



TC01767

Appeal number TC/2010/04896

Customs Duty - Binding Tariff Information - appeal against the classification of imported traffic message channel receivers by HMRC as “other radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles”- the Appellant claimed that the receivers should be classified as “Other apparatus for the transmission or reception of voice, images or other data”- appeal allowed

FIRST-TIER TRIBUNAL

TAX

TOMTOM INTERNATIONAL BV

Appellant

- and -

-

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: S.M.G.RADFORD (TRIBUNAL JUDGE)
I.ABRAMS**

Sitting in public at 45 Bedford Square, London WC1 on 24 October 2011

Mr S Cock for the Appellant

Ms S. Choudhury, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant appealed against two Binding Tariff Information (“BTIs”) decisions GB 119599527, product code 2V00.007, and GB 119602971, product code 2UU.002.00, issued on by HMRC on 27 May 2010 classifying the traffic message channel (“TMC”) receivers imported by the Appellant (“the Receivers”) under heading 8527.2900.00 of the Common Nomenclature (“the CN”). The Appellant appealed directly against the BTIs.

2. The Appellant claimed that the Receivers should be classified as “*Other apparatus for the transmission or reception of voice, images or other data*” and therefore under CN code 8517.69.

3. HMRC classified the Receivers as “*Other radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles*” and therefore under CN code 8527.29.

15 **Background and facts**

4. The BTIs classified the Receivers under UK Tariff ten digit code 8527.2900.00 as “*Reception apparatus for radio-broadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock. Radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles. Other*”.

5. The Receivers are virtually identical. However, product code 2UU.002.00 integrates a car charger. Model 2V00.007 consists of an FM receiver, a cable aerial, a USB connector and four silicon rubber suction pads. Model 2UUC.002.00 consists of an FM receiver, a cable aerial, a mini-USB connector and an integral car charger. HMRC considered both Receivers to be similar and that they should be subject to the same classification.

6. Their essential characteristics are fundamentally the same: the reception of telemetric data through a radio signal, which data is then processed within the navigation unit to provide the user with up to date traffic information.

7. The function of the Receivers as set out in the Agreed Statement of facts is that they work by using the TMC. They acquire traffic data through an FM radio signal broadcast by regional and national providers. By connecting the TomTom GPS device to a Receiver, users automatically receive traffic information via the TMC connection.

8. Due to their design, they are intended exclusively for use as a means for acquiring data from the TMC. The Receivers obtain the data through the FM (Frequency Modulation) radio signal broadcast by the regional or national providers. The Receivers do not obtain any sound broadcast and are only able to obtain data material from the relevant channels.

9. They are intended to be connected to a TomTom GPS (Global Positioning System) device in order to automatically relay travel information to the GPS user. The

TomTom GPS translates the data received into a format which the final user can view on the screen of the GPS module.

5 10. The traffic data that is received by the Receivers is gathered from a variety of sources such as the movement of monitored vehicles, induction loops in roads, cameras and traffic surveillance.

11. The traffic data that is relayed over the TMC is processed at a centralised remote location.

12. Mr Cock produced a receiver for examination by the Tribunal.

The Legislation

10 13. The Combined Nomenclature Regulation No 2658/87 provides the legal basis for the Community's Tariff. An annual amendment to this Regulation contains the Combined Nomenclature that is reproduced in the UK Tariff.

15 14. The legal procedure for tariff classification is contained in Volume 2, Part 1, Section 3 of the UK Tariff. There are six General Interpretative Rules for tariff classification ("the GIR"). These have legal force and are intended to be applied whenever seeking to classify goods within the Combined Nomenclature.

15. The GIR state:

20 *"Classification of goods in the combined nomenclature shall be governed by the following principles:*

25 *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 ... goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

30 *(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. ...*

35 *(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 ...*

(c) When goods cannot be classified by reference to 3(a) or (b), they should be classified under the heading which occurs last in numerical order amongst those which equally merit consideration."

40 [...]

5 6. *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.*

16. A summary of the principles was made in Case C-486/06 *BVBA Van Landeghem* [2007] ECR I-10661, at paragraphs 23-25:

10 23. First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-0000, paragraph 27).

15 24. Second, the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see C-400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-0000, paragraph 18).

20 25. Lastly, according to the Court's case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*BAS Trucks*, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *KawasakiMotors Europe*, paragraph 36).

25 30 17. The structure of the CN heading 8517 is as follows:

35 **85.17 Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus of heading 84.43, 85.25, 85.27 or 85.28**

40 -Telephone sets, including telephones for cellular networks or other wireless networks

8517.11-- Line telephone sets with cordless handsets

8517.12--Telephones for cellular networks or for other wireless networks.

8517.18 --Other

-Other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network)

8517.61--Base stations

5 8517.62-- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus

8517.69-- Other

10 18. The HSEN to heading 8517 states:

15 *“This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electrical current or optical wave flowing in a wired network or by electromagnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be interconnected, include telephony, telegraphy, radio telephony, radio-telegraphy, local and wide area networks.*

19. The sub-heading HSEN to 8517.61, 8517.62 and 8517.69 states:

20 **“(II) OTHER APPARATUS FOR THE TRANSMISSION OR RECEPTION OF VOICE, IMAGES OR OTHER DATA, INCLUDING APPARATUS FOR COMMUNICATION IN A WIRED OR WIRELESS NETWORK (SUCH AS A LOCAL AREA NETWORK):**

(A) *Base stations.*

[...]

25 (B) *Entry-phone systems.*

[...]

(C) *Videophones.*

[...]

30 (D) *Apparatus for telegraphic communication other than facsimile machines of heading 84.43.*

[...]

(E) *Telephonic or Telegraphic Switching Apparatus.*

[...]

35 (F) *Transmitting and receiving apparatus for radio-telephony and radio-telegraphy.*

This group includes:

[...]

(4) *Transmitters, receivers or transmitter/receivers of telemetric signals.*

[...]

(G) *Other communication apparatus*

5 [...].”

20. The structure of the CN heading 85.27 includes:

85.27 Reception apparatus for radio-broadcasting, whether or not combined, in the same housing, with sound recording or reproducing apparatus or a clock

10 Radio-broadcast receivers capable of operating without an external source of power

[...]

Other apparatus combined with sound recording or reproducing apparatus

[...]

15 Radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles

Combined with sound recording or reproducing apparatus

[...]

8527.29 Other

20

21. The HSEN heading to 85 29 states:

“The sound radio-broadcasting apparatus falling in this heading must be for the reception of signals by means of electro-magnetic waves transmitted through the ether without any line connection.

25

The group includes:

(1) *Domestic radio receivers of all kinds [...]*

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(2) *Car radio receivers.*

(3) *Separately presented reception apparatus for incorporation in relay apparatus of heading 85.25.*

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(4) *Pocket-size radio cassette-players [...]*

(5) *Stereo systems (hi-fi systems) containing a radio receiver [...]*”

22. The HSEN heading to 85.27 excludes:

“Articles of heading 85.17 or 85.25.”

Appellant’s Submissions

5 23. Mr Cock submitted that the Receivers had the essential characteristics of receivers of radio-telegraphy and, more particularly, receivers of telemetric data to be further processed by the TomTom GPS module. Accordingly, they fulfilled the conditions set out in the HSEN for other apparatus for the reception of voice, image or other data under CN code 8517.69 and should be so classified.

10 24. He submitted that the Receivers were not able to receive voice radio broadcasting and their only function was to receive traffic data and transmit the same to the GPS module for processing. The information was received into the GPS module and further processed before being displayed.

15 25. He submitted that a key point was that the Receivers only existed to receive data, broadcast over the FM radio frequency range. The data was embedded within the transmission and sent out to the Receivers which transmitted to the GPS which turned the data into traffic information.

20 26. Mr Cock submitted that the Appellant did not accept that the Receivers fell within the definition of radio-broadcasting receivers within the meaning of classification 85.27 as that heading was intended to cover sound radio broadcasting and did not extend to data signals.

27. Mr Cock submitted that insofar as 85.27 may be applicable, which the Appellant denied, as a result of GIR3(a) the Receivers should be classified under 85.17, as it was a more specific one, dealing with data transfer, rather than sound radio transmissions.

25 28. Further he submitted that the Receivers did not have the essential characteristic of other radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles. If the 2UU.002 was plugged into a GPS not attached to a car it would still work and continue to work whether or not it had a power source.

30 29. Mr Cock submitted that the Receivers did not comply with the conditions set out in the HSEN for radio-broadcast receivers under CN code 8527.29 and should not, as a result of GIR3(a), be classified under that heading in the CN as it is the less specific one.

30. He submitted that as set out in the HSEN to CN heading 85.27, the Receivers, as articles of heading 85.17, were specifically excluded from CN heading 85.27.

35 31. He submitted that a number of terms used in the CN and HSEN should be interpreted as:

- (1) telegraphy - the science or practice of using or constructing communication systems for the transmission or reproduction of information;
- (2) radio-telegraphy - telegraphy using radio transmission;
- (3) telemetry - transmit data readings to a distant receiving set or station;
- 5 (4) telemetric data - readings transmitted to a distant receiving set or station.

32. Mr Cock referred to the *BVBA Van Landeghem* case and submitted that it was clear that it was the objective characteristics of the Receivers that were determinative of their classification and that both the CNEN and HSEN can assist in the application
10 of a particular CN heading definition although he accepted that they did not have legally binding force. Ultimately, it was the CN heading which was decisive. If the relevant Notes unnecessarily restricted the application of a particular CN heading or sought to alter its content, it was the latter that must take precedence.

33. He submitted that the purpose of the Receivers, as detailed in the Statement of
15 Agreed Facts was to receive traffic data broadcast over the TMC. They had no part in the reception of general sound radio-broadcast programs intended for use by domestic radios or radios used in motor vehicles.

34. He submitted that the essential character of the Receivers was that of a data reception apparatus which therefore fell within 85.17 of the CN.

20 35. He submitted that radio-telegraphy is a communication system that employs radio transmissions as a means to transmit information. It is a distinct use of radio when compared with the audio information contained in sound broadcast radio transmissions. The HSEN to CN heading 85.17 specifically provided for receiving apparatus for radio-telegraphy.

25 36. He submitted that it was clear from both the heading of 85.27 and the HSEN relating to that heading that it intended to cover apparatus for sound radio broadcasts and did not extend to products such as the Receivers which were only able to receive data information which was intended to be further processed by a different apparatus, such as the TomTom GPS device.

30 37. He submitted that Telemetry is a subset of radio-telegraphy. Telemetry is the use of radio waves to transmit telemetric data. The HSEN to CN heading 85.17 specifically provided for receiving apparatus for telemetric signals.

35 38. He submitted that Telemetric data is information that is gathered and processed before being relayed to a receiving device. He submitted that the information broadcast over the TMC is, on any view, telemetric data. Traffic flow information from diverse sources is gathered at a central location; it is processed and then relayed over FM radio to be received by the Receivers. Telemetric data is broadcast as a telemetric signal in radio-telegraphy. Sound plays no part in the transmission of signals to the Receivers, which only acquire data information, to be further processed
40 by the GPS device.

39. Taking into account of the essential characteristics of the Receivers and the definitions submitted above, he submitted that the Receivers should properly be classified as receivers of telemetric data. As a result, both product 2V00.007 and product 2UU.002.00, should be classified in heading 8517 as it was the one that more specifically described the function fulfilled by the Receivers.

40. In this respect, he submitted that heading 85.27 was simply not applicable, as the Receivers were not designed or able to acquire a sound signal through radio transmissions.

41. In the case of product 2UU.002.00, the Appellant wished it to be noted that this device also incorporated a power supply. The power supply, when connected to a 12V car outlet, allowed the paired GPS device to draw power. Were it imported as a separate product, such a power supply would be classified within CN heading 85.04.

42. The Appellant submitted that in the case of product 2UU.002.00 the TMC Receiver provided for the essential character of the device. The main reason for this was that the TMC Receiver would still work when connected to a GPS device even when the power supply was not connected to a 12V car outlet, while the power supply could not be connected to the paired GPS device in such a way that it operated without connecting the device to the TMC Receiver. Further, the retail value of a 2UU.002.00 is £50.00 while stand alone chargers cost as little as £5.

43. Mr Cock submitted that the scope of CN heading 85.27 was limited to equipment designed for use in the reception of sound radio-broadcasts, where the information received provides for the recording or reproduction of sound.

44. The CN heading to 85.27 and its sub-headings allowed for the classification of products such as pocket-sized radio cassette-players, portable radio receivers combined with other sound recording or reproducing apparatus, in motor vehicle radio receivers combined with other sound recording or reproducing apparatus, non-portable radio receivers combined with other sound recording/reproducing apparatus and alarm clock radios.

45. The only time that the reception of data was mentioned in CN heading 85.27 and its sub-headings was in relation to sub-heading 8527.21. This sub-heading related to in motor vehicle radio-broadcast receivers combined with sound recording or reproducing apparatus that were capable of receiving and decoding digital Radio Data System (RDS) signals.

46. Mr Cock submitted that RDS was a communications protocol used by audio broadcasters to supply several pieces of information in support of their program content including time, station identification and programme information. The reception of this data was secondary to the audio radio-broadcast that it supported and therefore was not the primary function of the apparatus receiving the sound broadcast, in direct contrast with the Receivers, which only functioned as receivers of data information to be further processed by the GPS module.

47. He contended that the HSEN to CN heading 85.27 further enforced the point that this heading does not provide for the classification of the Receivers. The HSEN to this heading only provided for sound radio-broadcasting apparatus, such as domestic radio receivers whether or not combined with sound recording or reproducing apparatus, car
5 radios, pocket-sized cassette-players and stereo systems containing a radio receiver; and equipment used in the reception of sound based radio-broadcasts. No mention was made in relation to the reception of images or other data. The Appellant submitted that the reception of data through a radio signal was already covered by heading 85.17 and that, therefore, heading 85.27 had no application to the present
10 case.

48. Mr Cock submitted that radio-broadcasts, in the sense of using radio frequencies to transmit information in a wireless environment, were commonly used as a means to carry data. The most common example was to be found in Wi-Fi enabled computer equipment, which used radio frequencies to convey data. Other examples included
15 mobile phones, Bluetooth, GPS and telex. In each case, radio waves were used to broadcast data but, nevertheless, such devices did not fall within heading 85.27.

49. In some cases the range was limited, particularly for example with Bluetooth where usage was limited to no more than 100 metres. In others the range was greater, for example broadcasting GPS satellites orbited the earth at 20,200 km. The
20 classification of reception equipment utilised in these applications was not limited to CN heading 85.27. Wi-Fi enabled computers were proper to CN heading 84.71, Bluetooth enabled equipment including mobile phones was proper to CN heading 85.17, GPS receivers were proper to CN heading 85.26 and telex receivers were proper to CN heading 85.17.

50. Mr Cock submitted that therefore reception apparatus for radio-broadcasting was commonly classified elsewhere than in CN heading 85.27 where the broadcast was something other than a sound broadcast. If HMRC's argument were to be accepted, all equipment using radio waves would be classified under heading 85.27. The Appellant submitted that such an interpretation of the CN would clearly be incorrect
30 and that heading 85.27 should be restricted to sound radio broadcasts, as clearly supported by the HSEN relating to that heading.

51. Mr Cock stated that the Appellant's primary submission was that, having regard to both the terms of the CN and the HSEN, the Receivers could not fall within heading 85.27 as that heading was only intended to cover apparatus intended for
35 sound broadcasting, which was clearly not applicable to the Receivers.

52. Insofar as it might be argued that heading 85.27 did potentially cover products which are only capable of receiving data through the use of radio waves, which the Appellant denied, he submitted that, taking into account the scope of CN heading 85.27 and the variety of radio-broadcast receivers that were not proper to this CN
40 heading, CN heading 85.27 provided for a less specific description for the Receivers imported by the Appellant than did CN heading 85.17. Heading 85.17 provided for a more specific function, that of receiving data, than heading 85.27 and should therefore be preferred, in accordance with GIR 3.

53. He contended that the HSEN to CN heading 85.27 expressly excluded articles of heading 85.17. As the Receivers imported by the Appellant were radio-telegraphy receivers and, more particularly telemetric signal receivers, in line with the HSEN to CN heading 85.17 they should be classified as 85.17.

5 54. In conclusion the Appellant submitted that as a result of its submissions the Tribunal should allow this appeal and confirm classification of the goods under heading 8517.

HMRC's Submissions

10 55. Ms Choudhury stated that it was not disputed that the principal characteristic and purpose of the Receivers was that they received a broadcast FM signal. HMRC therefore submitted that they had been correctly classified under 8527.29.00 as they constituted "*reception apparatus for radio-broadcasting*". As they were not combined with sound-recording or reproducing apparatus, they were not within 8527.21 and thus fell within 85.29.00 as "other" types of "radio-broadcast receivers"
15 which were not able to operate under their own power and were of a kind used in motor cars.

56. She submitted that it was not a pre-requisite for the application of this tariff heading that the products in question must be capable of receiving sound radio-broadcasts. HMRC did not dispute that many of the products within 85.27 would be
20 designed for receiving and reproducing sound radio broadcasts. However, it was envisaged in heading 85.27 itself that the reception apparatus may or may not be combined in the same housing, with sound recording or reproducing apparatus. In other words, it was not essential that the radio-broadcast receiver be able to receive, and thus record or reproduce, sound radio broadcasts for it to be within 85.27.

25 57. She submitted that according to the Shorter Oxford Dictionary, "Radio" was defined as:

- 30 *"1. The transmission and reception of radio-frequency electromagnetic waves, especially as a means of communication that does not need a connecting wire; wireless telephony or telegraphy.*
 2. Organised sound broadcasting by such means, sound broadcasting as a means of communication or an art form."

58. She submitted that as could be seen from the first dictionary definition given above, the transmission and reception of sound is not inherent in the definition of
35 radio. In addition, "Broadcast" is stated as meaning to "*disseminate by means of radio or television*"

59. She submitted that it was not a pre-requisite for the application of tariff heading 8527.29.00 that the products in question must be capable of receiving sound radio-broadcasts. HMRC did not dispute that many of the products within 85.27 will be
40 designed for receiving and reproducing sound radio broadcasts. However, it was

envisaged in heading 85.27 itself that the reception apparatus might or might not be combined in the same housing with sound recording or reproducing apparatus.

5 60. Ms Choudhury submitted that it was therefore not essential that the radio-broadcast receiver be able to receive, and thus record or reproduce, sound radio broadcasts for it to be within 85.27. As could be seen from the first dictionary definition given above, the transmission and reception of sound was not inherent in the definition of radio.

10 61. Ms Choudhury contended that the Appellant relied on the HSEN to heading 85.27 in support of its argument that this heading is only concerned with apparatus for receiving sound radio broadcasts. She said that it was important to bear in mind that HSENs are of persuasive authority but they do not have legal force. However HMRC submitted that this HSEN did no more than illustrate the point that many products within heading 85.27 would be those that were designed for receiving and reproducing sound radio broadcasts.

15 62. She referred to the HSEN which after setting out CN 85.27 stated that:

“The sound radio broadcasting apparatus falling in this heading must be for the reception of signals by means of electro-magnetic waves transmitted through the ether without any line connection.”

20 63. Ms Choudhury submitted that that while this sentence referred to “sound radio broadcasting apparatus” this did not mean that radio broadcasting apparatus that did not transmit or receive sound could not be within this heading.

25 64. She submitted that moreover the second part of this heading was of more significance, in that it requires the apparatus to be for the reception of “signals” by means of electromagnetic waves transmitted through the ether without any line connection.

65. Ms Choudhury contended that it was the fact that these items received signals as a result of electromagnetic waves which were not connected by wires, which is radio waves etcetera, which was the significant and distinguishing feature of the items within heading 85.27 and not whether or not they received sound in this way.

30 66. She contended that furthermore HSEN (IV) to Chapter 90, which provided an example of the functional apparatus that may make up an analogue or digital telemetering stated:

35 *“...line or radio transmitters and receivers for telemetering pulses remain in their respective headings (heading 85.17, 85.205 or 85.27, as the case may be) unless they are combined as a single unit with the instruments and apparatus referred to in (I) and (III) above or the whole forms a functional unit within the meaning of Note 3 to Chapter 90”.*

67. She contended that this note made it clear that a radio receiver for telemetering pulses could be classified under heading 85.27 and that it was therefore by no means

the case that such receivers could only be classified under heading 85.17, as argued by the Appellant.

5 68. Ms Choudhury referred to the Appellant's submissions that various items in which data was transmitted using radio waves were classified under headings other than 85.27 and that the consequence of the HMRC's argument would be that all these items would be classified under heading 85.27 because they use radio waves. She stated that this was not correct. The reason the Receivers had been classified under this heading was because it most closely accorded with the Receivers essential characteristic, that is, a receiver of an FM radio signal.

10 69. She submitted that the other products referred to by the Appellant, such as Wi-Fi enabled computers, mobile phones, GPS receivers and telex receivers have characteristics which are described more accurately by a tariff heading other than 85.27 and are classified as such in accordance with GIRs 1 and 6. This was not the case for the Receivers, in respect of which there was in HMRC's view, no other
15 category which described them more accurately including heading 85.17.

70. Ms Choudhury submitted that the Receivers were not within heading 85.17, let alone any of its sub-headings, because it was a fundamental requirement of this heading that the items to which it applies be part of a wired or wireless network.

20 71. She did not dispute that a machine or apparatus for the reception of telemetric data could be classified under heading 85.17 but this was subject to the overriding requirement that the machine or apparatus be part of either a wired or wireless network and that it is not within heading 85.27, which is not restricted to items that receive sound radio broadcasts. She submitted that this interpretation was supported by the HSEN to heading 85.17 which stated:

25 *"This heading covers apparatus for the transmission or reception of speech or other sounds, images or other data between two points by variation of an electric current or optical wave flowing in a wired network or by electro-magnetic waves in a wireless network. The signal may be analogue or digital. The networks, which may be inter-connected, include telephony, telegraphy, radio-telephony, radio-telegraphy, local and wide area networks".*
30

72. Ms Choudhury contended that the telemetric data received by the Receivers was by means of a form of radio-telegraphy. She stated however that as could be seen from the HSEN, the signal must be received from a network which included radio-telegraphy. HMRC did not consider that the Receivers were part of a network. The
35 Receivers were designed to receive a broadcast FM transmission, which could be received by anyone with the appropriate apparatus and are thus not part of a network.

73. HMRC contended that the application of GIR 3(a) did not result in the classification of the Receivers under heading 85.17 as opposed to 85.27 on the grounds that the former is more specific. Ms Choudhury submitted that on the
40 contrary if GIR 3 was in point, then heading 85.27 was the more specific as it was concerned with the receipt of radio broadcasts, which was the essential characteristic

of the Receivers. She submitted that heading 85.17 was, if anything, less specific when considered in this context because it required the presence of a network either wired or wireless and general FM broadcasts, even if not of sound, could not be characterised as taking place over such a network. Therefore GIR 3 did not assist the Appellant so as to result in the classification of the Products under heading 85.17 as opposed to 85.27.

74. Ms Choudhury submitted that even if it was acknowledged that the Receivers could be classified under heading 85.17, as they involved the transmission of data, they could nevertheless also be classified under heading 85.27 as receivers of radio signals and neither heading was therefore more specific than the other. In those circumstances, regard should therefore be had to GIR 3(c) which provided that if goods cannot be classified by reference to 3(a) or (b), they should be classified under the heading which occurs last in numerical order amongst those which equally merit consideration, which in the present case is heading 85.27.

75. Although the Appellant had contended that the HSEN of heading 85.27 expressly excluded articles of heading 85.17 and the Receivers were articles of the latter heading and were therefore excluded from heading 85.27 as a result of the HSEN, heading 85.17 itself excludes apparatus within heading 85.27. As to the question of which exclusion comes first she submitted that the HSENs were not legally binding whereas the CN headings did have legally binding force.

76. Ms Choudhury referred to Case C-185/73 *Hauptzollamt Bielefeld v Offene Handelsgesellschaft in Firma HC König* [1974] E.C.R. 607 where at paragraph 18 of their judgement the European Court of Justice held that the decisive criteria for classification of products in the Common Customs Tariff were their objective characteristics and properties. She submitted that this principle had been followed in subsequent cases for example, Case C-15/05 *Kawasaki Motors Europe NV v Inspecteur van de Belastingdienst/Douane district Rotterdam* [2006] ECR I-3657.

77. She submitted that moreover, the HSENs would be ignored if they were incompatible with the provisions of the CN and she referred to the case of *Intermodal Transport BV v Staatssecretaris van Financien* [2005] ECR I-8151) in which it was stated:

“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 relevant heading of the CN and of the notes to the sections or chapters.

48. “The explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force. The content of those notes must therefore be compatible with the provisions of the CN and may not alter the meaning of those provisions”.

78. She submitted therefore that the exclusion in heading 85.17 took precedence over that in the HSEN to heading 85.27. Therefore, heading 85.17 cannot apply to the Receivers because they are within heading 85.27.

79. She concluded that for all these reasons the appeal should be dismissed.

Appellant's Reply

80. Mr Cock referred to the definition of radio as provided by the Oxford dictionary and submitted that it covered a host of products including mobile phones and Bluetooth which were classified as 85.17. It was therefore stretching it to submit that it went to 85.27.

81. He stated that 85.27 referred to sound broadcasting but data could be in any one of a number of classifications.

82. Insofar as HMRC's contention that the Receivers were not within a network, he had not thought to put this forward as it was obvious that they fell within a large network. The GPS was a network in itself. It was a network of satellites which by means of radio waves all broadcasting signals were picked up by the GPS device.

83. The radio waves themselves were a network of sources of information received from radio cars, induction loops in the roads and councils.

84. He submitted that these two networks combined to create a workable product.

85. Insofar as the GRIs were concerned he submitted that HMRC's argument concerning the exclusions was circular. As far as the Appellant was concerned 85.17 dealt with products concerned with data and 85.27 dealt with products concerned with sound.

86. After GRI 1 which Mr Cock submitted in any event gave the right answer if one looked at GRI 3, then GRI 3 (a) stated that the most specific heading must be used and GRI 3(b) directed that it was the essential characteristics of the device which determined its classification. He submitted that this was data perception and therefore the Receivers fell within 85.17. It was therefore not necessary to jump to GRI 3(c) as HMRC had done.

Findings

87. The Tribunal found that the Receivers were essentially receivers of telemetric data to be further processed by the GPS and having examined the relevant CNs found that CN 85.17 included "*other apparatus for the transmission or reception of voice, images or other data including apparatus for communication in a wired or wireless network (such as a local or wide area network)*".

88. The Tribunal found that this heading was more specific than 85.27 because it dealt with data transfer rather than sound radio transmissions. Therefore in accordance with GIR 3(a) the more specific heading should be used in preference to a more general heading. In accordance with GIR 3 (b) they are classified by virtue of their essential characteristic. The Tribunal found that in fact it was not necessary to move on to GIR 3(b) nor GIR 3(c) as HMRC submitted.

89. The Tribunal found that the most essential characteristic of the Receivers was that they received telemetric signals.

90. We found that the HSEN to CN heading 85.17 specifically provided for receiving apparatus for radio telegraphy which included “*transmitters, receivers or transmitters/receivers of telemetric signals*”. We found that this accurately described the Receivers.

91. We found that the essential character and intended use of the Receivers was that of a data reception apparatus. At paragraph 55 of *Intermodal Transport BV* it was stated :

10 “According to the Court’s case law 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”.

15 92. In accordance with *Hauptzollamt Bielefeld* the decisive criteria for the classification of the Receivers is their objective characteristics and properties and the Tribunal found that these were data perception and the receipt of telemetric signals.

20 93. The Tribunal noted that contrary to HMRC’s classification of the Receivers as “*Other radio-broadcast receivers not capable of operating without an external source of power, of a kind used in motor vehicles*” and therefore under CN heading 8527.29 the Receivers still worked when connected to a GPS device not attached to a car and continued to work whether or not they had a power supply.

94. Contrary to HMRC’s submission the Tribunal found that CN heading 85.27 referred almost exclusively to apparatus intended for sound broadcasting and the HSEN to 85.29 referred to sound radio broadcasting.

25 95. The Tribunal found that the only time that the reception of data was mentioned in CN heading 85.27 and its sub-headings was in relation to sub-heading 8527.21 which related to motor vehicle radio broadcast receivers combined with other sound recording or reproducing apparatus that is capable of receiving and decoding digital radio data system signals. The reception of this data however is secondary to the
30 audio radio broadcast which it supports and therefore unlike the Receivers is not the primary function of the apparatus receiving the sound broadcast.

96. Whilst not legally binding, the Tribunal found it persuasive that the HSEN to CN heading 85.27 only provided for sound radio broadcasting and did not mention the reception of images and other data.

35 97. The Tribunal accepted HMRC’s submission that HSEN (IV) to Chapter 90 indicated that a radio receiver for telemetering pulses could be classified under 85.27 but nevertheless found that the 85.17 classification was more specific to the Receivers.

98. Contrary to HMRC's submission the Tribunal found that the Receivers were indeed part of a network of satellites and the GPS was a network in itself.

99. The Tribunal found that the Receivers had been wrongly classified by HMRC and should have been classified under CN 8517.69.

5 **Decision**

100. The appeal is allowed.

101. 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.

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TRIBUNAL JUDGE
RELEASE DATE: 20 January 2012

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