



TC03507

Appeal number: TC/2012/08666

CUSTOMS DUTY – Common Nomenclature – Power Supplies for sputtering machines – whether parts or standalone machinery or apparatus? On facts standalone machinery or apparatus – Appeal allowed.

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

SPTS TECHNOLOGIES LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE ADRIAN SHIPWRIGHT
MRS SUSAN LOUSADA**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 19 September 2013

Steve Cock, Duty Consultant, The Customs Consultancy, for the Appellant

Amy Manion, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision concerns the appeal of SPTS Technologies Limited (“the Taxpayer”) against HMRC’s decision on review to categorise certain “Pinnacle Power Supplies” (described below) under tariff classification heading 8504 4090.90 of the Common Nomenclature (“CN”) (Electrical Transformers...static converters ... other).
2. This was notified to the Taxpayer by letter dated 23 August 2012. This decision which upheld the original Binding Tariff Information was dated 13 July 2012.
3. Three Binding Tariff Rulings (“BTI”) were issued. These were BTI GB 121761301, GB121761790 and GB 121761888.

Procedural Matters –Application for Adjournment

4. HMRC applied on 20 August, 2013 to adjourn the hearing of the appeal (“the Application”).
5. We refused the Application and decided that the hearing should not be adjourned but should continue.
6. Judge Kempster had directed on 9 September, 2013 that the application should be heard as a preliminary matter at the appeal hearing. We followed this procedure and heard the Application as a preliminary matter at the appeal hearing.
7. HMRC argued that the determination of the appeal had been narrowed to the question whether the items in question were “parts” or “machines or apparatus”.
8. HMRC contended that this is a matter of mixed fact and law. HMRC said this therefore required expert evidence. They argued that there was inadequate evidence before the Tribunal for it to proceed. The hearing should be adjourned to allow expert evidence to be produced.
9. HMRC also “...respectfully submitted that on the basis of the evidence, so far available, the appeal falls to be dismissed...” HMRC urged “... the Tribunal that the proper course in this appeal is to adjourn for the preparation of expert evidence”.
10. We were not told by HMRC precisely what the expert evidence was specifically to refer to or how it would be of assistance. We were not invited to appoint a single expert under Rule 15.
11. The Taxpayer was happy to proceed on the basis of what was before the Tribunal. The Taxpayer did not see the need for expert evidence and questioned whether it would add anything. The Taxpayer did not see any need for expert evidence in how it presented its case.
12. We did not see that what HMRC was suggesting would be of assistance to us. We remained the persons who had to make the decision as to whether the item was a “part” or not. This was not something we could delegate. The gathering of expert evidence would only prolong matters, add to cost and was not necessarily something that would necessarily be of assistance.
13. The Taxpayer did not wish to lead such evidence and was happy to rely on the evidence it had led and urged us to carry on with the hearing.
14. The Taxpayer did not consider it would be prejudiced if the hearing were not adjourned but continued and specifically told us that that was the position of the Taxpayer. The Taxpayer again urged us to continue with the hearing.
15. On the basis that:
- (1) The Taxpayer would not be prejudiced by continuing with the hearing which was the Taxpayers position; and

(2) It was not obvious what the benefit of an adjournment would be for the preparation of expert evidence;

We decided that the hearing of the appeal should not be adjourned and the hearing should continue.

5 16. We made this decision bearing in mind the overriding objective in Rule 2 of the Tribunal Rules particularly as to cost and avoiding delay so far as is compatible with proper consideration of the issues. We considered that continuing with the hearing best met these requirements.

10 17. Accordingly, the Application by HMRC to adjourn the hearing was refused and the hearing of the appeal continued.

The Issue in the Appeal

18. The issue before the Tribunal was the proper categorisation of three types of Pinnacle Power Supplies (“the Power Supplies”) under the Common Nomenclature.

19. The three types of Power Supplies in issue were:

- 15 (1) Pinnacle plus+;
(2) Pinnacle 3000; and
(3) Pinnacle Diamond.

20. HMRC had issued three BTI’s on 30 May, 2012 categorising the Power Supplies as falling under 8504 4090.90.

20 21. The essential question, as the parties agreed, was whether the Power Supplies were either:

- (1) Parts or accessories; or
(2) Machines or apparatus for the manufacture of Semiconductor Devices or of electronic integrated circuits.

25 22. This was in issue as different rates of duty were applicable depending on the categorisation.

23. The broad issue is whether the Power Supplies are standalone items or part of something bigger so as to amount to a “part”.

The Law

30 24. The Law in this area is complicated. Essentially, it is to be found in the Common Nomenclature and the case law.

25. The position here is easier than it might be given that the parties agree that the case turns on whether or not the Power Supplies are “parts” or “machinery or apparatus”. We have concentrated on this in this decision and not elongated the decision further by considering other aspects in great detail in the decision. This does not mean that we have not carefully considered them,

35 26. We were provided with copies of the following matters.

- 40 (1) *Peacock AG and Hauptzollam Paderbon* C-339/98
(2) *Intermodal transport BV vs. Staatssecretaris* C-495/03
(3) *Kawasaki Motor European BV. Inspecteur* C -15/05
(4) *BVBA van Landeghem vs. Belgium* C-486/06
(5) *Rohmer & Haas Electronic Materials* C-336/11
(6) *Chandanmal T/AC Narain Brothers* [2012] UK FTT 188
(7) *HMRC vs. Epsom Telford Limited* [2008] EWCA Civ 567
45 (8) *Oxford Instruments Plasma* TC/2010/03 222
(9) CN Section XVI
(10) HSENS 8486

(11) HSENS 8504

(12) Binding Tariff Information Rulings

(a) GB 1188 49244

(b) GB 118849930

5 (c) GB 1189 70156

(d) GB 1188 63646

27. The combined nomenclature regulation number 2658/87 is the legal basis for the tariff. It contains six general interpretive rules.

28. The general interpretative rules so far as is relevant to provide:

10 "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...

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

29. CN heading 84. 86 so far as is relevant provides:

25 "84.86 machines and apparatus of a kind used only or principally for the manufacture of semiconductor boules or wafers, Semiconductor Devices, electronics integrated circuits or flat panel displays; machines and apparatus specified in note 9(C) to this chapter; parts and accessories:...

Machines and apparatus for the manufacture of Semiconductor Devices or of electronic integrated circuits;

30 8486. 2010. 00 machine tools operated by ultrasonic process

8486. 18090.00 other..."

30. Note 9 (C) and (D) to CN chapter 84 so far as is relevant provides:

"(C) Heading 8486 also includes machines and apparatus principally of a kind used for: ...

35 (2) Assembling Semiconductor Devices or electronic integrated circuit;...

(D) Subject note 1 to section XVI and note 1 to Chapter 84, machines and apparatus answering to the description in heading 8486 are to be classified in that heading and in no other heading of the nomenclature

31. CN heading 85.04 provides so far as relevant:

40 "85.04 electrical transformers, static converters (for example, rectifiers) and inductors:...

Static converters:...

8504.40

Other

45 Other

Other

850 4.4090 0.90 Other"

32. It under this last heading that HMRC have categorised the Power Supplies.
33. HSEN to heading 84.00 86 provides:
34. " This heading covers machines and apparatus of a kind used only or principally for the manufacturer of semiconductor boules or wafers, Semiconductor Devices, electronic integrated circuits or flat panel displays. However, this heading excludes machines and apparatus for measuring checking, inspecting, chemical analysis, etc.
- 5
35. The HSEN to the sub heading 8486.20 provides:
"... (B) Machines and apparatus for the manufacture of Semiconductor Devices or of electronic integrated circuits:
- 10 This group covers machines and apparatus for the manufacture of Semiconductor Devices for of them actually integrated circuits such as
- (1) Film formation equipment, which apply or produce various films on the surface of the way for during the fabrication process. These films serve as conductors, insulators and semiconductors' on the finish device.
- 15 They may include oxides and night triads of the substrate, metals and epitaxial layers, the process and equipment listed below are not necessarily limited to the generation of a particular type of film....
- (c) physical vapour deposition (PPD) equipment, which deposits various types of films which are obtained by vaporising a solid. For example:...
- 20 (2) sputtering equipment, in which the field is generated by bombarding the source material (target) with ions ..."
36. The HSEN for heading 85.04 so far as relevant provides:
37. "... (II) electrical static converters
- The apparatus of this group are used to convert electrical energy in order to adapt it for further use. They incorporate converting elements (e.g. transformers, induction coils, resistors, command regulations, etc.,. Their operation is based on the principle that the converting elements act alternately as conductors and non-conductors.
- 25 The fact that these apparatus often incorporate auxiliary circuits to regulate the voltage of the emerging current does not affect the classification in this group, nor does the fact that they are sometimes referred to as voltage or current regulators.
- 30 This group includes...
- (D) Direct current converters by which direct current is converted into a different voltage...".
38. The HSEN to CN heading 84.86 provides in respect of parts:
- 35 "... (E) parts and accessories
- Subject to the general provisions regarding the classification of parts (see the general explanatory note to section XVI), the heading includes parts and accessories for the machines and apparatus of this heading".
39. Note 2 to CN section XVI provides inter alia:
- 40 "... (a) parts which are goods included in any of the heading of chapter 84 or 85... are in all cases to be classified in their respective headings".

Evidence

40. There was one volume of agreed documents produced ("the Bundle"). The contents of the Bundle were agreed by the parties and all the documents were admitted in evidence none of them having been objected to.
- 45
41. We did not hear any oral evidence as no witnesses were called by either party.

42. It was accepted by HMRC that the Power Supplies "... are used principally in the manufacture of semiconductors".

Findings of Fact

43. From the evidence we make the following findings of fact.

5 44. In essence, sputtering machines deposit a uniform layer of material on a surface which is important in the manufacture of semiconductors. This is done in a vacuum chamber which contains plasma which is generated by applying an electronic field to an inert gas in the chamber.

10 45. The Power Supplies are not physically part of the sputtering machines themselves. They stand outside the sputtering machines and are physically separate from them. There is a cable connection though.

46. The components in the Power Supplies include:

- 15 (1) Mains filter;
- (2) Circuit breaker;
- (3) Contractor;
- (4) Input by rectifier, diodes etc.;
- (5) Main smoothing electrolytic capacitors;
- (6) Main switching transistors;
- (7) Transformer;
- 20 (8) Output by rectified, diodes etc.;
- (9) Embedded PC microcontroller (contains unique software...)
- (10) Fans
- (11) Heat sink

25 47. In the Bundle (all of whose documents had been admitted in evidence without objection as noted above) there was a document prepared with the assistance of project engineers at SPTS which described the Power Supplies and their functions.

48. Under the heading "Function" This read:

"[1] The Pinnacle range of DC Power Supplies are adapted to provide power to the semi-conductor manufacturing "sputtering" process.

30 Sputtering is the process used in the manufacture of semiconductors. It involves bombarding a target (i.e. silicone substrate) with atoms. These atoms are highly charged and when they come into contact with the atoms of the substrate, it causes a small explosion that ejects the atom from the substrate. This then leaves a space. This is the process by which silicon substrates are "etched".

35 This process takes place in a vacuum which contains a plasma. A plasma may be generated by applying an electric field to an inert gas in a vacuum. The Pinnacle range of Power Supplies are designed to provide the required electrical current.

[2] The Pinnacle range of Power Supplies are supplied with proprietary software which makes them unique to SPTS and to the Semiconductor Manufacturing industry.

40 [3] The Pinnacle range of Power Supplies are standalone. That is to say they do not form a part of any other product and can carry out the functions for which they are designed in complete isolation".

49. The Power Supplies are within an aluminium enclosure.

45 50. The Power Supplies did not have to be used with any individual machine but seemingly often were. This seems to be a matter of convenience rather than anything else.

51. In essence, the sputtering machines contain plasma which had to be activated by applying an electric field to the inert gas. The Power Supplies allowed this to be done. They are not contained within the sputtering machine but are separate standalone items.

5 52. Like a printer for a computer the sputtering machine could operate without the plasma being activated in the same way that a printer can operate without printer cartridge with ink in it or a cartridge. We so find and do so as a matter of fact to the extent that we can do so. We also find that the Power Supplies did not enable the sputtering machine to perform a function above its standard function. Again to the
10 extent we can do so we do so as a matter of fact.

53. We find that the Power Supplies are standalone units which as a matter of fact do not form part of the sputtering machines. To the extent that we can we find as a matter of fact that the Power Supplies are not “parts” of the sputtering machines. They also do not form part of a bigger sputtering machine or machinery and are not
15 part of a bigger machine. They may assist the outcome provided by the operation of the sputtering machine but they are not part of that machine as they are standalone nor are they part of a bigger set of machine to produce semiconductors.

54. We find that the Power Supplies are self-contained standalone units that are not parts for incorporation into the machinery or apparatus with which they are used. To
20 the extent that we can we find is a matter of fact.

55. The Power Supplies were not something which enables the principal to perform a function over and above its standard function. We so find and to the extent that we can we do so as a matter of fact.

56. In summary, we find that the Power Supplies are not “parts” but standalone
25 “machinery or apparatus”.

Submissions of the Parties

The Taxpayer`s submissions in outline

General

30 57. In essence, the Taxpayer argued that the Power Supplies were standalone units which were not part or parts of a bigger machine. They should be categorised on that basis looking to their objective characteristics.

58. The Taxpayer accepts that but for notes 9 (C) and (D) to CN heading 84 the Power Supplies will fall within the definition of static converters within the meaning of code
35 85.04.

59. Notes 9(C) and (D) to CN heading 84 directly exclude the Power Supplies from classification under 85.04 (see above).

60. Power Supplies are not Parts but machines or apparatus.

61. The Shorter Oxford English dictionary describes a part as " any of the
40 manufactured objects that are assembled together to make a machine or instrument". Here the Power Supplies do not form an assembly with a sputtering machine and so do not fall within the dictionary meaning.

62. The CJEU also supports this approach. It said at paragraph 21 in *Peacock*:
45 "...the word "parts", on the other hand, implies a "whole" the operation of which the part is essential and this is not so in the case of network cards. In that respect, it appears from the documents before the court that network cards, which come in the form of slot in cards, they also take other forms, in particular that of a standalone units".

63. This description of network cards could simply be applied to Power Supplies including static converters. A built in Power Supply as is the case with most domestic appliances would be a part as the items form part of the whole. However, static converters, such as the power supplies, which operate a standalone units, are not parts but goods in their own right.

64. The *Epson Telford* case in the Court of Appeal also supports the view that the Power Supplies are not “parts”.

65. The Power Supplies are not "accessories". It was said in the *Epson Telford* case that "... only something which enables the principal to perform the function over and above its standard function could be an accessory; and the ink cartridge did not meet that test..."

66. The Power Supplies simply provide electrical power and so cannot be said to have an additional functionality. Consequently they are not accessories.

67. As the Power Supplies are not parts or accessories heading 845.04 is not applicable. They are also not subject to the general provisions provided by note 2 (a) to CN XVI.

68. An examination of the published by TI database shows that unless the static converter is referred to as a sub-assembly or similar, they are not regarded as parts and note 2 to CN section XVI is not referenced in the reasons for the decision

69. The argument that the Power Supplies are "parts" cannot be supported. The Power Supplies a self-contained standalone units that are not parts for incorporation into the machinery or apparatus with which they are used.

70. The Taxpayer accepts that note 2 to CN section XVI means that parts of goods within the heading that are subject to those general provisions. However, this is beside the point as the Power Supplies are not "parts".

71. This approach is supported by the classification of Power Supplies in motor vehicles.

72. Here the Power Supplies are standalone machinery or apparatus and not “parts”.

73. Accordingly, the appeal must be allowed.

HMRC’s submissions in outline

General

74. In essence HMRC argued that the Power Supplies were “parts” and so properly categorised.

75. HMRC the accepted that the parties agree that if the items are “parts” HMRC’s categorisation prevails. It also agreed that if the items are “machines or apparatus” the Taxpayers’ contention that they should be categorised under heading 8486 prevails.

More Detail

76. At a higher level HMRC contends that the Power Supplies are part of the overall sputtering machinery and so “parts”.

77. The determination of this matter necessarily involves a consideration of facts and law to decide if the items are parts or standalone machinery. The test in law for this purpose is “... To be a part there must be a whole for which the operation of the part is essential” (se *Peacock* above). Here the Power Supplies are static converters for the sputtering machinery and are static converters within heading 8504 and as such are parts.

78. The items provide the charge by which the sputtering process works. It is essential to the operation. The machinery cannot function at all without the items and one cannot properly so it's "...will not work properly without the Power Supply" (see *Rohm and Haas Electronic*, particularly paragraphs 14, 24, 34, 39, and *Turbon International*).

79. The position here is not the same as the printer example in the case law. The activation of the plasma field is essential to the desired outcome of etched silicon chips here.

Discussion

10 *Introduction*

80. In this case we are concerned with functionality rather than outcome. Does the sputtering machine function whether or not the Power Supplies is connected and switched on and carry out the same function The answer is Yes. It is the outcome that differs not the functionality. We remind ourselves that we our concerned with functionality rather than outcome.

81. We set out at the start of this Decision our view of the issue and some questions relevant to deciding the case.

82. As noted above the essential issue in this case as agreed by the parties is whether the Power Supplies are parts or standalone machinery or apparatus. We find they are standalone machinery and not parts. It was accepted by HMRC that"... if the items are "machines or apparatus" the Taxpayers' contention that they should be categorised under heading 8486 prevails". This is the case here.

83. We consider this raises a number of questions

- 25 (1) What is the function of the Power Supplies?
- (2) Can the sputtering machine operate without the Power Supplies?
- (3) Would such operation produce etched chips? Does it matter?
- (4) Is there a whole here for which the operation of the part is essential?
- (5) Is there a part or standalone machinery?

84. We will consider these questions after making a general comment.

30 *General Comment*

85. The process in question needs to have a particular setting if it is to work properly in the sense of producing etched chips The machine can operate without this setting in place. However, this would not achieve the desired outcome of etched chips although the machine would have gone through the operations which are its function. The functionality of the sputtering machine is not changed but remains the same even though the desired outcome is not achieved. This is also true of the printer and the printer cartridge in the case law (see the *Epson Telford* case). The printer goes through the processes it is designed to do. However, if there is no cartridge or the cartridge is empty there is no printed page produced. However, the ECJ did not consider that this made the cartridge an accessory or part of the machine.

86. Certain processes need to take place in certain conditions such as a particular temperature range if they are to work properly in the sense of producing the desired outcome. This would include matters such as applying Glasscoat to motor cars. Electric heaters separate from the equipment for application would not be treated as part of such machines or equipment nor would the power supply to such heaters.

87. It was not argued that the Power Supplies were accessories. It was correct to take this course as the Power Supplies did not enable the sputtering to perform a function over and above its standard function. Function is not the same as outcome.

What is the function of the Power Supplies?

5 88. The function of the Power Supplies is to activate the plasma field. It is not to operate the sputtering machine.

89. The plasma field is the context or setting in which the sputtering takes place when etched chips are produced.

10 90. The function of the Power Supplies is not to produce etched chips. They are not part of the machinery to do so. The operation or function of the Power Supplies is to provide current of the right type to activate the inert gas so that there is a plasma field. It goes to the setting rather than the function of the sputtering machine. The functionality of the sputtering machine remains the same. The Power Supplies do not add to the functionality of the sputtering machine. What is different is the outcome.

15 15 When the plasma is activated this changes the setting in which the sputtering machine functions but not the function or functionality of the sputtering machine. This remains unchanged whether or not the plasma is activated. The Power Supplies change the setting in which the sputtering machine operates. It goes to setting rather than the functionality of the sputtering machine. The function of the sputtering machine. The functioning of the sputtering machine itself remains the same. It is the outcome that is different because of the change of setting not what the sputtering machine does.

20 *Can the sputtering machine operate without the Power Supplies?*

25 91. The sputtering machine can operate without the Power Supplies. The Power Supplies were not essential to the mechanical or electronic functioning of the sputtering machines. They are thus like the ink cartridge. The Power Supplies did not add a function above the standard functions of the sputtering machines. They allowed the setting in which the function took place to be of a certain type but they did not change the function of the sputtering machine. The outcome may be different but this was not a matter of the functionality of the sputtering machine. An etched chip was produced by the functioning of the sputtering machine when there was an activated plasma field. The function remained the same whether or not there was an activated plasma field. It was the outcome that differed. This is the same position as in the case the printer cartridge (see. *Epsom Telford*).

30 92. The Power Supplies are not an integral part of the machine so as to be part or a part of it.

35 *Would such operation produce etched chips? Does it matter?*

93. Such operation would not produce etched chips. However, the sputtering machine would have operated which is the important matter.

94. It does not matter that etched chips would not be produced.

40 *Is there a whole here for which the operation of the part is essential?*

95. As noted above the sputtering machine can operate without the plasma field being activated. Whilst this may not produce the desired outcome of an etched chip that is different from whether or not the sputtering machine could operate. It could operate without the Power Supplies. It is like the printer with no ink. It can operate but does not produce the desired result. That does not go to the operation of the sputtering machine but to outcome.

45 96. *Is there a part or standalone machinery?*

97. Here there is a standalone piece of machinery and not a part.

98. We so find. We do so on the basis of the objective characteristics and properties defined in the CN.

Conclusion

5 99. We have found that:

(1) Here there is a standalone piece of machinery or apparatus;

(2) The Power Supplies are not part of the sputtering machine or a bigger machine to produce semi-conductors;

10 (3) It follows that the original categorisation was wrong on the basis agreed between the parties.

100. Consequently, this appeal is allowed.

15 101. 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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**ADRIAN SHIPWRIGHT
TRIBUNAL JUDGE**

RELEASE DATE: 25 April 2014