mistakenly paid on those imported goods. Two such claims were made in October 2006, and both claims were accepted by the Commissioners, and the duty repaid in November 2006.

20. As mentioned, with effect from 1 January 2007 the classifications within Chapter 85 of the CN, as they related to digital cameras and video camera recorders, were amended.

21. On 2 February 2007 the Appellant submitted a third claim for repayment of duty paid on the import of its Fastcam APX models of camera – the claim which resulted in the decision of the Commissioners which is the subject of this appeal, as set out in paragraph 3(1) above. That claim related to importations made during the period 27 October 2004 to 30 August 2006, that is, before the BTI was issued by the Netherlands customs authorities.

22. From the correspondence between the Appellant and the Commissioners in relation to that third claim, it appears that the Commissioners were not satisfied that the Netherlands customs authorities had correctly classified the Appellant's high speed cameras when issuing the BTI, and in consequence had brought the matter before the Customs Code Committee for its consideration. The Commissioners also pointed out that the importations in relation to which that third claim for repayment was made pre-dated the BTI, and so the Commissioners were not compelled to apply the BTI in respect of those importations.

23. In the meanwhile, the Appellant began proceedings before this tribunal, lodging its appeal in relation to the repayment claim on 11 April 2007

24. The matter was considered by the Customs Code Committee at its 428th meeting in July 2007. The eventual result of that meeting was the Regulation and CNEN both published on 23 October 2007 (see paragraphs 15 and 16 above).

25. On 30 July 2007 the Appellant applied to the Commissioners for a BTI in respect of two models of its high speed Fastcam cameras. It is the Commissioners' decision to issue a BTI in November 2007 (that is, after the publication of the 23 October 2007 Regulation and CNEN) classifying the cameras as video camera recorders under the CN code 8525 80 91 (rather than as digital cameras, as requested by the Appellant) which is also the subject of this appeal, as set out in paragraph 3(2) above.

26. The Appellant began its proceedings before this tribunal in relation to that decision of the Commissioners by lodging its appeal on 9 April 2008.

27. In early 2008 the Commissioners determined to bring once more before the Customs Code Committee the issue of the classification of high speed cameras, with

the purpose of having such cameras classified as video camera recorders under CN code 8525 80 91.

28. In preparation for, and by way of support of, their case to the Customs Code Committee the Commissioners sought and obtained a report from a Mr Bevan John Clues of the consultancy firm of Clues & Co, dated 18 March 2008 ("the Clues Report"). Mr Clues is a member of the Institution of Electrical Engineers, a member of the Academy of Experts and a member of the Chartered Institute of Arbitrators. It will be necessary for us to return to the Clues Report below, but for present purposes it is sufficient to note the following:

(1) It states that since 1990 Mr Clues has carried out numerous forensic investigations and examinations and has given expert evidence in civil and criminal proceedings;

(2) It states that since 1990 Mr Clues has worked as a consultant in many parts of the world on the design, development, testing and installation of telecommunications systems including radio, telephone, facsimile, television, telex and data networks and also in internet system design and operation, computer systems and audio/visual systems;

(3) It provides an opinion as to the functional characteristics of high speed cameras imported by the Appellant, and it states that in the course of the preparation of the Clues Report Mr Clues met employees of the Appellant and was given a demonstration of the Appellant's Fastcam APX high speed cameras;

(4) In considering the function and purpose of the cameras it states that "these cameras are intended to be used to capture a sequence of images which occur in relatively short periods of time e.g. a car crash, where it is required to be able to slow down the playback rate in order that the sequence of events can be analysed in slow motion. It is also possible, using the interface card, to download a recorded video sequence onto a host PC. Using suitable software it is possible to produce a video sequence suitable for playing on a computer, e.g. MPEG format. It is also possible to take individual frames or sequences of frames and to make further analysis and measurements."

(5) It concludes that "the practical everyday use that will be made of these products is to take a high speed video sequence of an event for subsequent playback at a lower frame rate as a video sequence".

(6) It further concludes that "the Photron camera is consistent with the wording of the CNEN 8525 80 30 Digital Cameras and is not consistent with 8525 80 91 Video Cameras. However, it has to be said that the function of the Photron cameras do not fall within the wording of the CNENs in any meaningful way. The cameras are clearly video cameras. The authors of the CNEN could not have envisaged a camera of the type produced by Photron when these were written."

29. In October 2008, in preparation for the hearing of the Appellant's appeal, Mr Andrew Hilton, a director of the Appellant, and Mr Russell Brown, the technical manager of the Appellant, produced witness statements of the evidence they intended to give in the appeal proceedings. The detail of their evidence is referred to below,

but it is sufficient to mention here that both witness statements make extensive reference to the Clues Report, challenging in the Clues Report: the description of the way in which the Fastcam cameras function; the purposes for which they are used; the distinction between the technicalities of recording images for video playback and still images; the digital formats in which images may be stored in the cameras; and the different qualities of the images which make up a video sequence as against those which are high quality still images. Copies of these witness statements were served on the Commissioners.

30. In December 2008 the Commissioners formally brought before the Customs Code Committee the question of the classification of high speed specialist cameras such as the Fastcam cameras of the Appellant. The submission by the Commissioners to the Customs Code Committee notes that the appeals section of the Netherlands customs authorities has held that such cameras are digital cameras within CN code 8525 80 30; that the cameras meet the terms of the CNEN to code 8525 80 30 so that "a simple reading of the text would lead to the goods being classified as a digital camera"; that the cameras record images at extremely high speeds for subsequent analysis; that a video sequence comprises a sequence of still images displayed in quick succession; and that the UK view is that the cameras, by recording images at very high speeds, are capturing video sequences. The submission gives a physical description of the cameras, and for technical information of the product refers to the Appellant's website and to the Clues Report, which is appended to the submission. There is no reference in the submission to the extensive challenges to the Clues Report made in the witness statements of Mr Hilton and Mr Brown.

31. In October 2009, following a meeting of the Customs Code Committee, the Committee issued a "classification statement". The published summary report of the Customs Code Committee (Mechanical/Miscellaneous Sector) states as follows:

> "A national tribunal [this is thought to be a reference to the decision of the appeals section of the Netherlands customs authorities] has found that the product is to be classified as a digital camera and not a video camera.
>
> The product is capable of capturing and storing a sequence of images which, after further processing, can be viewed either as individual images (JPEG) or as a video sequence (MPEG). The images are of a higher resolution than those captured by "normal" video cameras. The video sequence is of a limited duration compared to "normal" video cameras depending on the storage capacity of the individual product.
>
> A discussion on what constitutes a video sequence took place. Does the number of files stored by the camera matter? Does the format of the files influence the classification?
>
> Following some minor textual amendments, a classification statement as reproduced in Annex XII was adopted."

It should be noted that the Appellant's cameras do not store images as a video sequence in the MPEG format (see below) – this error (of some significance to the classification issue) appears to be based on statements in the Clues Report –

statements which were challenged in the witness statements of the Appellant's witnesses.

32. The classification statement in Annex XII to the summary report of the Customs Code Committee is headed: "Statement on the classification of "High Speed Camera", and is as follows:

> "A rectangular shaped camera comprising a lens and electronic circuitry, including internal memory. The lens is mounted on the front and a cable is connecting the camera to an automatic data-processing (ADP) machine. The camera can also operate in stand-alone mode.
>
> The product is designed to capture a sequence of images at a shutter rate of 1000 frames per second at a maximum resolution of 1024 x 1024 or 109500 frames per second at a lower resolution of 128 x 16. The captured images may be viewed individually or played back as a slow motion video. They may be subject to analysis in a laboratory or similar environment for studying, for example, ultra-high speed phenomena such as automotive crash test.
>
> Given that the product is designed to capture, at high speed, images of a given event for subsequent viewing as a video sequence at a lower frame rate, it constitutes a video camera recorder. Therefore, classification as a digital camera of CN code 8525 80 30 is excluded.
>
> By virtue of GIR 1 and 6, the product is to be classified under CN code 8525 80 91 as a video camera recorder only able to record sound and images taken by the television camera. (see also the CN Explanatory Notes to subheading 8525 80 99)"

It will be noted that, in this classification statement, the stated function of the cameras ("designed to capture, at high speed, images of a given event for subsequent viewing as a video sequence at a lower frame rate") is directly derived from the terms of the Clues Report. The Appellant's witnesses, in their witness statements, had challenged such a statement as a proper description of the nature and function of the Appellant's Fastcam cameras.

33. The classification statement is not European Union legislation and in that regard differs from a CN Explanatory Note. It is, perhaps, an indication of the form of legislation which the Customs Code Committee might, were it minded to do so, request the Commission to promulgate by way of a CNEN or classification Regulation. According to the Commissioners they agreed that a classification statement "was preferable to avoid the delay in preparation of a Commission Regulation". Be that as it may, a classification statement is not binding on us, but we should pay careful regard to its terms. As we mention below, the Appellant contends that since the function of the cameras as stated in the classification statement does not accord with that of the Appellant's cameras, it is not in any event determinative of the classification of those cameras.

The evidence

34. In evidence before us we had two lever arch files of documents comprising the correspondence between the parties in relation to the matters under appeal; the papers relating to the submissions to and deliberations of the Customs Code Committee; the Hardware Manual for the Appellant's Fastcam-APX RS model of camera (which runs to some 150 pages) and the User's Manual for the software supplied with that model of camera (which also runs to some 150 pages); product datasheets for a range of models of the Appellant's cameras (each datasheet – essentially a promotional document – summarises the technical specification of the camera in question and its performance capabilities); a number of academic papers and other material demonstrating the use and application in scientific and industrial research and product design and development of high speed imaging as provided by the Appellant's Fastcam cameras; extracts from the Appellant's website; and the Clues Report.

35. We heard evidence from two witnesses for the Appellant, Mr Andrew Thomas Hilton, a director of the Appellant, and Mr Russell Norton Brown, the European technical manager of the Appellant. As mentioned, each of Mr Hilton and Mr Brown had prepared a witness statement, and they each gave oral evidence, including in response to Mr Macnab's cross-examination.

36. Mr Hilton has worked in the high speed imaging industry since 1983 and has extensive knowledge of high speed imaging techniques, the application areas in which high speed imaging systems are applied, and the users of such systems. He has presented technical papers on high speed imaging technology and applications at international conferences. He joined the Appellant in 2001. His evidence related to the uses and application of the Appellant's cameras by purchasers of the cameras; the nature of the "still camera" images recorded by the cameras as contrasted with the "continuous motion" video images recorded by video camera recorders; and the ability of the camera to store and play back images. As mentioned, Mr Hilton's evidence specifically challenged certain of the matters appearing in the Clues Report, both as to the technical description of the capabilities of the cameras and the principal function of the cameras.

37. Mr Brown has worked in the high speed imaging industry since 1990 as a micro electronic engineer and technical sales engineer and manager with experience in the aerospace and high speed digital camera industries. He joined the Appellant in 2002 and receives annual on-site training in Japan from the design engineers responsible for development of the Fastcam cameras at the associated company of the Appellant which manufactures the cameras. He provides the Appellant's customers with technical support and provides feedback to the manufacturer for future development of its camera products. Mr Brown's evidence related to the technical properties of the Fastcam cameras and contrasted those properties with the technical properties of cameras used for recording video sequences. He compared the high quality, crystal clear, still digital image required for specialist analysis (and the features required to record and store such an image – such as shutter mechanism, image storage formats, image scanning processes) with the digital images recorded and stored by a video camera recorder (and the different features required to record and store such images). Mr Brown's evidence contained a detailed challenge to the Clues Report, refuting

much of the technical analysis in that Report of the properties and functions of the Fastcam cameras, and identifying errors in that Report where it purported to explain differences between the technical processes utilised in still imaging and those utilised in video recording.

38. By way of evidence in support of its case the Appellant also provided the tribunal with a demonstration of one of the cameras from its current range of Fastcam models. Regrettably the court facilities at 45 Bedford Square did not readily permit the staging of a simulated car crash or the firing of a ballistic weapon (two common research activities in which the cameras are used), and so we had to be content with the camera recording the rather less dramatic incident of a hammer hitting a nail into a piece of wood.

39. The camera was linked to a laptop computer which in turn was linked to a screen on which we could see the images recorded by the camera. The camera was set at an image resolution of 1024 x 1024 pixels and the image sensor was set to capture 1,000 images per second over a period of 10.918 seconds, with an exposure time for each image of 1/4,000th of a second. This resulted in 10,918 images or frames recording the hammer hitting the nail. Each of those images could be displayed as a separate image on the computer screen, but first those images were scanned as a slow motion sequence (at 5 images per second) to identify the particular images showing the hammer actually striking the head of the nail: 485 images were so identified, and each of those images was saved in the camera software loaded onto the computer in TIFF format, with each image numbered and also timed relative to the trigger signal given to the camera to begin the photographic sequence. From the 485 images displayed 108 images were further identified as those showing the exact moment of impact of hammer head on nail. Those 108 images were shown on the screen as "thumbnail" images. Several of those images were then shown "full size" on the screen, and, using the software supplied with the camera it was possible to make various calibrations and measurements from the individual images showing, for example, how much the nail moved into the wood, and the angle at which it did so. (When the camera is used for a specific piece of research the user will have his own software tailored to the subject of the research for the purpose of analysing the individual images.) The camera had no optical zoom facility (it is not practical to zoom in or out on a subject when images are captured at such speed), but once images were stored on the computer it was possible to zoom in or out in relation to each individual image.

40. We also saw, at the request of the Commissioners, short sequences from the "Gallery" on the Appellant's website demonstrating the facilities and functions of the cameras (for example, a bullet fired through a number of balloons filled with water). These were video sequences and could not be shown as individual still images. Mr Brown explained that these were sequences produced specifically for the website in compressed video format to enable them to be downloaded from the internet – that formatting could not be achieved or played on the software which comes with the camera.

41. For the Commissioners we had in evidence a witness statement of Mr D A Harris, a Higher Officer of the Commissioners employed in the Tariff Classification Service

of the Commissioners, with responsibility for the classification of goods within the Electrical, Mechanical, Medical and Scientific Sector of the Customs Tariff, and the officer who represent the United Kingdom at meetings of the Customs Code Committee. Mr Harris's evidence was not challenged by the Appellant, and therefore Mr Harris was not called to give oral evidence. His evidence related to the processes of the Customs Code Committee, and the distinction between a CNEN, a Regulation and a Classification Statement. Mr Harris also explained the sequence of events whereby the Commissioners had made submissions to the Customs Code Committee in 2008 and 2009 and the discussions which led to the issuing of the Classification Statement (that is, the matters we have set out in paragraphs 30 to 32 above).

42. The papers before us at the beginning of the hearing included the Clues Report and also a witness statement prepared by Mr Clues. When he opened his case in the course of the hearing Mr Macnab told us that the Commissioners no longer found it necessary to rely on the evidence of Mr Clues in making their case, since the tribunal had heard sufficient by way of evidence as to the technical specification and capabilities of the Fastcam cameras from the Appellant's witnesses. We have therefore disregarded Mr Clues's witness statement. We have, however, had regard to the Clues Report in reaching our findings and decision in this appeal, in part because the Clues Report was an integral part of the Commissioners' submissions to the Customs Code Committee which eventually resulted in the Classification Statement, and in part because the Appellant's witnesses, in challenging the Clues Report, threw helpful light on the issue in this case, namely the difference between a digital camera taking still images and a video recording camera taking a video sequence of images.

The findings of fact

43. From the evidence before us we make the findings of fact set out below.

44. The Appellant imports a range of models in its series of Fastcam cameras, and models are revised, and new models introduced, over time. There is no issue between the parties as to differences of character between the various models, all of which share the same fundamental technical properties and are used for similar purposes. We refer in the paragraphs which follow principally to the model "Ultima Fastcam APX-RS", whose User Manual was produced in evidence. Certain characteristics mentioned below may not be features of that particular model, but are nevertheless, from the evidence before us, characteristics generally of the Appellant's Fastcam cameras.

The features and characteristics of the Appellant's Fastcam cameras

45. The camera has an end-user price in excess of £50,000.00.

46. The camera's dimensions are 158.6mm (H) x 131.4mm (W) x 289.2mm (L), and it weighs 4.9kg. It comprises a camera lens and electronic circuitry with a cable connector.

47. The camera does not have a viewfinder and neither the lens nor the digital software provides a zoom function during the photographing process.

48. The camera does not record sound.

49. The camera records and stores images in digital format. It stores images only for so long as it is switched on. Recorded images captured during a photographic shoot are lost (and cannot be recalled) when it is switched off. To store images it is therefore necessary to connect the camera to a computer, onto which images are downloaded for storage and use. The camera is supplied with the proprietary software (Photron Fastcam Viewer – PFV) for this purpose which is loaded onto a personal computer, and that software can be used to control the camera from the computer for setting camera options and shooting photographs as well as for saving recorded images and processing, using and analysing images recorded by the camera. The imported product, for customs tariff classification purposes, comprises the camera together with the PVF software.

50. The camera has a 10-bit CMOS sensor which incorporates a global shutter which enables all the pixel values in an image to be captured at the same time (this is in contrast to a sensor with a rolling shutter, as generally found in video recording cameras, which captures pixels at different times – see below). This sensor/global shutter is a critical feature of a high speed camera: the fact that it captures all the pixel values at the same instant gives the high quality and blur-free "snapshot" still image essential for detailed quantitative analysis; it also allows that high quality image to be taken off the sensor (once recorded) and replaced by a new image for capture in very quick succession, so as to permit images to be captured at up to 250,000 frames per second.

51. The resolution at which images are recorded varies from 1,024 x 1,024 pixels maximum (giving the clearest image) to 128 x 16 (the poorest image). The speed at which images can be recorded (measured in frames per second) can be increased as the image resolution decreases: thus at a resolution of 1,024 x 1,024 pixels up to 3,000 frames per second can be recorded; at 128 x 16 pixels up to 250,000 frames per second can be recorded.

52. The camera can be equipped with 2GB, 8GB or 16GB of memory, and this determines the period during which the camera can record images and hence the total number of images it can record and store on any occasion. If the camera is recording images at maximum resolution at the rate of 3,000 frames per second, with 2GB of memory the camera can record for 0.7 of a second (recording 2,048 images) and with 16GB of memory 4.1 seconds (12,288 images). If the camera is recording at minimum resolution at the rate of 250,000 frames per second, with 2GB of memory it can record for 4.2 seconds (recording 1,048,576 images) and with 16GB of memory 25.2 seconds (6,291,456 images). The maximum period for which the camera can record images on any single occasion is 204.8 seconds (maximum resolution, 60 frames per second, and 16GB of memory, resulting in 12,288 images).

53. There is an electronic "trigger" which activates the camera (and another triggering device can turn it off). The "trigger" will be set for the purposes of the research being carried out: for example, if a simulated car crash is being photographed, the camera will be triggered at a moment immediately preceding the point of impact. The camera can be set to record a timed sequence of images as from the trigger point, or a single image at the trigger point.

54. Images recorded by the camera can be saved in a variety of industry-standard digital formats: BMP (Bitmap); TIFF (Tagged Image File Format); JPEG (Joint Photographic Experts Group) and PNG (Portable Network Graphics). All of these file formats are bitmap formats, suitable for still images, but not for video images. Images saved in these formats are not compressed, so that the quality of the image is retained. The camera does not save recorded images in MPEG (Moving Picture Experts Group) format, which is the digital format specifically designed for video replay where the priority is to maintain the smooth continuous reproduction of the video sequence. The camera can save recorded images as a single AVI (Audio Video Interleave) format file. This file type can be used for storage of still images in bitmap format or audio data.

55. Each image recorded and saved can be separately identified, captioned and viewed or reproduced. Each image can be displayed with the time at which it was taken (usually shown as the time elapsed (in milliseconds) from the triggering of the sequence). Once stored on the computer onto which it has been downloaded it can individually be edited (including magnified by a zoom feature) and used for whatever analysis or measuring purpose is required by the user.

56. The camera has the capability of playing back recorded images onto a monitor at between 2 and 30 frames per second (although a typical high specification computer is capable of replaying only 5 to 10 frames per second without skipping frames where the images are high resolution, because of the amount of detail (reflected in the high pixel numbers) in the individual images). This capability is used partly to check that the required process or event has been properly captured, and partly as a search facility to find the exact images required for the user's purposes. If the recorded images are played back at speed the resulting "moving image" has a "stuttering" quality which is detected by the human eye, but a user will generally be interested not in such a rolling sequence but in particular still images.

The features and characteristics of a video camera recorder

57. A professional quality video camera system capable of recording a continuous video image of superior image resolution and quality has an end-user price of approximately £3,000.00.

58. A video camera recorder records sound in conjunction with recording a video sequence.

59. A video camera recorder is equipped with a viewfinder. It has an optical zoom facility which can be used in the process of recording a video sequence.

60. A video camera recorder has either a CMOS sensor with a rolling shutter or an interlaced CCD sensor, both being sensors designed to record continuously, rather than to record individual images. The essence of these sensors is that the pixels are imaged at different times as the images are continuously scanned, and this gives a "smooth" or unbroken moving image when played back as a video sequence on a monitor or other viewing device with video format. In the case of interlaced sensors the image recorded is divided into odd and even horizontal lines scanned separately at speed, but a single "snapshot" image displayed on playback will have a "flicker" or "comb" effect as a consequence of this differential scanning process. In the case of CMOS sensors with a rolling shutter (a technology which is superseding interlaced CCD sensors) the image is not scanned on the basis of horizontal lines, but it is scanned on a "rolling" basis, so that all the pixels which make up the recorded image have not been captured at the same instant. In this case, a single "snapshot" image displayed on playback will be "skewed" by distortions as compared with the still image captured by a CMOS global shutter as used in the Fastcam cameras.

61. A video camera recorder should be viewed as an integral part of a video system which records images to a specified video standard for storage on a particular medium (tape or memory card) for playing back on a video viewing device. For this purpose all video camera recorders compress images to reduce the amount of data stored, and images in this compressed form are stored in MPEG format. This compression of images results in poorer quality "snapshot" images as compared with still images captured on a digital camera. The MPEG format for compressed images is specifically designed for video replay where the priority is to maintain the smooth continuous reproduction of the video sequence, albeit at the expense of the quality of the image. For this purpose it has special "compression" features and techniques, for example it identifies an object in a video frame and encodes that object, so that when it reappears in a subsequent video frame it is repositioned in that frame without further encoding.

62. The different shutter and recording process and the compressed storage of video images in MPEG format characterises the purpose of a video camera recorder, which is to record for playback a lengthy video sequence of smooth and continuous images where there is some sacrifice of quality of the particular image for the sake of the overall quality of the sequence as a motion or video image. A video camera recorder will usually have the capacity to record a continuous sequence of video for a period of at least 30 minutes.

The purposes for which the Fastcam cameras are used

63. The Appellant's Fastcam cameras are designed specifically for, and used in, the detailed analysis and quantitative measurement of scientific and industrial processes in the course of academic research and the development of engineering and industrial applications. The "Unique Selling Point" of the camera, as Mr Hilton stated in cross-examination by Mr Macnab, is the ability to record crystal clear images in very rapid succession, and, having lodged each image in the computer's memory, to clear it from the camera so that the next image can be captured without any significant loss of data.

64. The Appellant's distributors are obliged to inform the Appellant of the intended use of the cameras by their "end-user" customers. During the period April 2007 to March 2008 cameras supplied within Europe were, according to the information gathered in this way, used for the following purposes (the percentage figures indicating the proportion of total sales in that period attributable to the respective purposes):

Defence research	17%
Engineering analysis	15%
Automotive safety testing	13%
Particle image velocimetry	12%
Aerospace testing	11%
Materials science	10%
Fluid mechanics research	7%
Combustion analysis	5%
Other purposes	10%

During this period no cameras were supplied to customers carrying on business in broadcast or conventional motion picture recording applications.

65. Self-evidently the cameras are used to capture highly dynamic, and not static, events (a car crash at speed; a bullet leaving the barrel of a gun; the combustion processes in a diesel engine; the flow dynamics of liquids; the strain produced in the flexing of materials; the growth and collapse of bubbles within an electrochemical cell; aerospace products tested in a wind tunnel). The principal function of the camera in these different applications is to record still images of the highest quality taken at defined points in time so that there can be detailed measurement and analysis of the event being recorded, generally using specialist analysis and measurement software developed by the customer for his particular research activity (the Appellant does not supply such software). In some cases (for example in automotive safety testing) a number of cameras will be used to capture the event in question from different angles, and the triggering of the cameras will be synchronised so that the same instant is captured on all the cameras.

The parties' submissions

The Appellant's submissions

66. Miss Sloane, for the Appellant, submitted that in classifying the cameras we must seek their objective characteristics and properties and then, as required by GIR 1, look to the terms of the headings in the CN classification code and any relevant notes to

those headings to see under which heading the cameras, as so characterised, properly fell.

67. In the present case the relevant CN headings for consideration are "digital cameras" (8525 80 30) and "video camera recorders: only able to record sound and images taken by the television camera" (8525 80 91). These headings are to be interpreted as by "the intelligent businessman" (see *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch), at paragraph 28), and where, as in the present case, the headings do not precisely describe a product according to its objective characteristics and properties, the tribunal should look to the customary usage or meaning of the words used in the headings (see the decision of the Court of Justice in *Imexpo Trading* Case C-379/02 [2004] ECR I-9273).

68. The objective characteristics and properties of a product may be determined by identifying the intended principal use of that product (see the decision of the Court of Justice in *Neckermann Versand AG* Case C-395/93 [1994] ECR I-4027), provided that such intended principal use is inherent in the product (see the decision of the Court of Justice in *Ikegami Electronics (Europe) GmbH* Case C-467/03 [2005] ECR I-2389).

69. In the present case the principal purpose of the Appellant's cameras is to capture at speed by digital technology high quality still images which are stored and made available for viewing for the purposes of specialised industrial and academic applications. That principal purpose is inherent in the characteristics of the cameras, and all the features which are essential components of the cameras (special sensor and shutter; storage of images in uncompressed formats; the ability to record images at "trigger" points; the ability to display individual images and to attach data to each image) answer to that purpose. The principal purpose of a digital camera is to capture and store still images by the use of digital technology, and therefore it is correct to classify the Appellant's cameras under that heading.

70. By contrast, the primary function of a video camera recorder is to capture and store for viewing moving images. For this purpose a video camera recorder records images using shutter processes designed to facilitate viewing images as fluid moving images and stores images in special compressed formats to allow for a video sequence of many minutes. A video camera recorder records sound alongside the recorded images and has a zoom facility which can be used when recording images. These are characteristics which show the intended purpose of a video camera recorder. The Appellant's cameras do not have these characteristics.

71. The Appellant accepts that it is possible to play back the still images it has recorded and stored in rapid succession. The Appellant argues that that is no more than the playing back of still images, and is not the playing of a video sequence or a "movie". But even if it is regarded as such, where a product has more than one function, it must be classified according to the principal function, applying Note 3 to Section XVI of the Combined Nomenclature, and there can be no doubt that the principal function of the cameras is to record and store still images of a high quality – the playback facility could be removed, and although that would make the cameras

less convenient to use (in terms of isolating the exact images required), the principal purpose of the cameras would not be affected.

The Commissioners' submissions

72. Mr Macnab for the Commissioners submitted that the difference between the parties lies in what is to be regarded as the principal function of the Appellant's cameras – the Commissioners do not materially dispute the facts as to the objective characteristics and properties of the cameras or as to their use: they accept that the cameras take many images of high quality in rapid succession at precise and known intervals.

73. But the purpose of the cameras is to capture motion and changes, enabling the components of motion (speed, distance) to be measured qualitatively and quantitatively, so that an event can be seen in slow motion or measured as it is viewed. This purpose can be seen from the essential feature of the cameras, which is the capture of a sequence of images at defined intervals, so as to ensure that the vital instant is captured and the event or change observed and measured by reference to earlier or later images of the event or change. For this reason the cameras share the characteristics of a video camera recorder, the essence of which is the capture of movement, and should be classified as such. The function of a digital camera is to capture single, still images, in the sense of a snapshot of a single moment. That is not the function of the Appellant's cameras, and so they cannot be classified as digital cameras. There is no dual function, and so Note 3 to Section XVI is not in point in this case.

74. The Commissioners accept that the Appellant's cameras record images of much higher quality than those recorded by a standard video camera recorder, and at a far higher rate of frames per second, using sophisticated shutter and other technology, but those should be regarded as differences in quality, and not in inherent characteristics and properties, and therefore those distinctions are not relevant to the classification of the cameras.

75. Mr Macnab referred to material produced by the Appellant itself which indicate the "video camera" purpose of the Appellant's cameras. He pointed to the opening Preface to the Hardware Manual for the Fastcam-APX RS model camera, where the camera is stated as being "most useful to capture the image of high-speed moving subjects for subsequent slow-motion observation and motion analysis". He also pointed to references in the Appellant's marketing material which describe the cameras as "a video system".

76. He also cautioned against falling into the trap of seeking to ascertain the characteristics and properties of the cameras from the use which a user makes of the images once recorded by a camera. In any event, he argued that the Appellant had produced little evidence (and none by third parties) as to how the cameras are actually used – whether to view an event or change in slow motion or for quantitative analysis by reference to individual images.

Decision and reasons for decision

77. The approach we must take in order to determine the correct classification within the CN of the cameras with which this appeal is concerned is well-established. It is helpfully summarised in the Opinion of AG Kolkott in the *Ikegami Electronics* case, at paragraphs 33 to 36. After stating the primacy of the basic rule in Rule 1 of the GIRs (which requires that classification is to be made first according to the terms of the headings and the notes to the sections and chapters set out in the CN) and the similar rule in Rule 6 (requiring that the terms of any subheadings are likewise the primary basis of classification), she continues as follows:

> "35 The two relevant criteria for classification of an article are its material composition and its intended use. The intended use of an article is to be determined by recourse to objective criteria.
>
> 36 In classifying an article in the Combined Nomenclature the following steps must therefore be taken: (1) the intended use and material composition of the article must be precisely determined; (2) in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken (a) according to its intended use and (b) according to its material composition; (3) it must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters a definitive classification may be reached; if that is not possible then (4) in order to resolve the conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules (in the present case in particular Rule 3); (5) lastly, classification must be made under (a) a subheading of the Harmonised System and (b) a subheading of the Combined Nomenclature…."

78. The Court of Justice case law makes it clear that goods must be classified by reference to the objective characteristics and properties of those goods according to such characteristics and properties as they are ascertained from the CN headings and subheadings (with the aid, if required, of the CNENs). Thus, for example, the Court of Justice said as follows in its decision in Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financiën* [2005] ECR I-8151, at paragraph 47:

> "According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters."

79. In the *Intermodal Transports* case, the question was whether a particular vehicle fell to be classified under the heading "works trucks, self-propelled…of the type used in factories, warehouse, dock areas or airports for short distance transport of goods", or under the heading "tractors of the type used on railway station platforms". In that case the respective headings distinguished between the physical features or properties of the vehicles to be classified within each heading and also between the uses to which the vehicles were to be put.

80. In the present case the subheadings with which we are concerned are 8525 80 30, "Digital cameras" and 8525 80 91, "Video camera recorders – only able to record sound and images taken by the television camera", and therefore the use to which the goods are put is not a feature of the subheadings which have to be applied. However, it is clear from the Court of Justice case law that where the intended use of the goods is not part of the heading or subheading definition of those goods, but is nevertheless inherent in the characteristics of the goods, the objective characteristics and properties of the goods can be ascertained from intended use. Thus in Case C-395/93 *Neckermann Versand AG* [1994] ECR I-4027, the Court was required to decide whether particular garments were to be classified as women's pyjamas. It stated as follows (paragraphs 6 to 9):

> "The wording of heading 61.08 of the Common Customs Tariff ('women's or girls'…pyjamas,…knitted or crocheted') does not provide a definition. Nor is a definition of pyjamas to be found in the Explanatory Notes on the Common Customs Tariff or in the Explanatory Notes to the Nomenclature of the Customs Cooperation Council.
>
> In the absence of such a definition, the objective characteristic of pyjamas, which is capable of distinguishing it from other ensembles, can be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear.
>
> If that objective characteristic can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas.
>
> It follows that, for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which it is intended."

81. Turning to the circumstances of the Appellant's case, we note first that neither the relevant heading for CN code 8525 80 ("Television cameras, digital cameras and video camera recorders"), nor the relevant subheadings (8525 80 30, "Digital cameras", and 8525 80 91, "Video camera recorders – only able to record sound and images taken by the television camera") as such contain a description – they do not define or describe what a digital camera or a video camera recorder is. (We should mention that in referring to the relevant CN classification codes and CNENs we are referring to the version in operation since 1 January 2007 – as noted above, slightly different terms applied before that date, but neither party considered that the difference was material to this case.)

82. Some assistance is found in the CNENs for, respectively, digital cameras and video camera recorders (see paragraph 15 above). A digital camera is always capable of still image recording, whereas a video camera recorder is always capable of recording sequences of video; a digital camera may have video-capture capability to record sequences of video, but only if the video sequence is less than 30 minutes at a specified resolution and frame speed; a video camera recorder may have still image recording capability. There are different physical properties which distinguish the

two types of camera: a digital camera does not have a foldable viewfinder, whereas as video camera recorder may have such a viewfinder; a video camera recorder always offers an optical zoom function, whereas a digital camera (when functioning as a video camera) may not have such a zoom function.

83. Miss Sloane offered the view that the essential difference between a digital camera and a video camera recorder lies in their respective functions: the purpose of a digital camera is to capture images for viewing as still photographic images, whilst the purpose of a video camera recorder is to capture images for viewing as a video sequence – as a "movie". The still images captured and stored by the digital camera may be viewed in rapid succession (where they have been captured in rapid succession), but they will not give a true or high quality video sequence; conversely, a still frame or image may be isolated from a video sequence captured by a video camera recorder, but that will not be a true or high quality still image. In other words, although there may be some apparent overlap in functions, what a digital camera does best (and uniquely does it to the best standard) is capture and record in digital format still photographic images and what a video camera recorder does best (and uniquely does it to the best standard) is capture moving images for viewing as a video sequence. We agree that this provides a reasonable and effective definition of each type of camera: it is based on the objective characteristics and properties of the different cameras as ascertained from their respective uses; it is also consistent with the terms of the CNENs relative to each type of camera.

84. We now need to turn to the question of whether the Appellant's Fastcam cameras best answer to such definition of a digital camera or to such definition of a video camera recorder.

85. The Commissioners' case, as advanced by Mr Macnab, was straightforward: the Fastcam cameras take photographic images of events in motion at very high speeds to capture that motion for subsequent analysis, and those images can be viewed in slower motion for the purposes of that analysis – a moving image is captured for viewing as a video sequence. The cameras are therefore more correctly described as video camera recorders than as digital cameras.

86. On the basis of the evidence before us, including the demonstration we saw of the Fastcam camera in action, we do not agree. Whilst it is the case that the special properties of the Fastcam camera (in particular those properties which enable it to capture thousands of images per second at a high resolution and to store those images on a computer using the proprietary software which is part of the camera "package") enable it to photograph events which occur at the highest speeds, it does so in order to obtain still images of the highest possible quality of particular points in time in the course of the event in question: it does not do so in order to obtain a record of the event as a video sequence or moving image.

87. Mr Brown made this critical distinction clear in the course of his evidence: iin his witness statement he described a pioneering experiment in the field of speed photography where the photographer took rapid photographs of a horse trotting to capture the one photograph which proved that a horse has, at one moment in its

trotting movement, all its hooves off the ground – what was photographed by the series of images was the event of the horse trotting, but this was to obtain a single image of a particular point in time in the course of that event, not to obtain a record of the horse trotting.

88. If we look at the physical properties and characteristics of the Fastcam cameras we see that they are consistent with this function – recording and storing the highest quality still images of a particular point in time. Thus:

(1) The shutter incorporated into the sensor is specifically designed to record a high quality and blur-free image by capturing all the pixel values comprising the image at the same moment; it is also designed to set aside the image (once captured) at the highest speeds possible to enable the next such image to be captured;

(2) Although the number of pixels in an image is reduced when the very highest frames per second shots are taken, the camera retains high resolution capability in order to produce the highest quality images;

(3) The electronic "trigger" facility in the camera enables the camera to capture a single image at a pre-determined point in time, or a series of images, each at a pre-determined time;

(4) Each image recorded is stored on a computer (using the software supplied with the camera) as a separate image and is therefore capable of being identified, edited and viewed individually and given its own caption or other unique data by way of identification;

(5) Images recorded by the camera are saved in one of a number of digital bitmap formats designed for storing and retrieving still images;

(6) The camera has no viewfinder or zoom capability – it is statically directed to capture specific images at specific times in the course of the event to be photographed; and

(7) Although a sequence of recorded images can be viewed in quick succession (subject to computer capability and capacity), the resulting "moving image" is of a poor standard since the images are uncompressed.

89. Similarly, if we turn to the uses made of the Fastcam cameras, it is clear that in the industrial and engineering processes, and in the scientific and academic research in which they are used, the requirement is to have a single image, or a series of individual images, or synchronised images from different angles, each of the highest quality and clarity to enable a particular moment or sequence of moments in the course of a process or event to be observed and analysis and measurement made. (Mr Macnab criticised the Appellant's case in regard to the uses and application of the cameras, in particular on the grounds that no evidence was given by any user-customers. The evidence we had was that given by Mr Hilton and in various published scientific papers where experiments had been conducted using the cameras in the course of those experiments. It was clear to us that Mr Hilton had a comprehensive knowledge of the Appellant's customers and of the uses to which they put the cameras they purchased: that is exactly as one would expect where Mr Hilton

and his colleagues are marketing a highly specialised and technologically sophisticated and expensive product to a small and specialist market where the Appellant relies on customer experience and feedback to develop its products. The Appellant's evidence on this matter was adequate to enable us to have a clear understanding of the uses to which the cameras are put.) A user may see the separate images played in rapid succession, but that is likely to be for the purpose, as in the demonstration to us, of rapidly identifying and isolating, for detailed examination, the smaller number of individual images which record the exact moment or series of moments in which the uses is particularly interested for the purposes of his analysis and research.

90. Therefore, in both its properties and its use the Fastcam cameras accord with the definition of a "Digital camera", that is, a camera which captures and records in digital format still photographic images.

91. Our view is reinforced if we enquire whether the Fastcam cameras have the characteristics of a video camera recorder: they clearly do not. A video camera recorder has special properties which are designed to give the best quality moving images when recorded images are played back as a video sequence. These are set out in paragraphs 60 to 62 above. In summary, the rolling shutter incorporated into the sensor of a video camera recorder is designed to "smooth" the sequence of images recorded by the video camera recorder when they are played back – quality of image is thereby compromised in order to improve the video sequence experience for the viewer; likewise, the compression of images and their storage in the special video MPEG format is again designed to give the best "movie" playback, albeit at the cost of quality of image. Further, a video camera recorder is designed to record lengthy continuous sequences, consistent with its function of recording for playback the entirety of events as they take place.

92. Mr Macnab argued that the global shutters and other specialist technology found in the Fastcam cameras which produce the high quality images should be seen as no more than differences of degree, and not as defining characteristics of the cameras. We do not agree. Such items are the essence of the cameras: they are the means by which the cameras deliver what their users require, namely still and individual images, usually recorded in rapid succession, of the highest resolution and quality. It cannot be said that a global shutter as used in the Fastcam cameras, with its particular properties, is simply different by degree from a rolling shutter used in a video camera recorder – they are different in essential character in that they function quite distinctly and differently and they do so to achieve the different purposes for which they are respectively designed.

93. Miss Sloane had a secondary submission to make to us: if the Fastcam cameras can be regarded as having video camera recorder properties, so that they fall in the video camera recorder CN classification as well as the digital camera CN classification, then we should apply the "tie-breaker" of Note 3 of Section XVI of the CN, and look to the principal function, which in her submission is as a digital camera. We do not need to do so. In our judgment the Appellant's cameras are properly, and only, classified as digital cameras. However, should we be held to be wrong in this

conclusion, we would agree that the application of the "tie-breaker" in Note 3 would result in the conclusion for which Miss Sloane argues.

94. We need to refer to the classification statement in Annex XII to the summary report of the Customs Code Committee headed: "Statement on the classification of "High Speed Camera". This was issued following the October 2009 meeting of the Customs Code Committee (see paragraphs 30 to 33 above). As we have mentioned, it is not binding on us as it is not a statement of law, but we should have regard to it since it is an indication of the law which the Commission might eventually promulgate.

95. It is clear from the summary report of the October 2009 meeting of the Customs Code Committee that, to the extent that the Committee was dealing with the Appellant's Fastcam cameras, it was doing so under at least one critical misapprehension. That report states: "The product is capable of capturing and storing a sequence of images which, after further processing, can be viewed either as individual images (JPEG) or as a video sequence (MPEG)". The images captured and stored by the Fastcam cameras are not stored in MPEG format and cannot be viewed as a video sequence in that format. As we have made clear, we regard that as one of the key properties which distinguishes the Fastcam cameras as a digital camera and not as a video camera recorder. This misapprehension implicitly underlies the Statement itself, which says:

> "Given that the product is designed to capture, at high speed, images of a given event for subsequent viewing as a video sequence at a lower frame rate, it constitutes a video camera recorder. Therefore, classification as a digital camera of CN code 8525 80 30 is excluded."

In our finding the Fastcam cameras are not designed to capture images of a given event for subsequent viewing *as a video sequence.* They are designed to capture individual still images of points in time in the course of a given event for subsequent viewing as still images – the moment the hammer strikes the nail in the rather prosaic demonstration we saw, or the different angles of the nail entering the wood at different moments – not to provide a viewing of the "movie" of the event as it occurs.

96. Accordingly, the Statement, even if we were required to apply it as a matter of law, would not require us to reach a different decision.

97. Therefore it is our decision that the Appellant's Fastcam cameras are to be classified under the subheading: 8525 80 30, "Digital cameras". In relation to the classification which obtained before 1 January 2007 they are to be classified under the subheading: 8525 40 11 "Still image video cameras; digital cameras – digital cameras".

98. We allow the Appellant's appeals against the two decisions of the Commissioners set out in paragraph 3 above. In detail:

(1) We allow the Appellant's appeal against the decision of the Commissioners (paragraph 3(1) above) not to allow repayment of customs duty paid by the

Appellant on the importation of the Appellant's Fastcam APX range of cameras during the period 27 October 2004 to 30 August 2006, and we direct that such duty is repaid forthwith;

(2) We also allow the Appellant's appeal against the decision of the Commissioners (paragraph 3(2) above) to issue BTI notifications on 16 November 2007 classifying the Fastcam cameras in question under heading 8525 80 91 of the Combined Nomenclature classification, and we direct that the Commissioners issue in substitution BTI notifications classifying the Fastcam cameras in question under the subheading 8525 80 30 of the Combined Nomenclature classification**,** such substituted notifications to take effect from the same effective date, and to run for the same period, as the original notifications.

99. The parties have leave to apply to us for further directions should that be necessary to give full effect to our decision and its consequences.

The Commissioners' conduct of matters before the Customs Code Committee

100. We have set out in paragraphs 17 to 33 above the background to this case and the events leading up to the hearing of the Appellant's appeals. In our view the conduct of the Commissioners, as it appears from those events, is open to criticism. This is particularly so in relation to the way in which it brought matters before the Customs Code Committee in December 2008. When we indicated to Mr Macnab at the hearing the matters of concern to us he told us that it is no part of our function to criticise the procedures of the Commissioners where that is not an element of the decision we have to reach. In the narrow sense Mr Macnab is right, given the statutory nature of our jurisdiction. But where the circumstances of a case shine a light on a process which falls short of the standards which are expected of the Commissioners as a public body, tribunals have seen the need to bring to the attention of the Commissioners any such shortcomings. As a responsible public authority we can fairly assume that the Commissioners would take note of – even if they do not relish it – any observation of this kind with a view to maintaining the high public service standards to which they presumably aspire.

101. Our particular concern relates to the Clues Report and its use in the representations which the Commissioners made to the Customs Code Committee when they brought to that Committee the circumstances of the Appellant's claim as to the nature and classification of its products. The details of that process are set out above. Specifically, our concerns are the following:

(1) The Commissioners instructed Mr Clues as their expert in this matter. Mr Clues is a chartered electrical engineer, a member of the Institution of Electrical Engineers, a practising member of the Academy of Experts and a member of the Chartered Institute of Arbitrators. Whilst Mr Clues is clearly distinguished and professionally qualified, none of his qualifications appear to relate to the technical matters concerning digital or video photography. In the Clues Report Mr Clues sets out his experience, which is wide-ranging, but apart from a reference to "television" and another reference to "audio visual systems", we see nothing to indicate specialist knowledge or experience in the technical field

relevant to the Appellant's products. Since, as we have mentioned, it was the decision of Mr Macnab not to call Mr Clues as a witness (although Mr Clues had prepared a witness statement and was, we understand, present at the hearing) the relevance and competence of his qualifications and experience for this particular case could not be ascertained or examined in cross-examination or by questions from the tribunal. Our concern is that the Commissioners instructed as an expert someone who, however distinguished in other fields, was not expert in the highly technical and specialist fields relevant to this case.

(2) Our concerns in this regard are heightened by the technical errors and shortcomings in the Clues Report (which was written after Mr Clues had met with the Appellant). By way of example, the Report makes no reference to the nature and characteristics of the global shutter used in the sensor of the Fastcam cameras, nor of the different shutter mechanism used for recording images for video playback; the Report states, wrongly, that the Fastcam cameras can store images in MPEG digital format (the compressed format required for video images to ensure a "smooth" playback as a video sequence); and the Report states that since a sequence of individual images shown at speed creates the illusion of a moving picture, that is a video sequence. All in all Mr Brown devotes five pages of his witness statement to identifying and correcting technical errors in the Clues Report.

(3) If the Clues Report had been prepared solely for the purposes of the Appellant's appeal to the tribunal its errors and shortcomings would not have been of undue concern, since the Appellant would have had the chance to challenge the Report in the course of the appeal proceedings. The real criticism we have is that the Commissioners used the Clues Report as support (if not the basis of their case) in their December 2008 formal submissions to the Customs Code Committee, the confidential process whereby they sought to establish their view that the cameras, by recording images at very high speeds, capture video sequences and should therefore be classified as video camera recorders. This they did, so far as appears from the papers before us, without any reference to the substantial challenges made to the Clues Report in Mr Brown's witness statement (which the Commissioners had received some two months earlier). Whilst we do not, as Mr Macnab fairly pointed out, know the detail of the deliberations of the Customs Code Committee, we can nevertheless see from its report of its conclusions and from the Statement which was issued following those deliberations, that the Clues Report was a decided influence in determining the outcome of those deliberations.

102. In bringing the matter before the Customs Code Committee (in effect seeking to overturn a tribunal or similar ruling in the Netherlands which had classified the Appellant's Fastcam cameras as digital cameras) the Commissioners were, we assume, principally concerned with the Appellant's products, but the consequences could extend to importers of other similar products. Furthermore, the actions of the Customs Code Committee relate to the entirety of the European Union. It is a process in which someone in the Appellant's position has no part, no knowledge that it is taking place, and no opportunity to question any submissions made by the Commissioners. In such circumstances the Commissioners should, in their conduct,

have proper and careful regard to their responsibilities to act fairly and openly: it is not responsible action, in our view, to present a case to the Customs Code Committee which is partial, based on evidence which purports to be of an expert when it is questionable whether that expert is indeed expertly qualified in the technical and industry issues relevant to the matter in hand, and without disclosure of detailed, competent and expert challenges to that evidence (or at least without revisiting the original expert view in the light of such challenges).

103. We hope that the relevant departments in the Commissioners' organisation will take note of our concerns as to their conduct in this particular matter.

Costs

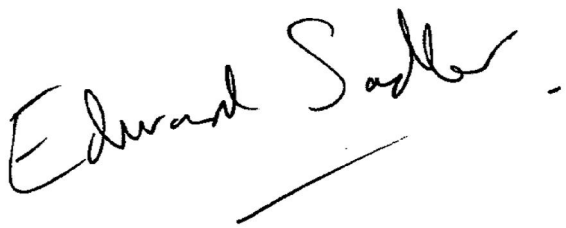
104. On 15 February 2010 upon the application of the Appellant the tribunal directed, in exercise of its powers under paragraph 7(3) of Schedule 3 to The Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009, that Rule 29 (Award and direction as to costs) of the Value Added Tax Tribunals Rules 1986 (as amended) should apply in relation to this appeal, the proceedings having commenced before 1 April 2009.

105. Miss Sloane applied at the hearing that costs should be awarded to the Appellant should it succeed in its appeal, which it has.

106. We direct that the Commissioners pay to the Appellant the costs of the Appellant of and incidental to and consequent upon the Appellant's appeal in this matter, such costs to be determined in default of agreement by a Taxing Master on the standard basis. Either party has leave to apply to the tribunal for further directions should that be required to give detailed effect to our costs order.

Appeal rights

107. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.



EDWARD SADLER

TRIBUNAL JUDGE
RELEASE DATE: 19 May 2011

Authorities referred to in skeletons and not referred to in the decision:

Joined Cases 69 and 70/79 *Rolf H Dittmeyer v Hauptzollamt Hamburg-Waltershof* [1977] ECR-231

Case 145/81 *Hauptzollamt Hamburg-Jonas v Ludwig Wünsche & Co* [1982] ECR 2493

Case 253/87 *Sportex* [1988] ECR 3351

Case C-130/02 *Krings* [2004] ECR I-2121

Case C-142/06 *Olicom A/S v Skatteministeriet* [2007] ECR I-6675