



TC04305

Appeal number: TC/2012/09801

CUSTOMS DUTIES — intelligent power distribution units — whether proper to tariff heading 8471 (automatic data processing machines) or 8537 (electrical distribution) — BTI issued in heading 8537 — BTI correct — appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ENLOGIC SYSTEMS EUROPE LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE COLIN BISHOPP
MR JOHN DAVISON**

Sitting in public in London on 24 July 2014

Ms Anne Redston, counsel, instructed by DWF LLP, for the appellant

**Mr Owain Thomas, counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the respondents**

DECISION

Introduction

1. The question we must determine in this appeal is whether certain devices, imported by the appellant from the United States, are properly classified as automatic data processing machines within heading 8471 of the Combined Nomenclature, as the appellant maintains, or as power distribution units within heading 8537, as the respondents contend. Formally, the appeal is against the respondents' decision, upheld on review, to issue a binding tariff information ("BTI") classifying the devices to heading 8537. That heading attracts duty at the rate of 2.1% whereas goods in heading 8471 are free of duty.

2. The Combined Nomenclature, or CN, is the annually revised Annex I to Council Regulation (EEC) 2658/87 ("the Tariff Regulation"). It sets out systematically the classification of goods to Sections, Chapters, headings and sub-headings, for the purpose of determining (among other things) the rate of customs duty which they attract on importation into the European Union. With a limited exception, it is unnecessary for this decision for us to descend any further in the tariff than the headings. A BTI, issued in accordance with art 12 of Council Regulation 2913/92/EEC ("the Implementing Regulation"), as its name implies, contains a decision, said by the Implementing Regulation to be binding on the customs authority (but in practice binding on the holder as well) relating to the correct tariff classification of the goods described in it.

3. The appellant describes its goods as "intelligent power distribution units". They perform the function of distributing electric power within server cabinets housing computers, at the same time undertaking various control and monitoring functions. There are five models of the units relevant in this appeal, but although they have different features those differences are not material for present purposes and we can describe the goods in generic terms.

4. We mention for completeness that in its original application for a BTI the appellant itself suggested heading 8537. HMRC issued a BTI, however, in heading 8544 (insulated electrical conductors) as BTIs in that heading had been issued for other, apparently similar, goods. When the appellant challenged that BTI, suggesting instead heading 8471 (its current preference) or 8473 (parts and accessories for use with various other machines), HMRC reconsidered, and arrived at the heading the appellant had first put forward, but which it no longer favoured. The appellant's position is that the original application was made, by mistake, by an employee with insufficient understanding of the subject. Whatever the explanation, we do not derive any assistance from the parties' changes of position.

5. The description of the units which appeared in the revised BTI, a description with which the appellant takes no issue, was as follows:

"Power distribution unit (PDU). Product comprises of [*sic*] a sophisticated rack-mounted power distribution unit which is used for the electrical distribution of power, principally in computer data centre applications, for connecting network communications and electrical power to computer

network servers. Product includes multiple sockets in a housing, complete with power and energy metering and network monitoring of power loads for overload avoidance. Includes capacity, load balancing and energy use optimisation. The device includes circuit breaker status monitoring and hot swappable network management card, complete with LED display. Features also include environmental monitoring with support for up to six plug and play sensors, colour coded outlets and breakers for visual identification. Also included are premium hydraulic magnetic branch circuit breakers. The unit takes power from the main electricity supply, then distributes and measures it to various parts of computer systems and data networks. Complete with a power cord.”

6. It then went on to classify the unit to heading 8537, which relates to:

“Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517.”

7. Headings 8535 and 8536 relate to different kinds of “electrical apparatus for switching or protecting electrical circuits” and there is no dispute that the items with which we are concerned contain components which meet that description. Chapter 90 includes (among other things) measuring and checking instruments and apparatus. Heading 8517 relates to telephony equipment and it is undisputed that it is irrelevant to this case.

8. The classification the appellant now prefers is to heading 8471:

“Automatic data-processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included.”

9. The appellant was represented before us by Ms Anne Redston and the respondents by Mr Owain Thomas, both of counsel.

30 *The evidence*

10. We were shown samples of the products, with sales literature and technical specification materials, and had witness statements made by Mr Michael Jansma and Mr Robin Li, who are respectively the appellant’s chief marketing officer and its research and development manager. Mr Jansma also gave oral evidence.

35 11. The appellant’s products resemble electrical extension leads with several outlet sockets, although it is obvious from even a cursory examination of their exterior that they are much more sophisticated than the extension leads of that kind one might expect to see used in a domestic environment. They are considerably larger, and they contain various features which one would not expect to see in a similar piece of equipment designed for domestic use. In particular, although not all of these features are present in every model, they have display screens on which the user may read the output of the control functions, input facilities in order that they can be programmed to the user’s requirements, input and output ports to enable sensors of various kinds (supplied separately from the goods) to be connected to them, and the capacity to be “daisy-chained”, that is

linked to other similar devices in order that the linked devices can be controlled and monitored as if they were one unit. Control and monitoring are typically managed by means of a computer network, but may be managed locally by use of the screen and input facilities each device has.

5 12. As the BTI description indicates, the devices are designed to be installed in
cabinets or racks housing several computers, usually mounted one above another,
in a server room hosting a computer network, typically in an industrial or
commercial application. Each unit is connected to the electrical supply, thus
energising the sockets, and each of the computers in the cabinet is connected to
10 one of the sockets. The appellant accepts that, for this reason, the apparatus does
answer to the description of power distribution unit; indeed, its own sales
literature refers to it as a power distribution unit, though that term is usually
qualified by an adjective such as “metered” or “intelligent”. It is this fact which
forms the foundation of HMRC’s position which, in summary, is that once it has
15 been determined that the product is a power distribution unit one needs to look no
further: heading 8537, by its own terms, plainly includes such goods.

13. The appellant’s position, by contrast, is that the distribution of power is
merely the means by which the apparatus performs its principal function, which is
to provide the monitoring and control facilities we have described, including
20 measuring and limiting the current being fed to each of the computers, in order to
minimise power consumption, and to provide information to the user about the
energy consumed. The appellant is, Mr Jansma told us, a company which
specialises in the design and development of computerised measurement, data
acquisition and management systems for use by data centre operators, and the
25 devices with which we are concerned represent, we understand, only some of the
products they offer which are designed to perform those functions.

14. Mr Jansma’s evidence was that power distribution in server cabinets may be
supplied by simple devices, whose only function is power distribution, or by
devices such as those in issue here which do considerably more. A simple device,
30 like its domestic equivalent, merely takes a power supply from the mains and
distributes it to the sockets into which the individual servers are plugged, although
devices used in server cabinets will usually incorporate protection against
“spikes” in current or “outages”. The appellant’s products, he said, differ
fundamentally from the simple units. Although they also distribute power to the
35 servers in the cabinet in which they are mounted, they are distinguished from
simple devices because they contain an embedded central processing unit,
supported by a solid-state memory, an operating system and appropriate software,
in order that the monitoring and control functions we have described can be
performed. It is for that reason that the units are not bought by customers as power
40 distribution units; they are bought as monitoring devices, to whose operation the
function of power distribution is merely ancillary. They are, he said, computers
which happen to perform their function by distributing power, rather than power
distribution units which happen to have a computer added to them.

15. Mr Jansma explained how the devices could be programmed by the user
45 either by use of the inbuilt keyboard or remotely, and in the latter case by a wired
connection or over the internet. Depending on the model and the manner in which

it was configured, a device could be programmed to monitor the consumption of electricity by all the servers in the rack, or by the individual servers separately, and it could perform switching functions, turning the power supply to a server on or off according to the user's preference. Those functions were, conventionally,
5 the functions of a computer and it was for that reason that the devices contained the components required by computers—the hardware already described—and had software installed. Sensors, to monitor such things as the temperature or humidity within the server cabinet could be added by means of the ports provided for the purpose, and the unit programmed to relay their output to the user by
10 means of the inbuilt screen or to a remote location. Additional devices, such as cooling fans, could also be controlled automatically by the units.

16. Because of their level of sophistication the appellant's devices cost, depending on model, between £350 and £1,350, whereas a simple device might cost as little as £85. A customer would buy one of the appellant's units only if he
15 required the computing functions, because of that difference in cost. We accept that proposition, which Mr Thomas did not seriously challenge.

The BTI

17. Box 9 on the BTI allows for the issuing authority to provide its "Justification of the classification of the goods". It was completed (so far as
20 relevant for present purposes) as follows:

"Classification has been determined in accordance with the following:

General Interpretative Rules (GIRs)

GIR 1 has been used to classify this product by the terms of heading 8537 – boards, panels, consoles, desks, cabinets and other bases, equipped with two
25 or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517....

HSEN general notes to heading 8537."

30 18. The General Interpretative Rules form part of the CN, and they are binding rules for its interpretation. GIR 1 reads:

"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
35 notes and, provided such headings or notes do not otherwise require, according to the following provisions."

19. As the narrative in Box 9 makes clear, the author of the BTI has concluded that the terms of the heading, by themselves, bring the appellant's goods within heading 8537, although it goes on to refer to the "HSEN general notes". The HSENs are the Harmonised System Explanatory Notes, the Harmonised System being the internationally agreed classification on which the CN is based. The material passages in the general note to heading 8537 are as follows:

"These [*ie* the products included in the heading] consist of an assembly of apparatus of the kind referred to in the two preceding headings (*eg* switches

and fuses) on a board, panel, console etc, or mounted in a cabinet, desk etc. They usually also incorporate meters, and sometimes also subsidiary apparatus such as transformers, valves, voltage regulators, rheostats or luminous circuit diagrams.

5 The goods of this heading vary from small switchboards with only a few switches, fuses etc (*eg* for lighting installations) to complex control panels for machine-tools, rolling mills, power stations, radio stations, etc, including assemblies of several of the articles cited in the text of this heading.

The heading also covers:

- 10 (1) Numerical control panels with built-in automatic data processing machine, which are generally used to control machine-tools.
- (2) Programmed switchboards to control apparatus; these permit variations in the choice of operations to be followed. They are normally used in domestic electrical appliances, such as washing
15 machines and dish washers.
- (3) ‘Programmable controllers’ which are digital apparatus using a programmable memory for the storage of instructions for implementing specific functions such as logic, sequencing, timing, counting and arithmetic, to control, through digital or analog
20 input/output modules, various types of machines.”

20. The HSENs are, as the Court of Justice of the European Union (“CJEU”) has said many times, “an important aid to the interpretation of the various tariff headings but do not have legally binding force” (see, for example, *Holz Geenen GmbH v Oberfinanzdirektion München* (Case C-309/98) at para 14. It is, nevertheless, customary to heed the HSENs, while bearing in mind that they are
25 an aid rather than binding.

The appellant’s arguments

21. The essence of the appellant’s case, as we have already indicated, is that the BTI is based on a misunderstanding of what it is that the products do. If the notion
30 that they are power distribution units is put to one side, it becomes clear that they are, in truth, data processing machines of precisely the kind for which heading 8471 caters. That is made clear by the HSEN to heading 8471, the first three paragraphs of which are as follows:

35 “Data-processing is the handling of information of all kinds, in pre-established logical sequences and for a specific purpose or purposes.

Automatic data-processing machines are machines which, by logically interrelated operations performed in accordance with pre-established instructions ..., furnish data which can be used as such or, in some cases, serve in turn as data for other data-processing operations.

40 This heading covers data processing machines in which the logical sequences of the operations can be changed from one job to another, and in which the operation can be automatic, that is to say with no manual intervention for the duration of the task. These machines mostly use electronic signals but may also use other technologies. They may be self-
45 contained, all the elements required for data processing being combined in

the same housing, or they may be in the form of systems consisting of a variable number of separate units.”

22. That, said Ms Redston, is a precise description of the products in this case. The HSEN goes on to provide that a complete automatic data-processing system comprises, at least, a central processing unit, an input unit and an output unit. Again, the appellant’s products satisfy those requirements.

23. She referred us too to Note 5(A) to Chapter 84 of the CN which (as GIR 1 indicates) has binding force. The Note is as follows:

“For the purposes of heading 8471, the expression ‘automatic data-processing machines’ means machines, capable of

- (1) storing the processing program or programs and at least the data immediately necessary for the execution of the program;
- (2) being freely programmed in accordance with the requirements of the user;
- (3) performing arithmetical computations specified by the user; and
- (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.”

24. There is no disagreement between the parties about requirements (1), (3) and (4), which HMRC accept are all met. The dispute lies in requirement (2): the appellant says that its goods are freely programmable, by use of the built-in interface (keypad and screen) or by remote means. HMRC’s mistaken position is revealed, said Ms Redston, by the assertion in the review letter that classification in heading 8471 is available only if a device includes “a hard disc drive for data storage”. That assertion ignores the fact that technology has moved on, and that the function of a hard disc may now be undertaken by the solid state memory which these devices contain.

25. HMRC’s further objection, set out in their statement of case, that the devices do not have the flexibility of an automatic data-processing machine, apparently because their data-processing function is confined to the monitoring of servers, has no basis in law. In *Axial Systems Ltd v Revenue and Customs Commissioners* [2013] UKFTT 319 (TC) this tribunal had also been faced with an argument by HMRC that a machine—in that case a network monitoring device—was not an automatic data-processing machine because it was programmable only within the confines of its function. At [95] the tribunal said:

“We see no basis for restricting the plain words in the way suggested. We note in [*Igekami Electronics (Europe) GmbH v Oberfinanzdirektion Nürnberg* (Case C-467/03)] that although there was no discussion specifically on the point, the equipment there (close circuit surveillance equipment which was not anything like a desktop PC), was accepted as prima facie falling within the Automatic Data Processing machine heading, and Note 5(A) was referred to.”

26. In other words, “freely programmable” does not mean that the item in question must be capable of performing any task of which automatic data-processing machines, as a class, are capable; it may be confined to a limited range

of tasks, provided that within that limitation it is freely programmable, and satisfies the other requirements of Note 5(A).

27. Ms Redston relied on the observation by the European Court of Justice in *Hauptzollamt Hamburg-St Annen v Thyssen Haniel Logistic GmbH* (Case C-459/93), at para 13, and repeated in broadly similar terms in many other cases, that

“... the intended use of a product may constitute an objective criterion for classification if it is inherent to the product ...”

28. Mr Jansma’s evidence could lead only to the conclusion that purchases of the appellant’s products were made only by those who wanted to use the monitoring and control features; the price differential between these products and simple power distribution units made that clear. It followed that they were purchased as automatic data-processing machines, and should be classified accordingly, that is to heading 8471.

29. That argument was particularly strong in respect of one of the models of the appellant’s products, the EZ1000, which is fitted between a standard power distribution unit and the server. Although, in order to function, it has to channel the power from the mains supply to the servers in the cabinet, it is a supplementary device, added for the sake of its computing, or data processing, power, to the existing means of power distribution. Although that model represents a particularly compelling example, it is in reality typical of all the relevant products.

30. Ms Redston accepted that the appellant’s products fell within the letter of heading 8537 in as much as they were “equipped with two or more apparatus of heading 8535 or 8536”, but took issue with the proposition that the units were “for ... the distribution of electricity”. Again, she said, that proposition could not be reconciled with the fact that purchasers would not buy such units for that purpose; they would buy the cheaper units available if that was all they required. The function of the units, when viewed in that way, was not that of distributing electricity. Even HMRC accepted as much; in their statement of case, at paragraph 31, they quoted (though without acknowledgment) a passage to be found on the appellant’s website, stating that the function of the units is

“... to monitor data centre environments continually looking for threats from electrical circuit overload and any physical and environmental conditions which may place it computing loads at risk.”

31. That, said Ms Redston, is not the distribution of electricity. Other statements made on the website, and in technical literature, reinforce that conclusion by describing the functions, beyond simple power distribution, of which the units are capable and for which they are bought. Once one discards the notion that the units are “for” the distribution of electricity it becomes clear that they must be classified to heading 8471, either because of GIR 1 or, failing that, GIR 3(b), which requires that goods 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”.

32. That approach was adopted by the CJEU in *Kip Europe SA and Hewlett Packard International SARL v Administration des Douanes* (Joined cases C-

362/07 and C-363/07), in which it had to consider multi-function machines, capable of photocopying, scanning and printing, in some cases with a computer installed in the same housing, in others with the capability of being connected to a computer. The customs authority placed reliance on Note 5(E) to Chapter 84, which provides that

“Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data-processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.”

33. Their argument was rejected. The court observed that:

“32 It follows from the wording of Note 5(E) to Chapter 84 of the CN that the ‘specific function’ performed by a machine working with an automatic data-processing machine must be a function ‘other than data processing’ (see *Olicom* [Case C-142/06], paragraph 30).

33 Furthermore, it follows from the general scheme and purpose of that note that the expression ‘are to be classified in the headings appropriate to their respective functions’ does not seek to have one function take priority over others also performed by the apparatus to be classified and which also constitute data processing, but to prevent apparatus whose function has nothing to do with data processing from being classified under heading 8471 for the sole reason that they incorporate an automatic data-processing machine or work in connection with such a machine.”

34. Further support for the proposition that the BTI is based on a fundamental misunderstanding is to be derived from the fact that the full tariff classification is to a residual code, 8537 10 99, for which the relevant HSEN provides the example of remote control devices for televisions and video recorders. Those goods are wholly different from the appellant’s products, and the classification is plainly inappropriate for the latter.

35. If there should be any room for doubt about the classification, Ms Redston added, we must have recourse to GIR 3:

“When ... 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 ...

(b) mixtures, composite goods consisting of different materials or made up of different components ... 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”

36. The most relevant of those requirements lies in sub-rule (b), namely that pointing to classification by reference to the “component which gives [the goods] their essential character”. Here, there could be no real doubt that the essential character of the goods lies in their data processing capabilities. The same approach had been adopted by the Court in *Kip Europe*, in which it stated that if the copying facility which the machines in issue in that case was subsidiary to its printing and scanning functions it was the latter which governed the classification

of the machine for tariff purposes. Here, it was plain that the power distribution function was subsidiary to the devices' main purpose of monitoring and control, and it was those functions which should dictate the tariff classification.

5 37. As an alternative (and with rather limited enthusiasm) Ms Redston suggested classification to heading 8473, which applies to "Parts and accessories ... suitable for use solely or principally with machines of headings 8469 to 8472". It is uncontroversial that networked computers, or servers, fall within heading 8471. The HSEN to heading 8473 makes it clear that what is included within the heading is "interchangeable parts or devices designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine or to increase its range of operations". The appellant's devices were designed for use with networked computers, and to undertake the management of their power supplies, thus enhancing the computers' reliability and effectiveness.

15 *HMRC's arguments*

38. Mr Thomas began from the position that once it had been accepted by the appellant, as it has, that heading 8537 is capable of applying to the products the questions to be answered are whether heading 8471 is also engaged, and if so which of the two prevails.

20 39. He emphasised that heading 8537 is of broad scope. It applies, as its own terms show, to boards, panels, consoles, desks, cabinets and other bases, provided only that they incorporate (as these devices do) multiple apparatus of heading 8535 or 8536. The heading applies to goods which do not merely distribute electricity, but also those which include control functions. The HSEs to the heading add that goods within it "usually incorporate meters and sometimes also subsidiary apparatus such as transformers, valves, voltage regulators, rheostats or luminous circuit diagrams", and that they "vary from small switchboards with only a few switches, fuses etc ... to complex control panels for machine tools, rolling mills, power stations, radio stations etc" and that the heading includes "numerical control panels with built-in automatic data processing machines, programmed switchboards and programmable controllers." As those notes make clear, the heading is intended to include apparatus which control or monitor the distribution of electricity, including those which incorporate a programmable memory for the storage of the user's instructions relating to the manner in which the device is to implement those instructions. That description is plainly entirely apposite to these devices.

40. By contrast, heading 8471 is not apposite. The devices are not freely programmable, and therefore do not satisfy the requirements of Note 5(A) to Chapter 84. Note 5(E) is engaged: the devices perform "a specific function other than data processing", that is power distribution, and are accordingly to be classified in the heading appropriate to that specific function, which is 8537. In addition, Section Note 3 to Section XVI of the CN—the section which includes Chapters 84 and 85—is in point.

41. The requirement of Note 5(A), that a device be "freely programmable" is met only if the device in issue if the product has flexibility, meaning that it can be

programmed entirely as the user chooses. Here, that quality is not present as the devices have to operate within pre-set parameters, even if there is a measure of user choice within those parameters. The appellant's devices are comparable to those considered by the tribunal in *Bladeroom Group Ltd v Revenue and Customs Commissioners* [2013] UKFTT 574 (TC), which were also designed to be used in server rooms in order to monitor environmental conditions, particularly current loads, temperature, pressure and humidity, and to provide a current of cool air. The tribunal rejected the contention that the products were freely programmable on the ground that the extent to which the user could alter the pre-set parameters was limited, in that they would cease to perform their designed function if they were re-programmed rather than subjected to relatively minor adjustment to suit the particular server room in which they were placed. Although the appellant's devices did not perform exactly the same functions, at least without the optional sensors, the extent to which they are programmable is materially the same, that is within limited bounds. It may well be that the automatic data processing unit contained within it could be taken out and used in a different application, but that is beside the point. What has to be considered is the product as presented, and as presented the appellant's products do not have the ability to be freely programmed, as that expression is used in Note 5(A).

42. Mr Thomas accepted that it was not the aim of Note 5(E) to prioritise the functions of machines which have both data processing and other capabilities; that was clear from the CJEU's judgment in *Kip Europe*. Thus the fact that a machine has a function other than data processing does not, without more, exclude it from heading 8471. Conversely, the fact that a machine is capable of data processing is not enough to bring it within that heading. There is no clear distinction between headings 8537 and 8471, that is an explicit provision rendering them mutually exclusive: so much is apparent from the numbered paragraphs of the HSEN to heading 8537 (set out at para 19 above). Those notes show that goods within heading 8537 include those which incorporate a data processing module in order that their main function may be performed, and that the incorporation within such a device which would otherwise fall within the heading of a data processing module does not take it out of the heading. In other words, the fact that the appellant's product are intelligent power distribution units does not make them any the less power distribution units.

43. If that conclusion is accepted, Mr Thomas said, it follows that Section Note 3 to Section XVI of the CN—the section which includes Chapters 84 and 85—is engaged. The Section Notes, too, are binding, as GIR 1 makes clear. The relevant part of the Note reads:

“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.”

44. Mr Thomas relied too on Commission Implementing Regulation (EU) 115/2014, made pursuant to arts 9 and 10 of the Tariff Regulation. It relates to a device incorporating an automatic data processing module with operating system as well as various input and output ports, a display and touch screen input, and

states that it is excluded from heading 8471 because “the apparatus is intended to be used for electric control of machines in industrial processes. Classification under heading 8471 as an automatic data-processing machine is therefore excluded.” It goes on to add that “As the apparatus incorporates an ADP machine it is to be classified under CN code 8537 10 10 as numerical control panels with built-in automatic data-processing machine”. There was, Mr Thomas said, no material difference in tariff terms between that product and these.

45. The appellant’s case that GIR 3(b) is engaged, he said, is misconceived. That argument presupposes that the data processing function defines the essential character of the goods. But that is not the test which rule 3(b) applies; as the Court of First Instance explained in *Sony Computer Equipment Entertainment Europe Ltd v Commission of the European Communities* (Case T-243/01), at para 124,

“...according to the clear terms of general rule 3(b), it provides for the classification of mixtures and composite goods according to the material or component which gives them their essential character. It does not provide for the possibility of classifying mixtures or composite goods according to the function which gives them their essential character.”

46. If we were to decide that it was not possible to determine what was the component which defined the essential character of the goods then both the GIRs themselves and the HSEs to the Section Notes provided that, as long as the context did not otherwise require, it becomes necessary to use GIR 3(c), which provides that classification must be to the heading with the higher number. That approach, too, dictates classification to heading 8537 rather than 8471.

47. HMRC reject the proposition that the goods are to be classified to heading 8473 as parts of an automatic data-processing machine. That proposition assumes a “whole” of which the device is a “part”, but no such whole could be identified: the appellant’s devices might supply power, and monitoring and control functions, to an array of servers but they did not affect the operation of the servers and did not represent or become a part of the network. For similar reasons they could not be said to be accessories; an accessory enhances or adds to the operational functions of the principal device, but these items did neither.

Discussion and conclusions

48. We have no doubt that the appellant’s units are of a sophisticated nature and that, as Mr Jansma said, they are bought primarily for their added functionality rather than as power distribution units which happen to have useful features. We accept his evidence on the nature of the devices, their uses and the market for them. However, as Ms Redston accepted, his evidence on these topics does not address the proper test: it is not the purpose of the purchaser but the objective characteristics of the article which determine its classification. The purpose of the purchaser, or the use of the product, may throw some light on the objective characteristics, but they are not in themselves determinative: see *Thyssen Haniel*, cited above, in which the Court’s complete observation on this point was that:

“... 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”

49. We accept too that the appellant's products are devices which contain automatic data-processing machines. In reaching that conclusion we prefer Ms Redston's submission, in relation to Note 5(A) to Chapter 84, that the term “automatic data processing machine” includes articles which have a restricted range of functions (such as the devices in issue in *Igekami Electronics*) provided that, within that limitation, they are freely programmable—that is, the user may change the conditions which activate them, the actions they take when activated or a combination of the two. Although we see the attraction of Mr Thomas's argument that a practical limitation on the extent to which the program may be adjusted is inconsistent with the proposition that the device is freely programmable, we do not find within Note 5(A), or in the case law to which we were referred, any ground for supposing that, before it can be classified to heading 8471, an automatic data-processing machine must be able to perform any task of which such machines, as a class, are capable. In addition, as we understood the evidence, the automatic data-processing machine installed in each of these devices would have been capable of a wider range of tasks if removed from the housing and applied to a different purpose; it is the designed application of the device as a whole rather than any inherent limitation of the capabilities of the automatic data-processing machine which restrict its function.

50. That is not, however, to say that these devices are properly classified in heading 8471. We accept that Mr Thomas is right to argue that what must be considered is the article as a whole, even if the nature of some of its components is material to the description given in the heading. Thus the fact that the units contain automatic data-processing machines does not carry with it the implication that they are, themselves, automatic data-processing machines. There seem to us to be three major obstacles in the way of the classification of these units as such machines, and appropriate to heading 8471.

51. The first lies in the wording of the heading itself. It includes within its scope goods only if they are “not elsewhere specified or included”. Thus once it is established that the appellant's products are capable of inclusion within heading 8537 they are necessarily excluded from heading 8471. There is no similar proviso to heading 8537; thus if goods are, in principle, capable of coming within both headings, 8537 must prevail. We have recorded above that the appellant does accept that heading 8537 is a possible classification but, irrespective of that concession, it seems to us clear that heading 8537 is designed to capture devices of this kind. For convenience we repeat it:

“Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517.”

52. Ms Redston was unable to show that any part of that description was not met. We agree with Mr Thomas, in addition, that it is plain from the relevant HSEs that the intended scope of the heading is wide; and it is apparent from an

examination of the examples listed in that note, although they do not include apparatus of this precise type, that very similar goods are within the heading.

53. The second obstacle lies in our conclusion that Mr Thomas is right in his argument that Note 5(E) to Chapter 84 is an impediment to classification within that Chapter. There can, we think, be no real doubt that these devices do perform a function other than data processing—namely power distribution—and we see nothing in what was said in *Kip Europe* which assists the appellant on that score. Ms Redston’s argument presupposes a finding that data processing is the predominant function of the devices, but that presupposition is itself undermined by a further point she raised which, with respect to her, seems to us to demonstrate the reverse of what she argued.

54. That point was that in many cases the European Court of Justice had adopted a “removal” test. In *Turbon International GmbH v Oberfinanzdirektion Koblenz* (Case C-250/05) the court said, at para 21:

“...in carrying out the tariff classification of goods it is necessary to identify, from among the materials of which they are composed, the one which gives them their essential character. This may be done by determining whether the goods would retain their characteristic properties if one or other of their constituents were removed from them”

55. It is that passage which, in our judgment, identifies the difficulty. The evidence showed that if the devices with which we are concerned lacked their power distribution function, they would be incapable of performing any other of their functions, since those functions are all parasitic on power distribution: it is what they monitor or control. That sensors connected to the device might still operate is irrelevant since what must be considered is the goods as they are, not as they might be if supplementary devices were added. A machine incapable of functioning would, plainly, lose its essential character whether one were to regard that essential character as data processing or power distribution. By contrast, if the automatic data processing components were removed, the units would still be capable of power distribution, even if in an unsophisticated manner. It follows that power distribution must represent the principal function, and the section note makes it plain in those circumstances that classification to power distribution (heading 8537) is mandated.

56. The third obstacle lies in our agreement with Mr Thomas that Regulation 115/2014 is in point. The machines described in it are not identical to those with which we are concerned, but they are plainly very close to them in their characteristics, and we can identify no distinguishing feature which might be said to differentiate them. We can see, therefore, no basis on which we might properly disregard the Regulation, which steers us inexorably to heading 8537.

57. We add for completeness that if we entertained any doubt, which we do not, whether heading 8471 or 8537 was correct, GIR 3(c) would also dictate classification to heading 8537, and that we agree with Mr Thomas that classification to heading 8473 is not possible, and for the reasons he gave.

58. In our view HMRC’s arguments are broadly correct, and the devices with which we are concerned were properly classified by the BTI to heading 8537. The appeal must, therefore, be dismissed.

59. 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
- 5 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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**COLIN BISHOPP
CHAMBER PRESIDENT**

RELEASE DATE: 2 March 2015