[2015] UKFTT 0586 (TC)

TC04727

Appeal number: TC/2014/00372

CUSTOMS DUTY – Combined Nomenclature – appeal against Binding Tariff Information decision - whether Gas Alert Micro 5 falls within CN heading 8531 or 9026 – held 8531 applies, but not 9026 – appeal dismissed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

HONEYWELL ANALYTICS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
DAVID BATTEN

Sitting in public at the Royal Courts of Justice, London on 1 September 2015

Stephen Cock of the Customs Consultancy Ltd for the Appellant

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

DECISION

1. This was an appeal by Honeywell Analytics Ltd ("the appellant") against a Binding Tariff Information ("BTI") decision made by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") on 19 December 2013 and upheld on review in a decision dated 16 October 2013.

2. The sole issue for our decision was whether a product of the appellant's, the Gas Alert Micro 5 ("the device"), was correctly classified under heading 8531 90 85 in the Combined Nomenclature ("CN") of the EU or should be classified, as the appellant urges, under heading 9026 80 20. The difference between the headings is that 8531 90 85 attracts customs duty on import into the EU of 2.2% while 9026 80 20 is duty free. We were given to understand that the amounts at issue were in six figures.

Jurisdiction and appeals procedure

3. We were not informed by either of the parties what legislation governs the appeal process against a BTI and what our jurisdiction on such an appeal is. Based on what we have found in Tribunal decisions on similar cases we note that Article ("Art.") 243 of Council Regulation 2913/92 establishing the Community Customs Code ("CCC") and having direct effect in Member States ("MS") gives a right of appeal against a decision of the "customs authorities" which relates to the application of customs legislation, and that the appeal must be lodged in the MS where the decision was applied for. That MS in this case is the United Kingdom.

4. Art. 243(2) of the CCC sets out a two stage appeal process. An appeal from the decision of the customs authority is made "initially" to that authority and "subsequently" to an independent body, which may be a judicial body or an equivalent specialised body, according to the provisions in force in the MS. In the UK this Tribunal is a judicial body. Art. 245 of the CCC requires MS to determine the appeals procedure to be used in its jurisdiction.

5. The appeals procedure that the UK has adopted in relation to BTIs is set out in the Customs Reviews and Appeals (Tariff and Origins) Regulations 1997 (SI 1997/534) ("CRATOR"). Regulation 3(1) of CRATOR applies sections 13A to 16 Finance Act ("FA") 1994 to "any decision as to the tariff classification … of any goods" (paragraph (1)(a)). Regulation 4 provides that a decision about tariff classification is treated as if it was a decision mentioned in s 13A(2)(a) to (h) FA 1994. The significance of only mentioning paragraphs (a) to (h) of s 13A(2) is that a decision within those paragraphs cannot be an "ancillary decision" (s 16(8) FA 1994), and that in turn means that the limited jurisdiction of the Tribunal set out in s 16(4) FA 1994 which applies, among others, in cases where a person seeks restoration of goods or vehicles forfeit to the Crown does not apply to a decision within regulation 3(1)(a) of CRATOR. Ours is therefore a full review jurisdiction.

6. The BTI was issued on 16 October 2013. The appellant was told it had three options. It could request a (non-statutory) reconsideration, it could request a

(statutory) review (which could be followed by an appeal to the Tribunal) or it could appeal direct to the Tribunal.

7. None of those options seems to be, in form at least, an initial appeal to the customs authority, and in this case the appellant wrote on 1 November 2013 to HMRC stating that it "wished to appeal the BTI" and set out its grounds of appeal, presumably in exercise of its right under Article 243(2)(a) of the CCC. On 19 December 2013 HMRC wrote to the appellants noting that it "has requested a formal Departmental Review" of the BTI decision, and providing the conclusions of the officer's review.

8. This all seems to us slightly odd. We can only assume that HMRC's view is that the statutory review is the initial appeal within Art. 243(2)(a), that HMRC's telling the appellant that it has the option of requesting a review amounts to an "offer" to review the decision within s 15A(1) FA 1994, and that the appellant's "appeal" letter is the acceptance of such an offer. That "appeal" letter of 1 November must also have been taken as the appellant's representations under s 15F(4) FA 1994. What is also odd is that the Part I FA 1994 legislation attracted by CRATOR allows for the possibility of an appeal direct to the Tribunal without any HMRC consideration of an appeal, and that does not seem to be consistent with Article 243(2).

9. It also appears that HMRC may have gone beyond the 45 day deadline given by s 15F(6)(a) FA 1994. That deadline was 45 days from the date HMRC received the "acceptance". The HMRC letter of 19 December said that this date was 4 November. The 45 days therefore started on 5 November and ended on 19 December. That is the date of HMRC's letter so it is difficult to see how it can have been "given" to the appellant on that day. The "giving" of a statutory notice of enquiry into an income tax return has been held by decisions of the Special Commissioners to require the receipt of the notice in question by its addressee or at least the deemed receipt by virtue of s 7 Interpretation Act 1978 (see *Wing Hung Lai v Bale (HM Inspector of Taxes)* [1999] STC (SCD) 238), and we see no reason why this should not apply to the giving of notice under the review provisions here. Fortunately we do not have to investigate further, as the HMRC conclusion was to uphold the decision, and that is also the deemed conclusion if the 45 day deadline had passed (see s 15F(8) FA 1994).

10. On 13 January 2014 the appellant's representative notified the Tribunal of its appeal. This at least clearly amounts to an appeal to a judicial authority required by Art. 243 of the CCC.

Evidence

11. We were provided with a bundle of documents which contained a statement of agreed facts (according to the index to the bundle) or an agreed statement of facts (according to the first page of the statement) running to 146 pages. The actual statement was eight pages, and the rest were datasheets and user manuals for the device.

12. The bundle also contained a witness statement of Mr Christopher Townsend. Mr Townsend is a physicist and is head of Product Applications, Support and Training for the appellant. Mr Townsend gave oral evidence and was cross-examined by Mr McGurk. We record here that Mr Townsend gave his evidence in a careful and straightforward manner and we accept it, so far as it was evidence of fact. There was some dispute between Mr Cock and Mr McGurk about an admission Mr Townsend was said to have made in cross-examination and we deal with that below.

13. It should be noted that although Mr Townsend is clearly an expert in relation to the device, his was not expert evidence within the meaning of CPR 35. His witness statement contained what were clearly his opinions about the two tariff classifications in issue, and what devices fell within what category, and he repeated these and other opinions in oral evidence. Since his opinions were about the very matters that the tribunal has to decide, not the witnesses, we do not take these opinions into account.

Facts

Agreed Statement of Facts.

14. The Appellant designs, manufactures and sells gas detection solutions and describes itself as an "expert in gas detection".

15. In its request for a review of the BTI decision, the appellant described the device as follows:

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

16. Under the heading in the statement "The product: Its use/function" it was stated that:

> "14. …there is an abundance of technical literature that is available online in relation to the Product. The Product is more fully described as the "Gas Alert Micro 5 Multi Gas Detector" on various sales websites.
>
> 15. On one such site – BW-GasMonitors.com, a subsidiary or trading name of Honeywell – there is featured (i) a product description; (ii) the product's specifications; and (iii) datasheets and user manuals. …"

17. Paragraph 15 of the statement then goes on to say "Taking each in turn:", "each" meaning the items (i), (ii) and (iii) in paragraph 15. At paragraph 15(i) there is the "Product description" taken from the appellant's website:

> **"Protect yourself**
>
> Simultaneously monitor and display up to five atmospheric hazards with the GasAlertMicro 5. Adaptable to a variety of applications, the GasAlertMicro 5 has an extensive selection of user-settable field options and is available as either a standard toxic gas model, a PID model for the detection VOCs, or an IR model for CO_2 detection. Use the passcode function to prevent unauthorized modifications of the instrument's settings. Compatible with BW's MicroDock II automatic test and calibration system, the GasAlertMicro 5 is unparalleled in its versatility, performance and overall value.
>
> - Measure up to five atmospheric hazards concurrently
> - Fully customizable to suit any application
> - Rapidly switch from diffusion mode, to the optional integrated pump in the field
>
> **Standard features of BW products:**
>
> - Continuous LCD shows real-time gas concentrations
> - Water-resistant
> - Automatic calibration procedure; compatible with BW MicroDock II automatic test and calibration station
> - Full function self-test of sensor, battery status, circuit integrity and audible/visual alarms on start up
> - Bright wide-angled visual alarm bars
> - Built-in concussion-proof boot
>
> **Additional GasAlertMicro 5 Features:**
>
> - Integral motorized pump option for remote sampling
> - Equipped with internal vibrating alarm for high noise areas
> - Two power options: AA alkaline or rechargeable hotswappable battery packs
> - Multi-language support in English, French, German, Spanish and Portuguese"

18. At paragraph 15(ii) there are the specifications which include:

> Alarms - Visual, vibrating, audible (95dB)
>
> - Low, High, STEL, TWA, OL (over limit)

19. The sensor specifications show each of the toxic gases detected by the device against three columns, respectively Measuring Range (ppm), Default Resolution

(ppm) and High Resolution (ppm). For example against NO_2 the columns show 0-99.9, 1.0 and 0.1. In some cases the column "High Resolution" is shown as N/A.

20. Paragraph 15(iii) simply has the heading "Datasheets and User Manuals". Paragraph 16 explains that the sheets and manuals are appended. The User Manuals consisted of a Quick Reference Guide ("QRG") of about 25 pages and a full User Manual of about 100 pages.

Mr Townsend's evidence

21. Mr Townsend's witness statement ("WS") consists of seven parts, A to G, A being "Background" (i.e. about him), and B being "The product" which consists of a picture of the device (see the Appendix to this decision which contains a clearer picture than the one in Mr Townsend's WS which was a black and white photocopy)

22. In Part C "Uses of the Gas Alert Micro 5" paragraphs 5 to 8 of the WS describe the device in terms which were not questioned by HMRC and we reproduce them here.

> "5. The Gas Alert Micro 5 is able to measure the level and thus provide protection from up to five potential atmospheric hazards including oxygen, combustible and toxic gases.
>
> 6. A liquid crystal display readout shows simultaneous gas concentration levels fro five different types of gas.
>
> 7. The Gas Alert Micro 5 incorporates 3 discrete warning output mechanisms. The audible alert is a 95dB alarm one, the visual alert is comprised of two bright wide-angled alarm bars and the product is equipped with an internal vibrating alarm for high noise areas. These are in addition to the alarm indications given on the LCD screen. At the direction of the user they can be enabled/disabled. These alarms, if enabled, are activated as pre-set instantaneous or time weighted average gas levels are exceeded. The user can determine the gas pre-set levels.
>
> 8. Four alarm levels can be employed; instantaneous low and high alarms for all gases; TWA (time weighted average and STEL (short-term exposure limit) for VOCs (Volatile Organic Compounds) and toxic gases."

23. In paragraphs 9 and 10 (also in Part C) of the WS, Mr Townsend had referred to the use of an optional integrated motorised pump to remotely measure the level of gases, and an optional sample probe to locate the source of a gas leak. Mr Townsend agreed that neither of these accessories was part of the device which was the subject of the BTI. The device in issue required the operator to enter a confined space with the device on their person.

24. Mr Townsend agreed that the device detected whether there were gases at all in the relevant space, and that, if there were, the level detected may or may not be dangerous. He added that this was not a one off matter, as the time over which the level to which gases built up or reduced was also important. Taking CO_2 (carbon

dioxide) as an example, he agreed that the device measured dangerous levels of CO_2. Since CO_2 was present in the atmosphere at all times, there was no point in having a device that simply showed when CO_2 was present. He agreed that this point related only to CO_2 and not the other gases which might well not be present and not suspected.

25. When Mr McGurk asked him about the product description in the agreed statement of facts and whether alerting the operator to a potentially dangerous level of gas was the principal function of the device, Mr Townsend replied that it was "one of the functions". He further agreed that such an alerting function was "one of the main applications" of the device, and that the emphasis in all the literature was on "protection" (eg the heading of the product description itself) and safety, eg the statement shown to Mr Townsend in the QRG that "the detector is a personal safety device. It is your responsibility to respond properly to the alarm" and that the service the device performed was "alerting an operator that they were in danger".

26. Mr McGurk asked Mr Townsend about many of the gases which the device detected and their effect on human beings. Mr Townsend's response to these was that of a physicist: he was not concerned professionally with the effect of the gases on living organisms (as that we presume was the province of a biochemist). He did though agree that they were "pretty nasty gases" that the device was designed to prevent exposure to unsafe levels of, and that the purpose of the alerting function was to tell the operator to get out of the confined space.

27. In his WS Mr Townsend stated that the alarm indications could be disabled at the discretion of the user. When asked if he was referring to the "stealth mode" option (turning off the backlighting on the LCD screen, the visual and the audible signals) he repeated that it was possible to disable all the alarms.

28. Mr Townsend agreed that the Manual said it was not best practice to disable the detection sensors in a gaseous environment. The QRG in fact, as Mr Townsend agreed, contained a prominent warning to:

> "Use extreme caution when disabling a sensor. The disabled sensor cannot detect and alarm against the applicable gas."

This warning was repeated in the main User Manual.

29. In his WS at paragraph 12 (in Part D "Gas Detection") Mr Townsend explained that he understood there was a difference for customs duty purposes between a gas detector and a gas measurement device, and he illustrated what he considered by this by reference to a Honeywell device for detecting carbon monoxide (CO).

30. In Part E of his WS ("Gas Measurement") Mr Townsend describes what he would regard as a gas level measuring device. They, he says, can provide a measurement of the amount or level of a gas that is present generally in terms of parts per million, and in his view the device in question falls into this category.

31. In Part F of his WS ("Principle (*sic*) Function") Mr Townsend maintained that if the different elements of the device (the gas detector filters, the display and the alert systems) are considered in the round "the detectors would have been considered as the princip[al] function of the device". This is because, in his opinion, the screen only produces a data display to convey the amount of gas that has been detected, a role that can only be fulfilled if the sensors are in place and are detecting. As for the three types of alert, they are entirely reliant on the sensors being in place and functioning, and the alerts can be disabled. In his oral evidence he said that in appropriate conditions eg thick smoke or great noise, one or more of the signals would be useless and could be disabled, though he agreed that the vibrator would always be kept on. Mr Townsend added that "it is clear, therefore, that the Gas Alert Micro 5's alert functions must be considered subservient to its princip[al] function of measuring".

32. Part G was Mr Townsend's personal conclusion on the point we have to decide.

Further findings of fact

33. From Mr Townsend's written and oral evidence (so far as not consisting of his opinions), and from the documents attached to the agreed statement of facts we make the following further findings.

The device: its contents and how it works

34. As mentioned above, in the Appendix to this decision we include a photograph of the device we have taken from Honeywell's website. The device is about 5.5 x 3 x 1.5 inches, weighs 13 oz. and has an alligator clip on the rear so that it can be attached to a belt worn by the operator (a holster is also available). It contains up to four sensors which may be electrochemical or catalytic bead converters. One sensor is a CO_2 sensor which is automatically calibrated. One is an LEL sensor for detecting combustible gases (such as methane) and one of the remaining two may itself detect two toxic gases. There are a number of different levels of alarm condition which are chosen by the operator who will also calibrate the device before entering the confined space. There are four pushbuttons: one is the on/off switch and the other three allow different combinations of readings on the LCD screen. The pushbuttons can be operated by a gloved hand.

35. Levels of gas building up on the filters cause electrical currents to be generated which are proportionate to the level of the gas. Those currents are measured and displayed on the LCD screen. Optionally the user may log the readings and the device stores several months of continuous data on a removable memory card. The accuracy of the measurements depends on the calibration. If there is extended exposure to certain gases then the relevant sensor may become stressed and need to be recalibrated or replaced.

36. When a calibrated level of gas is reached the device will show the word "ALARM" on the LCD screen which becomes backlit and displays the ambient gas readings. It will flash, make a sound (95dB) and vibrate. The flashing and noise alarms may be disabled. We note again here that Mr Townsend said in oral evidence

that all the alarms could be disabled, but we could find no reference to this facility in the User Manual, as distinct from the option to choose "stealth mode" in which the vibrator remains active.

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

The device: its functions and use

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

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

40. We have mentioned twice already that Mr Townsend said that the alarms could be disabled. Since one of the safety checks listed in the Manual to be carried out before entering a confined space is to check that the visual and audible alarms are working, we find it inconceivable, and undoubtedly more likely than not, that this particular device, without optional pump or probe fitted (and with those items fitted the device is not within the scope of the BTI request), would ever be used by an operator in a confined space without any alarms enabled, even if it was possible to disable them all. (The same safety check suggests strongly to us that the vibrator cannot be disabled, or there would be a requirement to check it, especially if "stealth mode" was to be chosen.)

41. The availability of the accessories (the pump and the probe) referred to in Mr Townsend's WS show that it can never be the purpose of an operator entering a confined space where there is a risk of noxious gases just to measure the gases. Without the alerting function such an operator would be at a grave risk which need not be run: such a risk could be avoided entirely by using the device remotely with a pump or probe. It may be that with the probe or pump and with no operator using it in a confined space the device could be said to be for measuring as well as alerting, but

that is not the device we are concerned with. And the accessories are specifically linked to the possibility of remote sampling,

42. We said earlier that there was some dispute about what Mr Townsend had admitted about the "function" of the device. That concerned whether alerting was its principal function or merely one of its functions. We do not think we need to make any findings about this and accordingly we have given no weight to Mr Townsend's opinions in arriving at our findings.

The law

43. The relevant part of the CN which the BTI assigns to the device, including section, chapter, heading and subheading, is:

> "Section XVI - machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
>
> Chapter 85 - electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
>
> 8531 - Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530.
>
> 8531 80 - Other apparatus.
>
> 8531 80 95 – Other."

44. The relevant section Notes (ie those for section XVI as a whole) are:

> "1. This section does not cover:
>
> …
>
> (m) articles of Chapter 90;
>
> …
>
> 3. 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.
>
> 4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or 85, then the whole falls to be classified in the heading appropriate to that function.
>
> …

…"

45. The relevant Harmonised System Explanatory Note ("HSEN") is:

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

46. The relevant parts of the CN for which the appellant contends, including section, chapter, heading and subheading is:

> "Section XVIII - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof.
>
> Chapter 90 - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.
>
> 9026 - Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032.
>
> 9026 80 – Other instruments or apparatus.
>
> 9026 80 20 - Electronic."

47. The relevant section Note (for section XVIII as a whole) is:

> "…
>
> 3. The provisions of notes 3 and 4 to Section XVI apply also to this Chapter.
>
> …"

These notes are those set out in paragraph 45.

48. The relevant HSEN is:

> "90.26 Apart from instruments or apparatus more specifically covered by other headings of the Nomenclature such as:
>
> (a) Pressure reducing valves and thermostatically controlled valves **(heading 84.81)**
>
> (b) Anemometers (wind gauges) and hydrological level gauges **(heading 90.15)**
>
> (c) Thermometers, pyrometers, barometers, hygrometers and psychrometers **(heading 90.25)**
>
> (d) Instruments and apparatus for physical or chemical analysis, etc. **(heading 90.27)**
>
> this heading covers instruments and apparatus for measuring or checking the flow, level, pressure, kinetic energy or other process variables of liquids or gases.

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

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

> "Classification of goods in the Combined Nomenclature shall be governed by the following principles:
>
> 1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
>
> …
>
> 3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
>
> (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods; □
>
> (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable; □
>
> (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration. □
>
> 4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin. □
>
> …"

50. 20 cases were cited to us, 7 by the appellant and 13 by HMRC.

The appellant's submissions

51. The appellant had what Mr Cock characterised as a "knockout blow". He also had a back up in case the knockout blow was itself knocked out.

The knockout blow

52. The knock out blow was Note 1(m) to Section XVI of the CN. This showed that Chapter 85 could not apply to anything that might come within Chapter 90. In support of this contention he cited the VAT & Duties Tribunal case of *Flir Systems AB v HMRC* (C00253) ("*Flir VDT*"). (The appellant misidentified it as a decision of this Tribunal and did not supply a copy of the decision).

The backup argument

53. If Note 1(m) is not determinative, then the back up argument was that:

> (1) since the device has the objective characteristics of an instrument used to measure the level of specific and non-specific gases, it falls within heading 9026 80 20;
>
> (2) the device does not fall within Chapter 85;
>
> (3) but if the device is also capable of falling within heading 8531, Note 3 to Section XVI (applied by Note 3 to Chapter 90), made it clear that 9026 was to be preferred.

We note that the knockout blow only applies, of course, if the device does fall within Chapter 90, irrespective of whether it falls within any other Chapter. And we rather think that legs (2) and (3) of the argument are also knockout blows if they are right.

(1) the device falls within Chapter 90

54. The language of the headings has to be interpreted using the linguistic register of an intelligent businessman (citing *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) at [28]) (of which decision a copy was supplied). The device falls within the wording of heading 9026 because its purpose is to monitor the level of up to five atmospheric hazardous gases and that makes it an instrument for measuring and checking the level of gases.

55. The HSEN to Heading 9026 indicates that a measuring or checking apparatus generally includes an element sensitive to variations in the quantity to be measured. (The appellant's skeleton actually says "quality" but as the HSEN says "quantity" we assume that is what they meant). There is a difference between a gas measuring instrument and a gas detector as set out in Mr Townsend's witness statement: the evidence shows that the device is clearly a gas measuring instrument, and so falls within 9026 whereas a gas detector does not.

56. In fact HMRC has admitted, says the appellant, that the device is a gas level measuring instrument in both its statement of case and in its review decision. Furthermore, HMRC have confirmed that (in the words of the skeleton, not HMRC) "gas level measuring instruments, which do not include a sound or visual signalling element, are classified within CN Heading 9026", instancing a letter associated with this BTI decision and other BTI decisions relating to the appellant.

(2) the device does not fall within heading 8531

57. The appellant's argument for saying that 8531 does not apply is that that heading is limited to equipment whose principal characteristics are those of electric sound or visual signalling apparatus. It does not apply where other predominant functions are specified elsewhere in the CN, or 8531 would include a lot of everyday appliances such as a microwave oven or a washing machine which indicate that their function has been fully performed by audibly signalling.

58. The HSEN item (G) to 8531, relied on by HMRC, reinforces the appellant's point that 8531 does not include the device here. The HSEN only covers vapour and gas alarms that consist of a detector and a sound or visual alarm, not units that can quantify the level of gas.

(3) in any case, 9026 trumps 8531 through the Section and Chapter Notes.

59. The appellant admits that the device has a function of alerting, but that function is "entirely subordinate" to the measuring function of what the appellant calls throughout "the Measuring Device". The appellant also says that the agreed statement of facts reveals that HMRC accept that a gas level measuring instrument can fall within either 9026 or 8531, depending on the principal function. Thus as a result of Note 3 to CN Chapter 90 and by reference to Note 3 to Section XVI, classification is determined by the principal function. The appellant cites in support *RMS Communications Ltd v HMRC* [2010] UKFTT 411 (TC) ("*RMS*"), a decision of Judge Gandhi and Mr Law. In that case the Tribunal accepted the submission of the appellant that one appropriate test for determining which is the principal function is to consider which function would, if removed, most impact on the functional utility of the device. The appellant argues that eliminating the measurement function would render the device useless, while it could be useful even if the sound and visual signalling functions were not present. The appellant reinforced this point by stating that in "stealth mode" the device's sound and visual alarms are disabled, so the hypothetical nature of the test is reinforced in reality.

Other points

60. In addition the appellant also argued that HSEN Note (G) to Heading 8531 is inconsistent with the CN and should not be taken into account (apparently despite what is argued in paragraph 58 above).

61. The appellant also took issue with a number of statements made by HMRC when issuing the BTI and in its review decision. As those statements are not relied upon by HMRC in the appeal, we have ignored them.

HMRC's submissions

62. HMRC's primary submission was that the "whole point", the principal purpose and use, of the device is to alert users that there are unsafe levels of gas present in their working environment. HMRC has admitted and continues to admit that the device has a gas measurement function, but it fundamentally disagrees with the

appellant's notion that there is mutual exclusivity between gas detectors (8531) and gas measuring devices (9026). HMRC criticised the appellant's submission for ignoring all the elements of the device that play an alerting role, and invited the Tribunal to notice the various parts of the appellant's skeleton which it says is not a fair presentation of the device's brochure and other documentation.

63. HMRC submit that that the principal purpose as an alerting device is evidenced from the appellant's documentation, and that no other characterisation of that purpose can be fairly discerned from that literature. In particular while the device can clearly measure, the measuring function is "in service to" the principal function. HMRC point especially to the appellant's own literature and the parts of it which were ignored or mischaracterised, it says, by the appellant, including that:

(1) The name of the device is the Gas Alert Micro 5 (HMRC's underlining here and below)

(2) It is described in the literature as a "multi-gas detector"

(3) Its intended function is presented as to "**protect yourself**"

(4) The variant models are for VOC detection and CO2 detection

(5) The marketing literature emphasise the sensor functions for detecting hazards, the visual alarm bars, the audible alarm and the vibrator.

64. Heading 8531 covers instruments which have an audible or visual "signalling" function, and the list of instruments expressly included shows that the essence of them is their "warning, signalling or alerting" function. Accordingly the device has objective characteristics and properties as defined in the wording of heading 8531.

65. Instruments within heading 9026 do not need to possess any "warning, signalling or alerting" function. Their purpose is to measure substances known ordinarily to already exist. Accordingly instruments that are capable of warning and measuring fall within 8531 but not 9026. Since all alerting and signalling devices must measure something to be able to function, it would follow, if the appellant is right, that nothing could fall within 8531.

66. There is no need to have regard to the GIRs beyond Rule 1, but if regard is had to the lower levels, then Rule 3(a) shows that 8531 provides the most specific description, or, if not, Rule 4 applies.

67. Examination of the HSENs reinforces the conclusion, and the appellant's point about inconsistency between the HSENs and the CN is a bad one. It was not pleaded in the Notice of Appeal, it is premised on the argument that Chapter 90 and not Chapter 85 applies and resolving it is not within the jurisdiction of the Tribunal.

68. HMRC did not in its skeleton deal with the "knockout blow". But in oral submissions HMRC said that the appellant's argument "begs the question". For it to have any chance of applying, it had to be held that the device was within 9026: that was denied by HMRC.

Discussion

Interpretation of the CN

69. We have shown in paragraph 49 above the relevant GIRs in Part I Section 1A of the Combined Nomenclature. The Court of Justice of the European Union (formerly "of the European Communities") ("ECJ") has also, in hundreds of cases, laid down principles for national courts to follow in applying Rule 1 of the GIR.

70. Each of the parties selected an ECJ case to inform the Tribunal of these principles. From those cases we set out the principles which the ECJ has laid down:

> (1) in the interests of legal certainty and ease of verification by Customs officials, the decisive criterion for the classification of goods for tariff purposes is in general to be found in their objective characteristics and properties, as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters.
>
> (2) the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties.
>
> (3) the CNEN and HSEN are an important aid for interpreting the scope of the headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope.

71. The appellant's case to demonstrate these principles was Case C-486/08 *BVBA Van Landeghem* at [23] to [25]. HMRC preferred the most recent authoritative decision of domestic courts on the question of how to approach the interpretation of the CN, *Amoena (UK) Ltd v HMRC* [2015] EWCA Civ 25 ("*Amoena"*) in the judgment of Arden LJ. But the passages she refers to there are from ECJ Case C-514/04 *Uroplasty BV v Inspecteur van de Belastingdienst – Douana district Rotterdam* [2006] ECR 1-67219, ("*Uroplasty*") and there the three principles are to be found in [40], [42] and [41] (in that order).

72. We note here that in *Amoena* at [54] Arden LJ states that the first thing a Tribunal must do is to precisely determine "the intended use and material composition of the article". This is a direct quotation, not from the ECJ decision in *Uroplasty*, but from [42] of Advocate-General Kokott's opinion in that case, a formulation which elides to some extent principles (1) and (2) identified in paragraph 70 above. We did consider whether the two approaches are different in any way, and if they are, which we should follow, but having regard to additional note 2 to Chapter 85:

> "Should the customs so require, the declarant shall produce, in support of his declaration, an illustrated document (for example, instructions, prospectus, a page from a catalogue, a photograph) giving the normal description of the machine, its *uses* [our emphasis] and essential characteristics and, in respect of an unassembled or disassembled

> machine, an assembly plan and a list of the contents of the various packages.

we have concluded that there is no difference at all in the approaches, that "use" is always important and as used in this note must mean "intended use" assessed from objective matters.

73. The strictly hierarchical approach to the CN that must be adopted is also brought out in A-G Kokott's opinion, and the rest of [42] together with [43] and [44] of her opinion is summarised with approval by Arden LJ in *Amoena* at [54]:

> "Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken according to the article's intended use and material composition. There 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 not, then in order to resolve the conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules. Lastly, classification must be made under the subheadings."

74. Thus in accordance with the principles and the way they are applied that we derive from the two ECJ judgements cited we must determine the characteristics and properties of the device, and we consider its intended use, if that can be established by reference to objective factors.

75. Before we go on to consider this approach in this case we need to mention the numerous authorities cited to us. Our list of authorities (with the complete texts) from the appellant contained three ECJ cases in addition to *van Landeghem*. These three were mentioned in the skeleton only for the purpose of supporting principle (3), two being used in support at one point in the skeleton and the third at another. But when we turn to them we find only what has already been stated in *van Landeghem* as principle (3) in identical or near identical words. None of them can be regarded as the original source of the formulation by the ECJ of principle (3) as they all themselves refer to other earlier cases, as they themselves are referred to in *van Landeghem*.

76. Our list of authorities (with the complete texts) from HMRC contained 11 ECJ authorities, but not *Uroplasty*. Of those, two were cited in the skeleton itself in support of principle (3), one of which was the same as one of the appellant's, while the other again merely set out principle (3) in near identical language. Another, Case 40/88 *Weber v Milchwerke Paderborn-Rimbeck* [1989] ECR 1395 ("*Weber*") was cited in support of principle (1) and again set it out in identical words. The other eight were cases that were themselves cited in *Uroplasty* or in *Weber* as supporting the principles, and which, with one exception, merely stated the principles in near identical words. The exception is Case 36/71 *Henck v Hauptzollamt Emden* [1972] ECR 187 which does seem to be a case in which principle (1) was established for the first time. We mention all of this to emphasise that we did not find such a lengthy list of authorities (all of which we read to find out what they stood for) at all helpful. We would have been perfectly content to accept that the ECJ in either *van Landeghem* or

Uroplasty was correctly stating, for the umpteenth time, the law in this area and how to interpret it.

77. Returning to our task here, we have found (paragraphs 37 and 38 above) that the essential characteristics and properties and the only intended use (and in fact the only conceivable actual use) of the device is as an instrument for alerting its operator by visual, audible and vibrating signals to the presence of a dangerous build up or absolute level of particular hazardous gases and other noxious substances. With these findings in mind we then look at heading 8531 and 9026 in turn.

Heading 8531

78. Heading 8531 applies to:

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

In our view this describes accurately and clearly essential characteristics and properties and the use (the only intended use) of the Gas Alert Micro 5, and we hold that the description in heading 8531 does apply to that device.

Heading 9026

79. Heading 9026 applies to:

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

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

81. We find support for our view in one of the cases cited by the appellant, *Fluke Europe BV v HMRC* Case 00228 of the VAT and Duties Tribunal (Dr Avery Jones and Mrs Sadeque) ("*Fluke*"). That case was cited to show that "gas detectors" (which is what the appellant says the Gas Alert Micro 5 is) are, according to HMRC in other cases, properly classified under CN Heading 9031. We are not here concerned with whether that is correct or not as the items concerned are not this device, but what we see in *Fluke* at [10] is a lengthy citation from ECJ Case C-218/89 *Shimadzu Europa GmbH v Oberfinanzdirektion Berlin* ("*Shimadzu*"). That case concerned what is now CN Heading 9030 (formerly 9028 A II (a)) and the text in the heading "apparatus *for* measuring or checking electrical quantities" [our emphasis]. The ECJ held in *Shimadzu* that such apparatus was 'apparatus specifically intended to carry out such measurement" [10] and that "only apparatus whose very purpose is to carry out

checks on electrical quantities can be regard as apparatus for checking such quantities" [12]. At [13] the ECJ says:

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

82. We do not think for the reasons we have given that the "very purpose" of the Gas Alert Micro 5 is to measure levels of gas.

83. We therefore hold that heading 9026 does not apply.

The dividing line between "gas detectors" and "gas measuring instruments"

84. In saying that heading 9026 does not apply and that 8531 does, we are implicitly rejecting the dividing line drawn by the appellant in its skeleton (paragraph 55 above) and in Mr Townsend's WS between a "gas detector" ("GD") and a "gas measuring instrument" ("GMI") (see paragraphs 29 and 30 above). In the appellant's view a GD "is able to identify the presence of gas" while a GMI "is able to quantify and report the amount of gas that is present." As we have noted, Mr Townsend's statement at paragraph 12 (in Part D Gas Detection) says that he understands that for Customs Duty purposes "a distinction is drawn between devices that detect the presence of a gas, which then trigger an alarm, and those that are able to measure the level of a gas", and that he then gives as a common example of a GD a carbon monoxide (CO) alarm manufactured by Honeywell. In general, (he says) GDs simply detect the presence of CO rather than measure the level of any gas that is present.

85. The WS goes on to say after describing how a CO detector works, that in the presence of CO, two reactions (which he describes in his WS) "generate a small current between the electrodes. This current is proportional to the CO concentration".

86. In the Honeywell CO detector, he says that the CO alarm will activate if

> "it has detected CO concentration for a given time as described below:
>
> A. 50ppm: Alarm between 60 and 90 minutes
>
> B. 100ppm: Alarm between 10 and 40 minutes
>
> C. 300 ppm: Alarm within 3 minutes."

87. He goes on in this paragraph and the next to add that

> "the CO detector is set in accordance with the relevant European standard to provide an alarm determined by CO concentrations and the duration that concentration is present. This ensures that the alarm activates when dangerous levels of CO have built up over time and immediate action is required. It avoids false alarms from temporary low levels of CO (e.g. from cigarette smoke). In the case of the first

> alarm threshold (A), the requirement, by regulations, is that the detector must sounds the alarm at a point within the 30 minute period.
>
> In relation to the above the user will not be provided with am indication of the level of gas that has been detected. When the alarm is triggered they will simply know that the environment is hazardous."

88. Finally he contrasts this GD with a GMI, the difference being that a GMI "is able to do more than simply detect the presence of a gas that is present and can provide measurement of the amount of a level of the gas that is present." His Conclusion in part G of his WS at paragraph 25 is that "there is a clear distinction between devices that simply detect gases and alert users to their presence and devices that are able to measure and display the level of gas that is present in an environment." This conclusion forms part of the appellant's skeleton as its submission.

89. HMRC's response to this says that the appellant fails to appreciate that gas detecting and warning devices require some measurement, whether rudimentary or sophisticated, to perform the vital function of warning operators to the presence of dangerous levels of gas, and that gas measuring equipment that does fall within Chapter 90 could have an alarm function.

90. HMRC also say that since the appellant allows that a GMI can have a detecting function, it must follow, on the appellant's argument, that any device capable of measuring and detecting gas falls into 9026 and that no device than can do both can ever fall within 8531. On this point HMRC may correctly characterise the appellant's argument, but we do not think it is persuasive: it would not empty 8531 of all possible content.

91. We agree though with HMRC on where the appellant draws the line between a GD (8531) and a GMI (9026). We think the appellant's example of the CO detector makes HMRC's case for it. The CO detector is clearly measuring, and in much the same way as the device in question. Mr Townsend says that the "current between the electrodes … is proportional to the CO concentration". He also shows that the alarm is given over three different time frames covering three different levels or ranges of gas concentration. That must, we consider, involve a measuring of the differences in the current. But as with the device in question, the detector is not "for measuring"; the measuring is subordinate to the alarm function.

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

93. In our view the CO detector example blows apart the appellant's rigid division between GDs and GMIs. But in any event the whole argument is misconceived. It requires it to be accepted that any device that is able to measure the level of a gas is a GMI, but that is also a question-begging proposition: it assumes as part of its premise the answer which it is seeking. We leave aside for the most part the other inconsistences in the argument, save to note that at one point the appellant argues that a gas detector (in its terms) cannot have an alarm function (see the quotation from the argument in paragraph 56 above where the appellant clearly makes this point by using a non-restrictive relative clause bounded by commas), whereas Mr Townsend's example of a GD clearly does (as we can see from the photograph of it in his WS as well as from what he says).

A definitive classification

94. We have therefore arrived at a definitive classification of the device. We do not consider that we have to look further at the GIR and so we turn to the subheadings. We see no reason to disagree with the subheading 8531 80 95, and we note that there is no suggestion from the appellant that if 8531 is the correct heading the subheading in the BTI is wrong.

Down the hierarchy

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

The HSENs

96. As to HSENs we have noted that they are an appropriate guide to the interpretation of the headings unless inconsistent with the CN. The HSEN lettered G to heading 8531 says:

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

97. This is an accurate description of the device and what it is for. Methane is of course one of the gases that the device can be set up to detect[1]. The HSEN reinforces our view that 8531 is the correct classification. It cannot determine the classification, and for that reason we do not need to decide whether the appellant is correct to say

[1] It is we are sure a coincidence that the device is 5.5 inches long and yellow as that is also the length and colour of a canary (at least of the wild Atlantic Canary *serinus canaria*), but the device is a lot wider, heavier and less tuneful. Canaries were of course used until a few decades ago to detect methane in coal mines.

that this HSEN and one relating to heading 9027 (not, it should be noted, 9026) are inconsistent with the CN (which is fortunate because we do not fully understand the point the appellant is making). We add here that contrary to HMRC's view that we would have no jurisdiction to decide whether the HSEN to 8531 is inconsistent with the CN, we consider that had we found that it was, we would simply have ignored it in arriving at our decision on classification.

Other points

98. We have considered other arguments which the appellant has put forward to show that if 9026 and 8531 both apply, 9026 must trump 8531. We have dealt with the GD v GMI point above.

99. One of those arguments is that Note 3 to Section XVI gives that result. In our view this Note does not apply (even on the hypothesis that Chapter 90 can, contrary to what we have held, apply to the device). The measuring function and the alerting functions are not "complementary or alternative functions" in the way that the music and video functions of the iPod Nano are in *RMS*: the measuring function is subservient to the alerting function.

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

Decision

101. We uphold the BTI allocating the device to 8531 80 95 in the CN.

102. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 20 NOVEMBER 2015

APPENDIX

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