



TC05190

Appeal number: TC/2015/02545

CUSTOMS DUTY – classification of product installed in vehicles as a radio reception receiver or monitor under the Combined Nomenclature – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

ALPINE ELECTRONICS OF UK LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER MR CHARLES BAKER**

**Sitting in public at the Royal Courts of Justice, Strand, London on 10 and 11
February 2016**

Dr Amanda Brown of KPMG for the Appellant

**Mr Mark Fell, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, as Counsel for the Respondents (“HMRC”)**

DECISION

1. The appellant is appealing against HMRC's decision of 10 November 2014 (as
5 upheld on review on 2 March 2015) to revoke a binding information tariff ("**BTI**")
they had issued on 26 March 2014. The BTI stated that the product described in 4
(the "**Product**") was to be classified as a "radio navigational receiver" under
commodity code 8526 9120 (the "**Radio Receiver Code**") as liable to customs duty at
3.7%.

10 2. HMRC revoked the BTI on the basis that the Product is to be classified as a
"monitor" under commodity code 8528 5970 (the "**Monitor Code**") as liable to duty
at 14%. In revoking the BTI HMRC placed reliance on Commission Implementing
Regulation (EU) No 698/2012 both before and after amendment by Commission
15 Implementing Regulation (EU) No 459/2014 (respectively the "**2012 Regulation**"
and "**2014 Regulation**" and together the "**Regulation**").

Evidence

3. Our findings of fact are based on the bundle of documents produced to the
tribunal and the witness evidence of Mr Bruno Lach and Mr Masashi Yanagisawa,
who demonstrated the Product to the tribunal. Mr Lach is a project leader of Alpine
20 Electronics R&D Europe GmbH and has been employed by that company since 2004
in the course of which he worked on a number of research and development projects.
He was not involved in the development of the Product but has substantial experience
of the development of similar products. Mr Yanagisawa has been employed by the
appellant since 1998 in a number of senior roles which have included involvement in
25 managing the relationship with Honda Motor Company UK ("**Honda**").

4. We were also provided with a witness statement from Mr Harris the officer of
HMRC who had decided to revoke the BTI. He gave evidence, which is not disputed
and we accept, that he had decided to revoke the BTI essentially on the basis that the
Product is sufficiently similar to that classified under the Monitor Code in the
30 Regulation.

The Product

5. The appellant is part of the Alpine Electronics group (the "**Alpine group**")
which is a multinational producer of electronic devices, and in particular, car audio
and navigation systems.

35 6. The Product in dispute is built into Honda motor vehicles and has the following
main features as explained in further detail below:

- (1) A radio navigational receiver (Global Positioning System or GPS).
- (2) Two reception apparatuses for radio-broadcasting (radio.) One receiver is
40 dedicated to providing traffic messages and the other provides conventional
audio.

- (3) A sound reproducing apparatus (CD player).
 - (4) An image reproducing apparatus (DVD player).
 - (5) A 6.5 inch touch sensitive colour liquid crystal monitor.
 - 5 (6) Connectors enabling the reception of video signal from external sources.
7. The GPS is a comprehensive navigation system (referred to as the “**navigation system**”) that uses the LCD display screen to show maps and other related information as navigational aids. It has 11 language options available, it has voice recognition for 5 languages and includes map coverage for 33 countries. It comprises:
- 10 (1) A GPS interface in charge of decoding the GPS information collected over the antenna which is fitted in the dash.
 - (2) A gyro in order to perceive the orientation of the vehicle.
 - (3) An interface to the speed pulse of the vehicle which, coupled with the two above sensors, ensures a high quality positioning of the navigation system.
 - 15 (4) An interface to the tuner which is used for collecting the traffic messages that are computed by the navigation software.
 - (5) A dedicated computing board (a printed wiring board or PWB) hosting the navigation software which in effect is in charge of making queries to map data, rendering map information, traffic information, route information and monitoring the actual position of the vehicle to give real time information to the user with regard to the route he/she has to follow.
 - 20
8. A 60 GB Hard Drive Disk (“**HDD**”) is included in the unit. The HDD is partitioned before it is inserted in the unit in the sense that approximately 75% of the space is set aside for the navigation system as regards its software and map data and 25% to the audio system. The 75% of space on the HDD for the navigation system is needed so that updates to the system introduced by the yearly DVD (see 16) can be stored locally and to enable the storage of other data relevant to the driver such as speed, distance and route information. The remaining 25% of space for the audio systems is used for music storage.
- 25
9. The LCD screen with touch function is used both to support the navigation system by displaying maps and the route and to display other media such as information on music being played or media played from a DVD.
- 30
10. There is an audio board which hosts the different tuners and tuner processor as well as outlets for external devices that can be connected to it such as a DAB tuner (Digital Audio Broadcast), iPod and USB. The radio receives AM/FM signal which is heard through the vehicle’s speaker system. Part of the audio system, such as the tuner and speakers, are shared with the navigation system mainly for the interactional interfaces (such as interactions with the user and collection of live data such as traffic messages).
- 35

11. In Mr Lach's view the sharing of certain aspects of the Product by the different functions is merely a reflection of the fact that the Product is by design primarily a satellite navigation system which, to save development, integration and material costs includes the audio function as well.

5 12. There is a Bluetooth function which links to other devices such as mobile phones so that the driver can use a phone while driving on a hands free basis.

10 13. On the hardware side there are a number of PWBs which are boards used for the assembling of an electronic circuit where a board is needed on which the components can be mounted and wired together. Two are mainly assigned to the navigation function, being that described in 7 above and a middle PWB which primarily provides the hardware for the tuner used to receive traffic information, and one is mainly assigned to the audio function providing the hardware for the tuner for the radio and external devices (see 10).

Use of the navigation system

15 14. When the Product is first used the user is requested to select the preferred language and units (kilometres or miles) for the system which are both necessary to operate the system. Once the initial screen set up has been made the user has the option of changing the preferred language on the same screen as a warning message appears.

20 15. The Product is switched on automatically when the driver turns the ignition of the vehicle and the system starts loading on displaying the words "Satellite Navigation System" together with the Honda logo. This is followed by a warning message regarding the use of the navigation system whilst driving. This states "this system provides route information to help you reach your destination. Due to road conditions some recommendations may not be appropriate". The user must confirm his understanding of the warning message before the system will continue to load. The default screen once the system is loaded is a map with the driver's current location pinned.

30 16. The DVD function is used to update the navigation system with both software and map updates. It is possible to use the DVD function to display content on the touch screen, however, the DVD function will not be available when the vehicle is in motion. The DVD player only works as regards visual content when the car is stationary with the handbrake applied. Any sound from the DVD continues to work whilst the vehicle is moving.

35 17. The CD player can be used when the car is moving. The Product does not have a speaker incorporated in it and therefore any sound output from a DVD or CD relies on connection to the vehicle's speaker system.

40 18. The control of the audio system, whether in relation to radio or playing music from a disc or through the HDD, is through the monitor. When any sound from the audio system is being played the main feature shown on the monitor is still the map

for the navigation system. Any icons in relation to the audio system are minimised on the monitor in order not to disrupt the driver's view of the maps.

19. A voice control system allows for hands free operation of most of the navigation system's functions. The driver can also use it for control of the audio and climate system and to make and receive phone calls using the Bluetooth hands free telephone.

20. The interface settings include display settings. The display screen can be set for daytime and night time mode to ensure that the driver can see the details on the screen properly without distraction.

21. The navigation system allows the driver to store up to 200 address entries in the address book. Addresses can be manually inserted or the driver can save his current position as an entry. The system allows for alerts to be set off when the driver nears a pre-programmed place. The system will also maintain a list of previously routed destinations as a shortcut for entering the same destination in the future. The system automatically recalculates the route when any deviations are made to the originally chosen route.

22. There are additional useful settings directly related to the navigation system such as off road tracking and the correct vehicle position.

Owner's manual

23. The main part of the car user's manual is dedicated to the navigation system with that section taking up more than 50 pages. The key features as set out in the manual are as follows:

(1) When looking up addresses, the country the driver is in will be displayed (subject to manual change). The driver is then prompted to select the destination or is able to choose a destination based on "place category" (for example which may be useful if the driver does not know the exact name of the destination/address). The system allows the driver to search for a destination by phone number, by latitude and longitude map coordinates. It is also possible to use an intersection of two streets as the destination. These various ways of finding a destination are available due to the extensive map database.

(2) There are various routing preferences that the driver can choose from, for example, whether to use the fastest and most direct route or to minimise any use of motorways. The system will allow the driver to view three different routes to the chosen destination and will show estimated travel time for each.

(3) The "map menu" is used to control the icons that are displayed on the screen and to display any traffic information. It can also be used to find locations or to cancel a route. The display mode can be set to show a single screen, with the map and guidance on separate screens, or split screen, where map and guidance information is shown simultaneously. Various settings are also available in terms of what functions and icons are to be displayed from the map screen. It is also possible to select the map orientation so that it always North pointing up or for the direction of travel to be pointing up.

5 (4) The last section within the navigation part of the owner’s manual explains how to alter a route, add an interim waypoint, choose a different destination, cancel the current destination and continue a trip after stopping. This notes that when the audio and navigation systems are used simultaneously the map/route information is what is mainly displayed on the screen and any audio information is minimised at the top of the screen.

Appellant’s business

10 24. The appellant was established in 1985 as a wholly owned subsidiary of the Alpine Electronics Inc. based in Iwaki City in Japan. The group has manufacturing facilities in Japan, China, Mexico, Hungary and Thailand. It also has a large testing and product development facility at its European headquarters which is located in Munich with a supporting sales office and evaluation centre in Stuttgart. Product development largely takes place in Japan. The regional development offices such as Stuttgart assist with the provision of specific testing or research and provide input where specific local knowledge is needed.

25. Of the group’s global net sales, 21% relate to audio products and 79% relate to information and communication products, which includes navigational products. Receipts from sales of the navigation products represented around 56.4% of the group’s consolidated total turnover in 2014.

20 26. The appellant’s UK business is in two areas:

25 (1) The appellant is an “original equipment manufacturer” (“OEM”). This means it makes a part or system for use in another company’s end product. Such products are provided to customers, such as Honda, for direct installation in the vehicles they sell. The products are not Alpine branded and are often sold by the customer as optional extras or as part of an upgrade package. The group offer a range of products from basic audio to advanced navigation items. The precise specification of products depends on the requests received from the vehicle manufacturers and, therefore, there is no catalogue of products as such.

30 (2) The appellant also provides “after market” sales of products that are made through specialist care electronics dealers and which are installed after the vehicles have left the factory. These are Alpine branded and include products such as digital media receivers, advanced navigation stations, mobile media stations, camera systems, rear set entertainment, head units, DAB solutions, amplifiers, speakers and subwoofers.

35 27. Mr Yanagisawa expressed the view that there is a clear distinction between the different categories of products in terms of the functions offered and price. He and Mr Lach regard the Product primarily as a satellite navigation device, as that was the concept and design behind the Product, which is made specifically for Honda to their requirements as explained below.

40 *Satellite navigation and relationship with Honda*

28. The Alpine group has been a market leader in satellite linked navigation systems since co-developing the world's first navigation system (the Elector-Gyrocat) with Honda in 1981. The group was the first company to develop "re-route car navigation technology". The group continues to develop such products, which are constantly evolving, as explained below.

29. As noted the Alpine group has had a long association with Honda which goes back to 1978 when the group obtained a contract to develop an audio system which was more integrated with the Honda vehicle (compared to audio products in the market at that time). In 1986 the group was enlisted by Honda to manufacture an in-built AM/FM radio. As technology developed and consumer tastes changed, over the time the focus in the group's relationship with Honda moved from audio products to navigation products. The group became Honda's preferred partner in terms of developing navigation units to Honda's specification as new vehicles were produced by Honda.

30. In line with this, the Product is sold by the appellant as part of its OEM business exclusively to Honda as a satellite navigation system for direct installation in their vehicles. Honda's customers purchase the Product as an extra or upgrade to their new motor vehicle. It is described in the Honda CR-V catalogue as a "HDD satellite navigation system". (The products are not listed in Honda's 2015/16 catalogue due to discontinuation.)

31. Mr Yanagasawa's view is that the appellant and Honda make a clear distinction between audio and navigation products and both view the Product as the latter. The Product has a number of functions that are integrated with each other due to the technological developments made in the market and consumer demands. However, the satellite navigation function is by far the most advanced component of the Product which has taken years of development and accounts for the highest cost component. He notes that both the operational interface and the screen are used as part of the navigation function. If the group were to omit the navigation function, the Product would be a very significantly overpriced radio/CD/DVD player which would be unmarketable at its current price. The price at which the appellant provide Honda with the Product is more than 9 times the price for an audio product provided to Honda and around 88% of the HDD cost can be referenced to the navigation function.

Research and development

32. The satellite navigation products the Alpine group sells today represent the current stage of the evolution or life cycle of the products the appellant first developed with Honda in 1981. Each generation of navigation system leverages off the existing technology in the prior version as well as reflecting changing consumer tastes such that Mr Lach's view is that future satellite navigation products will be quite different to the Product. This particular Product was developed prior to the "connected-unit" concept of having the navigation technology and software external to the device on a user's smartphone. This is very different to the Product which has a fully "on-board" navigation function meaning that the map data base and the navigation engine are housed within the system itself. Such on board products require the Alpine group to

make significant development efforts in terms of, as Mr Lach said, “the adaptation and aggregation of the raw digitised data into a proprietary map database format to be used by a proprietary navigation engine and all the evaluation and quality controls” required to maintain that.

5 33. In view of the constant development of the navigation function, it is that aspect
of the products produced by the Alpine group which has seen the greatest investment
by the group and which has been developed the most significantly over the years.
Audio technology as regards the products has been relatively static over the same
10 period. This is representative of the market for these devices more generally. This is
to some extent illustrated by the fact that the process of yearly update cycles for the
system are triggered by the requirements of navigation system. Audio information
does not become obsolete over time and does not require constant upgrades (with the
exception of major changes coming when a new generation of products is planned).
15 On the other hand the navigation function needs to be always at the latest level to
ensure consistent and safe driving for the end user. The main fixes and updates after a
product launch are more related to navigation function (mostly the complex and safety
related function) rather than on audio.

20 34. The group has an advanced research and development programme that begins at
the design stage and continues after the products are installed in vehicles in use by
consumers. The group is committed to improving continually the navigation function.
The office in Stuttgart is responsible for cross-functional tests, system evaluation
durability and road testing with the primary focus on the navigation system as well as
radio wave testing, electromagnetic compatibility and non-destructive testing. The
25 group’s investment in this and the continued improvement of the satellite navigation
technology is intended to meet the customer demand for safer cars and it is the aim to
develop products with superior usability to support safe driving.

Improvements to Product through updates

30 35. For this Product the German team assists Japan with evaluating the system
yearly updates regionally through tests on the field and local support. Improvements
were then made to the operation and function of the devices on an annual basis by
way of mainly navigation database updates and software updates. The annual software
update process is split into four stages that roughly take place around the following
periods: in January, issues are identified; in June the software update development
35 process starts; in September, software updates are tested and in October, there is the
market introduction of the software update.

40 36. These updates were delivered to the customer from the Honda services team or
Honda dealership who were provided with the software update by way of a DVD
provided by the appellant. The content of the update included an updated map
database, new route information, the introduction of new landmarks, the introduction
of 3D landmarks and city models increased territories (such as expanding the maps
available to cover a wide range of countries), improvements in safety and “fixes” for
bugs in the system.

37. After market launch the Alpine group aims to ensure a period of at least 3 to 5 years of updates after the last production line fitment. The “must” focus of the yearly updates related to the map and routing data and less often to bug fixes after risk analysis.

5 *Market reputation*

38. That the group is particularly well known for its navigation devices is demonstrated by market reports:

10 (1) In 2002 to 2005 the group was ranked number one for its car navigation systems by JD Power. JD Power is an independent market research company for the automotive sector.

15 (2) JD Power categorizes the group as being in the navigation systems market. In referring to one of the group’s “aftermarket” products a JD Power (Asia Pacific) press release of 24 October 2014 refers to the importance of the navigation function in terms of customer satisfaction and also noted that the product “performs particularly well in the navigation function”.

(3) That press release also notes that in-dash navigation systems are evaluated for four factors (in order of importance) being (i) navigation function (42%) (ii) info-tainment equipment (21%) (ii) operational interface (20%) and (iv) screen (17%).

20 *Cost*

39. The Product as a whole has various functions that are integrated with each other due to the technological developments made in the market and consumer demands. The satellite navigation function is by far the most advanced component of the Product which has taken over years of development and accounts for the highest cost component.

40. The appellant produced tables showing the comparative costs of the various elements of the Product by reference to the navigation system, the audio system and the other functions of the Product.

30 41. The total cost ratios for the navigation system, the audio system and the other functions of the Product are 52%, 38% and 10% respectively.

42. The split of costs in percentage terms, as each of the components listed on the left, by reference to each of the navigation, audio and other systems is as follow:

	Navigation	Audio	Other
Navigation PWB	71.67	15.18	13.15
35 Audio PWB	5.67	94.33	0.00
Middle PWB	80.59	19.41	0.00

Display PWB	29.42	35.30	35.28
HDD ASSY	75.00	25.00	0.00
Mechanical Assy	25.00	75.00	0.00
Display ASSY	42.50	37.24	20.26

5 43. Mr Lach thought that the above figures looked at the cost of the raw materials of the components only. The figures do not include labour costs and research and development costs. However, as set out above, Mr Lach gave evidence that the development costs for the navigation system far outweigh those for the audio system (or any other part of the Product).

10 44. The total space which each of the navigation function, audio functions and other functions use on the system is 87.5%, 11.7% and 0.7% respectively.

Law

45. Customs duty is payable on all goods imported into the United Kingdom from outside of the European Union (“EU”).

15 46. The EU operates a harmonised system in respect of customs duty. This means that all Member States must apply the same set of rules to determine how goods are be classified for customs purposes which in turn determines how much duty should be paid in respect of those goods.

20 47. Article 12 of the Community Customs Code (Council Regulation 2913/92/EEC) (the “Code”) provides for the issue, by the customs authorities, of BTI rulings giving their opinion of the proper classification of the relevant goods.

25 48. The rules that Member States must apply in determining classification are set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 in the tariff and statistical nomenclature and in the Common Customs Tariff (the “Tariff”) and the Combined Nomenclature that is Annex 1 to the Tariff (the “CN”).

49. The CN provides for the systematic classification of all goods and is amended each year with effect from the following 1 January.

30 50. In order to help achieve consistent classification across Europe, the CN is drafted with clear and unambiguous language, supported where necessary with supplemental explanations in the form of section and chapter notes.

51. The World Customs Organization (“WCO”) publishes Explanatory Notes to the Harmonized System (“HSEs”) and the European Commission publishes Explanatory Notes to the Combined Nomenclature (“CNENS”), both of which, where available, should be used when classifying goods.

52. Whilst the HSEs are not legally binding, they have consistently been held by the European Court of Justice (“CJEU”) to be highly persuasive and to be an “important aid to the interpretation of the scope of the various headings” although they do not have legally binding force” (see *British Sky Broadcasting Group plc and another v Revenue & Customs Commissioners*) (Cases C-288/09 and C-289/09 [2011] All ER (D) 239 at [63]). In that case it was also noted (at [64]) that “The content of the Explanatory Notes to the CN, which do not take the place of those of the HS but should be regarded as complementary to them”.

53. The CN applicable when HMRC issued the BTI was set out in Commission Regulation (EC) No. 1001/2013 of 4 October 2013. This applied from 1 January 2014 to 31 December 2014.

54. The CN is structured by reference to sections, then chapter numbers with chapter titles, then headings and subheadings. The first two numbers constitute the chapter number, the next two numbers (together with the chapter numbers) constitute the heading and the final four numbers (where applicable) constitute the subheading. Each section and chapter within the CN has notes which provide guidance in respect of the application of each section and chapter respectively.

55. The CN headings for radio navigational receivers (8526 9120) and monitors (8528 5970) both fall within section XVI and chapter 85 of the Tariff.

56. The relevant headings in chapter 85 as regards the Radio Receiver Code are as follows:

“Chapter 85 Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

8526 Radar apparatus, radio navigational aid apparatus and radio remote control apparatus

8526 9120 Radio navigational receivers

57. The relevant headings in chapter 85 as regards the Monitor Code are as follows

8528 Monitors and projectors, not incorporating television reception apparatus; reception apparatus for television, whether or not incorporating radio-broadcast receivers or sound or video recording or reproducing apparatus.

8528 5970 Other, other

58. Section XVI provides the classification for machinery and mechanical appliances, electrical equipment, parts thereof, sound recorders and reproducers, television image and sound recorders and reproducers and part and accessories thereof.

59. Note 3 to section XVI sets out the principal function test as follows:

5 “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”.

60. Notes 4 and 5 to section XVI provide as follows:

10 “4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or 85, then the whole falls to be classified in the heading appropriate to that function.

15 5. For the purposes of these notes, the expression “machine” means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.”

61. The title to chapter 85 of section XVI covers:

20 “Electrical machinery and equipment and part thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles”.

62. There are no CNENs relevant to the radio Receiver Code or the Monitor Code.

63. The HSEN to heading 8526 provides at paragraph 1:

25 “This heading includes:

(1) Radio navigational aid equipment (e.g. radio beacons and radio buoys, with fixed or rotating aerials; receivers, including radio compasses equipped with multiple aerials or with a directional frame aerial). It also includes global positioning system receivers.”

30 64. The HSEN to 8528 provides that the following is included within the heading:

“1) Monitors and projectors, not incorporating television reception apparatus”

[...]

35 Monitors, projectors and television sets utilize different technologies, such as CRT (cathode-ray tube), LCD (liquid crystal

display), DMD (digital micromirror device), OLED (organic light emitting diodes), and plasma, to display images.

5 Monitors and projectors may be capable of receiving a variety of signals from different sources. However, if they incorporate a television tuner they are considered to be a reception apparatus for television”.

65. The General Interpretation Rules (“GIRs”) provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code. Unlike the HSEs, the GIRs have legal force.

10 66. Rule 1 provides:

15 “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.”

67. Rule 2(a) is not relevant in this instance but provides guidance on the determination of the objective characteristics of products in a specific state. Rule 2(b) applies to a restricted group of classification headings, namely, those restricted to products of an identical material or substance.

20 68. Rule 3 provides:

“When by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

25 (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

30 (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable;

35 (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.”

69. Under rule 4 “Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.”

70. Under rule 6:

5 “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
10 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.”

71. As noted HMRC look to the Regulation in support of their view that the Product is correctly to be classified under the Monitor Code. The Annex to the 2012 Regulation and Annex IV of the 2014 Regulation classify a product with the
15 following description (the “**Regulation Product**”) as a monitor under 8528 59 pursuant to GRI 1 and GRI 3(c) as follows:

“A multifunctional apparatus (so called “multimedia centre for motor vehicles”) of a kind used in motor vehicles. It combines in the same housing, a reception apparatus for radio broadcasting, a sound and video reproducing apparatus, a radio navigational apparatus and a colour liquid crystal display (LCD) with a diagonal measurement of approximately...7
20 inches...The apparatus is equipped with connectors enabling the reception of video signals from external sources such as a rear-view camera or a DVB-T tuner. The apparatus can also reproduce sound and images from a memory card. The apparatus is presented with two remote controls. An
25 additional display can be connected to the apparatus.

Classification is determined by general rules (GIR) 1, 3(c) and 6 ..and by the wording of the CN codes 8528, 8528 59 and 8528 59 70.

30 The apparatus is designed for the purpose of performing various functions (of sound reproduction, video reproduction, radio navigational aid, radio-broadcasting, displaying video), none of which, in view of its design and concept, gives the apparatus its essential character.

By application of GIR 3(c), the apparatus is therefore to be classified under CN code 8528 59 70 as other monitors”.

35 72. Both parties accept that, whether the appeal falls under s 16(1) or s 16(4) of the Finance Act 1994, the dispute as to the correct classification of the Product is determinative of that appeal.

Appellant’s submissions

73. In summary the appellant’s position is as follows:

5 (1) Under GIR 1 and 6 it is necessary first to determine the objective characteristics, having regard to appearance, composition, presentation and intended use of the Product, for the purpose of determining which heading (or subheading) of the CN most closely matches such characteristics. In this case, as the Product is multi functional, the Product matches a number of headings.

(2) Under Notes 3 to 5 to section XVI, classification is determined therefore by reference to the principal function of the Product, which is as a radio navigational receiver.

10 (3) If the tribunal does not agree with the above conclusion, the appellant's view is that under GIR 3 classification is nevertheless by reference to heading 8526, the Radio Receiver Code, as that is more specifically descriptive of the Product, as it provides for a narrower range of products than heading 8528, the Monitor Code, which applies to monitors generally.

15 (4) If the tribunal does not consider one heading to be more descriptive than another, as the Product has a number of components, classification is to be made under the principles in GIR 3(a) or (b) by reference to the essential character of the Product which again is as a radio navigational receiver. GIR 3(c) which classifies by reference to the last heading in numerical order is not therefore relevant.

20 (5) The Regulation is not determinative in this case as the goods it covers are not identical or sufficiently similar to the Product.

Classification under GIR 1 - objective characteristics test

25 74. It is settled law that, in the interest of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and notes to the sections or chapters (see *Kip Europe SA and Others v Administratin des douanes – Directions generals des douanes et droits indrecits* (Case c-362/07) [2009] All ER (D) 17 Feb) at [26] and [27]).

30 75. It is for the national court to determine those characteristics having regard to a number of factors as regards the goods or product including their physical appearance, composition and presentation (*Wiener SH GmbH v Hauptzollamt Emmerich* (Case C-388/95) ECR I-6495 at [21]).

35 76. As held in the *BSkyB* case (at [76]) 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”.

77. Similarly it was held that the objective characteristics and properties of a product may be determined by identifying the intended principal use of that product in *Neckermann Versand AG* (Case C-395/93) [1994] ECR I-4-27 and *Wiener*).

40 78. The appellant contends that in accordance with additional note 2 to the section XVI notes, the examination of the intended use is not confined to the Product itself

but rather extends to the examination of other available material such as the owner's instruction manual, photographs and marketing material. Note 2 read as follows:

5 “Should the customs so require, the declarant shall produce, in support of his declaration, an illustrated document (for example, instructions, prospectus, a page from a catalogue, a photograph) giving the normal description of the machine, its uses and essential characteristics and, in respect of unassembled or disassembled machine, an assembly plan and a list of the contents of the various packages”.

10 79. The appellant noted HMRC's arguments that marketing materials could not be taken into account on the basis of the Attorney General's opinion in the *Kamino* case (see 86) and the decision of the Upper Tribunal in *E.P. Barrus Ltd and another v Revenue and Customs Commissioners* [2013] UKUT 0449. However, in the appellant's view, this does not mean that marketing materials can never be relevant. In the case of *VTech Electronics (UK) plc v the Commissioners of Customs & Excise* 15 [2016] UKFTT 43(TC) at [50], the tribunal noted that whilst *Barrus* sets an authority to the effect that marketing materials and a product's targeted use are not to be taken into account this does not mean that marketing materials cannot be taken into account if they provide evidence of objective characteristics as regards intended use (see the discussion). In the *Sony* case at [67] it was clear that the tribunal was entitled to look 20 at the way the product was sold and presented.

80. In this case the owner's instruction manual clearly contains evidence such as diagrams of the components and description of how they work which are relevant to the objective characteristics of the Product. It is also not correct to say that information on the design and concept is not relevant. The Regulation on which 25 HMRC seeks to rely refers to design and concept as a relevant factor.

Order of application of tests – principal function test to be applied first

81. Where the application of the above test results in an item meeting the terms of more than one heading, under notes 3 to 5 to section XVI, classification is determined by reference to the principal function of the product. It is clear that this test must be 30 applied first before looking at the remaining GIRs and the essential component test in GIR 3. In the *Kip* case, the CJEU said that GIR 1 must be applied first in the case of a multifunctional device by reference, where appropriate, to the principal function test. Only where the functions performed by the product are classifiable under multiple headings and are of equivalent importance is it necessary to consider the remaining 35 GIRs.

82. As it is not in dispute that the Product is multifunctional, the approach to be adopted is to determine, by reference to the Product's objective characteristics, whether the Product has a function which is its principal function. This is essentially looking at the role the features of the Product have. It is different from the essential 40 character test which looks how the Product is made up.

Principal function test.

83. As set out in *BSkyB* the test looks to the different functions of the product in establishing which is principal and which ancillary. In making that determination it is relevant to look at what the consumer was primarily seeking from the product as discerned from the objective characteristics of the product (it is not a subjective test).

5 84. In that case the issue was whether models of set-top boxes, Sky+ boxes, should be classified as recording apparatus or reception apparatus. The CJEU concluded at [80] that the interaction between the functions of the Sky+ box, which makes the recording function dependent on the reception television signals:

10 “shows that consumers who choose that product are seeking, primarily, not a recording function, but rather a function of decoding television signals, although their choice may be influenced by the fact that it has a recording function or the number of hours of programming that can be recorded.”

15 85. It followed that the box was principally intended to be used to receive television signals and that function was inherent to that apparatus. It, therefore, constituted its principal function and the recording function was only secondary.

20 86. There have been some CJEU decisions regarding the correct classification of types of monitor which support this type of approach. In the CJEU’s decision in *Staatssecretaris von Financier v Kamino International Logistics BV* case C-376/07 the issue was the classification of certain monitors of the liquid crystal type. At [57] the CJEU said that it was necessary to look at the degree to which they were capable of performing a number of functions and as to the standard of performance which they achieve when performing those functions. In *Amazon* the CJEU specifically referred to the *BSkyB* approach as set out above in setting out how to approach the classification of reading devices for electronic books with a dictionary function. The CJEU concluded that:

30 “the CN must be interpreted as meaning that a reading device for electronic books which has a translation or dictionary function must, where that function is not its principal function, that being a matter for the national court to ascertain, be classified under [the heading other electrical apparatus] rather than under [the heading an electrical machine with translation or dictionary functions].”

35 87. The appellant also referred to Advocate General’s opinion in *Hewlett Packard BV v Directeur general des douanes et doits indrecits* (case C-119/99) [2001] ECR I-3981 (at [40] as affirmed at [24] of the CJEU decision) that to determine the principal function of machines operating as a printer/copier/fax and scanner, the approach was to examine carefully what the machines provide in terms of:

40 “performance of the various functions which they can carry out, and comparing such performance with that of machines which are specifically designed for those function... having regard to their degree of independence from the computer to which they are designed to be

connected and to the significance of otherwise of the absence of a fax car at the time of importation”.

5 88. Finally the appellant referred to *RMS Communications Limited v The Commissioners for Her Majesty’s Revenue and Customs* [2010] UKFTT 411 as an example of how the test has been applied in the UK. In this case the tribunal decided that the principal function of the 3rd generation Apple iPod Nano was as an audio player and its video capability was ancillary only. The tribunal rejected HMRC’s assertions (a) that the audio and video functions merited equal consideration and therefore that it must be classified under GIR3 (c) and (b) that because a product was
10 equally capable of two functions meant that one did not predominate over the other. The tribunal concluded that the principal function was the audio function.

89. In the appellant’s view the objective characteristics of the Product demonstrate that the principal function of the Product is as a radio navigational receiver:

15 (1) The Product is installed in Honda vehicles and is described in the Honda Cr-V catalogue as a “HDD satellite navigation system”. All Honda vehicles have a radio/CD audio function with a small screen. Only the higher grade models have the devices with the satellite navigation function.

20 (2) The appellant is particularly well known for its navigation devices. The Product was developed together with Honda, as part of their strategic partnership, as an advanced satellite navigation system for Honda vehicles. This demonstrates that the concept and design of the Product is as a satellite navigation system.

25 (3) That the Product is designed primarily as navigation system is further demonstrated by the amount of development and investment in the navigation system as set out in the appellant’s evidence.

(4) The Product provides a very comprehensive navigation system with the features set out in the evidence.

30 (5) The navigation system is automatically engaged when the vehicle is switched on, when the warning message appears which the user must confirm he has understood before the system loads.

35 (6) If the navigation system is actively engaged by the driver and the audio is also in use, the map/route information is displayed on the screen with audio information minimised at the top of the screen. In that case, the voice command for the navigation function interrupts the audio function as and when directions are given. If the navigation system is not actively in use it nevertheless remains in the background and the audio is interrupted if there is a traffic message.

40 (7) Every part of the Product contributes to the navigation function. The DVD is principally for use for the updates required for the navigation function. Otherwise the DVD use is very limited in that it does not operate whilst the vehicle is moving (as regards media content; the audio function continues). The radio tuner is used to give traffic information, the screen is necessary so

that map information can be given and the voice command allows the system to be used safely whilst driving.

5 (8) Whilst many of the component parts are shared by the different functions, the breakdown produced in evidence show that the cost distribution is as follows: GPS, 53%; audio (which is also used for GPS), 38%; other, 10%.

10 (9) The Product draws a favourable comparison in terms of performance against a product designed solely for use as a satellite navigation device. There is no such favourable comparator as regards use as a monitor. The DVD function, for example, cannot be operated unless the car is stationary and with a screen size of only 6.5 inches the Product would be very difficult to use as a monitor.

(10) The price of the Product is significantly higher than the price of other monitor products due to the advanced technology required for the navigation function.

15 (11) The appellant has received market recognition for its navigation devices on several occasions. It has been shown that in relation to in-dash navigation systems, end-users clearly find the navigation function of most importance and the Product performs particularly well in the navigation function.

20 90. The circumstances here are very similar to those in the *BSkyB* case. As in that case, the objective characteristics set out above demonstrate that the consumers who use the Product are seeking primarily a satellite navigation device for their car and not a DVD or CD player or radio. The appellant accepts that the Product has those other functions, and a user may well use those other functions, but in terms of design and concept and the objective features of the Product, those are ancillary to the principal
25 navigation function. As regards the monitor the appellant's view is that the Product does not have a function as a monitor as such. The monitor is merely the means used to display information and media required for the satellite navigation system and audio system to operate. To classify the Product by reference to the monitor would in effect be classifying it by a wholly ancillary function.

30 *Classification under GIR 3*

91. If, contrary to the appellant's view, the Product cannot be classified under the principal function test, the correct classification must be considered under the provisions of GIR 3. The appellant's view is that under GIR 3 classification is nevertheless by reference to heading 8526, the Radio Receiver Code, as that is more
35 specifically descriptive of the Product, as it provides for a narrower range of products, than heading 8528, the Monitor Code, which applies to monitors generally.

92. If the tribunal considers the different functions of a multifunctional device are of equal importance the tribunal must consider, by reference to the components which go to make up the device, what its essential character is. This involves looking at all
40 the components of the Product and how they contribute by reference to their "bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods" (see explanatory note VIII to GIR 3(b)) and thereby determine the essential character of the goods. It is only if the tribunal is left with parity of

importance of the characteristics of the goods after that exercise, that classification is by reference to GIR 3 (c). That this is the correct approach was confirmed in the *Kip* case (see [48] and [49]).

5 93. In a number of cases the CJEU has approached this issue by looking at whether the goods would retain their characteristic properties if one or other of their constituents were removed from them. This was the case in *Turbon International GmbH* (Case C-250/05) [2006] ECR I-10531 at [21], *Sportex GmbH & Co. v Oberfinanzdirektion Hamburg* (Case R-235/87) [1988] ECR 3351 (see [8]) and *Rank Xerox Manufacturing (Nederland) BV v Inspector der Invoerrechten en Accijnzen* 10 (Case C-67/95) [1997] ECR I-5401 (see [30]).

15 94. In this case, were the navigation function to be removed from the Product, it would render the Product wholly unmarketable for its current price. As set out in the witness evidence, the Product would be a significantly overpriced radio/CD/DVD player. The purpose of the Product would become simply to display audio information that could equally be displayed on the vehicles in-built intelligent information display screen. The removal of any other component would have minor effects. The Product would still be marketable at a price similar to the current price and any updates would be made via USB rather than DVD.

20 95. In any event, looking at the cost tables produced in evidence, it is clear that the largest component in cost terms (whichever table is used) is the navigation system such that it gives the Product its essential character.

The Regulation

25 96. HMRC rely on the Regulation which covers classification decisions in respect of 3 different multi-functional products which are described as multimedia centres for motor vehicles and are classified under heading 8528 5970 as monitors. Such Regulations have to be treated with caution.

30 97. In the Attorney General's opinion in the *Hewlett Packard* case it was noted that a classification regulation is of general application in so far as it does not apply to an individual trader but, in general, to products which are the same as that examined by the Customs Code Committee. The Attorney General cautioned at [24] that the approach adopted by a classification regulation for a particular product should not:

“unhesitatingly and automatically be adopted in the case of a similar product. On the contrary, as always, where reasoning by analogy is employed, great care is called for.”

35 98. A similar approach was adopted in *Krings GmbH and Oberfinanzdirektion Nurnberg* (case C-130/02) (see [33] and [34]), *Anagram International Inc v Inspecteur van de Belastingdienst –Douanedistrict Rotterdam* (Case C-14/05) (see [29], [32] and [34]) and *VTech Electronics (UK) Plc v The Commissioners of Customs & Excise* (see [18] to [22]). In *Krings* it was noted that such a classification may by 40 analogy apply to similar products and that it is necessary to look at the description of goods themselves and the reasons given for the classification.

99. In the CJEU decision in *Kamino*, in considering a similar classification regulation, the CJEU held that such a regulation applies only in so far as the product in question is technologically identical to that in the regulation. At [63] the CJEU said:

5 "It is apparent from case law, firstly, that a classification regulation, such as [the one on question], is adopted by the Commission when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute and, secondly, such a regulation is of general application in so far as it does not apply to an individual trader but, in general, to products identical to the one thus classified"

10

100. The CJEU noted that the goods were not identical from a technological point of view, they differed in their dimensions and the resolution in terms of the number of pixels. The CJEU added at [67] that:

15 "although the application by analogy to a classification regulation to goods similar to those covered by that regulation facilitates a coherent interpretation of the CN and the equal treatment of traders...it is still necessary, in such a case, for goods to be classified under the classification regulation to be sufficiently similar."

20 101. The CJEU concluded that at [68]:

"The mere fact that both the monitors at issue in the main proceedings and the goods covered by [the relevant regulation] have a DVI socket and that, for that reason, they are all capable of displaying signals coming from an automatic data-processing machine and from other sources, leaving aside any assessment of their objective characteristics and their performance of their various functions, cannot be sufficient, in the light of the differences noted...for that regulation to apply to those monitors by analogy"

25

30 102. As the monitors were neither identical not sufficiently analogous, the regulation was held not to apply.

103. In this case, the Product is not identical to the Regulation Product as follows.

- (1) The design and concept of the Product is not that of a multi media centre for motor vehicles but rather it is a satellite navigation system.
- 35 (2) The screen measurements are different.
- (3) The Regulation Product has remote controls.
- (4) There is nothing to indicate that for the Regulation Product the DVD function does not operate when the vehicle is moving.
- 40 (5) There is very little description of the GPS capabilities of the Regulation Product which indicates that the GPS functions not as sophisticated as that of the Product. The evidence is that this type of product is evolving all the time.

(6) The Commission concluded that the goods in that case had no principal function and no essential character whereas the Product clearly does have a principal function or an essential character as a satellite navigation system.

104. As is clear from the above cases the tribunal is required to consider the individual objective characteristics of the Product including performance of the various functions. If the Product's navigation capability is significantly more advanced when compared with the Regulation Product then bearing in mind also the other distinguishing facts the Product is neither identical nor sufficiently similar for the Regulation to apply to it.

10 *BTIs*

105. As regards the BTIs HMRC refer to, as they only include generic descriptions of the goods in question, these are not relevant. In the *VTech* case in this tribunal at [64] it was held that BTIs should not be considered where no evidence could be produced as to the properties of the goods covered by the BTIs to demonstrate that they are sufficiently similar to the goods in question. In any event the obligation on the tribunal is only that it should take care in departing from the classification give in BTIs if it is minded to take a contrary view.

HMRC's submissions

20 *Summary*

106. The Product falls within section XVI of the CN, in particular chapter 85, being an item of electrical machinery or equipment.

107. GRI 1 does not determine classification beyond that point because the Product falls within a number of headings in chapter 85: sound reproducing apparatus (8519); video reproducing apparatus (8521); radio navigational receivers (8526); reception apparatus for radio broadcasting (8527); and monitor (8528). Since none of these headings gives the Product its principal function or essential character, it is to be classified under GRI 3(c) to the Monitor Code, 8528 (monitor), as the heading which occurs last in numerical order. This is the approach taken in the HSEs for section XVI at note 3 which states the following:

35 “Where it is not possible to determine the principal function, and where, as provided in Note 3 to the Section, the context does not otherwise require, it is necessary to apply General Interpretative Rule 3 (c); such is the case, for example, in respect of multi-function machines potentially classifiable in several of the headings 84.25 to 84.30, in several of the headings 84.58 to 84.63 or in several headings 84.69 to 84.72.

108. HMRC's approach is supported by the Regulation and by a number of BTIs.

Classification under GIR 1 and 3

109. HMRC broadly agree with the description of the key elements of the objective characteristics and principal function test as set out in the appellant's submissions. In particular it was accepted that on the authority of *BSkyB* the notion of principal function should be understood as the opposite of a "secondary or ancillary" function and that the principal function of an item may be inferred from its intended use, where
5 that use is inherent to the product and capable of being assessed on the basis of the product's objective characteristics and properties (see also *Ikegami* (Case C-467/03)).

110. HMRC noted that another possible test (based on an analogy with GRI 3(b)) is to consider which function would, if removed, have most impact on the functional utility of the item (see *RMS* at [65]) or, whether the item would retain its characteristic properties if one or other function were removed (see *Turbon* at [21], cited in *RMS* at [66]).
10

111. Examples of when items are considered to be subsidiary are given in the HSEs to section XVI such as (a) printing machines with a subsidiary machine for holding the paper and (b) a cardboard box making machine combined with an auxiliary machine for printing a name or simple design.
15

112. The appellant has failed to demonstrate that the Product has a principal function corresponding with a CN heading under these applicable principles. There is no dispute that the Product performs a number of functions corresponding with CN headings as set out in 107. The appellant has not demonstrated either by reference to use and/or the characteristic properties test that radio navigational reception is the principal function of the Product, with the other functions being secondary or ancillary.
20

113. The appellant argues that the loss of either of sound reproduction or radio broadcast reception would have less of an impact on the functional utility of the Product than the loss of the radio navigational receiver. In the context of a Product whose objective characteristics show it is to be incorporated into a motor vehicle, the loss of a CD player or radio from such a product would be every bit as serious a loss of functional utility as the loss of a satellite navigation function.
25

114. The use inherent to the Product and capable of being assessed on the basis of its objective characteristics and properties consists not only of using the navigational receiver whilst driving but also of the playing of CDs while driving and listening to the radio while driving. There is nothing inherent to the Product to suggest that radio navigational reception is the principal intended use of the Product. The appellant notes that radio navigational receiver's output is shown on the screen automatically when the Product comes on and continues to be displayed while the CD and radio function are operating. However these are simply reflections of the fact that it is unsafe to operate a radio navigational receiver when driving and that a key output of this function is visual rather than audio.
30
35

115. A conventional handheld satellite navigation device, incorporating a screen, is classified under 8526 (see item 2 of the Annex to Commission Regulation (EC) 687/2002, updated by Commission Regulation (EC) 1179/2009). The reason for this
40

is that, for such a device, the function of the screen is solely to display matters relating to the radio navigational receiver. However in the case of the Product the monitor displays information regarding, and facilitates control of, not just the radio navigational receiver, but also the sound reproduction, video reproduction, and radio broadcast reception functions of the Product.

116. The monitor, and the display function it performs, must be treated as a separate characteristic and function from the radio navigational receiver which it is not merely ancillary to. HMRC can see no reason why the radio navigational receiver should be regarded as performing the principal function and the monitor a secondary function.

117. So far as use is concerned, the objective characteristics of the Product show that a use of the radio navigational receiver consists of the viewing of maps/routes on the monitor and the control of the radio navigational receiver by inputting commands and information using the touch screen of the monitor. It makes no sense to talk about using the radio navigational receiver, without also talking about using the monitor. Significantly, the converse is not true: it makes perfect sense to talk about using the monitor without also talking about using the radio navigational receiver. The monitor can be used to display information from and to control the CD player, the radio and the DVD player. There is no basis for saying in terms of use that radio navigational reception is principal and display secondary.

118. So far as characteristic properties are concerned, if the Product did not have a monitor, it would have lost a key characteristic function, namely, the display of data relating to, and in touch screen input of information and commands to, the sound reproduction, video reproduction, radio broadcast reception and radio navigational reception functions. It cannot be said that this represents a less serious loss of functional utility than that caused by the loss of the radio navigational reception function.

119. On the appellant's specific submissions as regards the assertion that the principal function and essential character is that of navigation, the matters relied on are irrelevant or insignificant:

(1) The appellant states that a higher proportion of the production costs for the Product relate to the navigation function than the audio system. No explanation is offered of why the cost of production of different aspects of the Product should determine one function is principal and others are secondary or ancillary.

(2) That the system defaults to the navigation feature when the Product is switched on is just a safety feature which ensures the person gives the required disclaimer. This cannot determine the principal function.

(3) The appellant makes a number of points on comparative performance. However, no reason has been given to suppose that the Product does not compare favourably in terms of performance with products designed solely for use as radios or CD players or as regards the comparative performance of the monitor. The reference to the monitor's role in relation to the DVD player is a

distraction, as no party is suggesting that the DVD player performs the principal function.

(4) Reliance on price does not show that radio navigation is the principal function (see *Farfalla Fleming* (Case C-228/89) at [22]).

5 (5) The appellant notes it is well known for its navigation devices and the Product was developed with Honda as an advanced satellite navigation system. The reputation of the manufacturer, and the subjective intentions of the manufacturer and the intended recipient are not objective characteristics which can determine classification (see *Farfalla Fleming* at [20] and *Kubota v Revenue & Customs* [2013] UKUT 0449 TCC) at [41]).

10 (6) The appellant asserts that consumers who buy the product are seeking primarily a satellite navigation device for their car, not a DVD or CD player. This claim is a general assertion, which is not based on analysis of the objective characteristics of the Product or its use so far as that use is inherent within the objective characteristics of the Product. Moreover the appellant has not considered fully the function performed by the monitor.

15 (7) Marketing material, market recognition, presentation in the instruction manual, and “targeted use” generally, do not determine the principal function of the Product (see Advocate-General’s Opinion in *Kamino* at [72] to [75], *Kubota* at [41] and *VTech* at [47] to [53].)

20 120. In conclusion the principal functions of video, radio, monitor and radio broadcasting are equal. There is no way of determining from the objective characteristics that one function is more important than the others.

25 121. *BSkyB* is not determinative of this case. At [73] the CJEU noted that the hours of programming that could be stored on the hard disk of the Sky+ boxes was not determinative. In the same way the appellant’s assertion that the principal amount of disk space on the HDD is reserved for the navigation function is not relevant. At [74] the CJEU said that the fact the boxes could not function using its hard disk alone and it is not needed for viewing television programmes, so that the reception of television signals is indispensable for the box to function, does not allow any conclusion to be drawn as to the principal function. The fact that a function is indispensable does not mean by itself that it is a principal function. If you have a radio the cable is indispensable (if it is a plug in machine only) but it would be very odd to say that is the principal function. The CJEU formed their conclusion on the basis that ability to use the video recording was entirely dependent on receiving television reception. In that context, it made sense to conclude that the consumers would choose the Sky+ boxes in order to obtain television reception. There is not a similar interaction between the relevant functions here.

35 40 122. Looking at the further tests in GIR 3, GIR 3(a) does not apply because there is nothing about 8526, the Radio Receive Code, which is more specific than 8528, the Monitor Code. Referring to a monitor is just as specific as referring to a radio navigational receiver.

123. As for GIR 3(b) for the reasons set out above the radio navigational receiver does not give the Product its essential character. Moreover there is inadequate evidence to support the cost breakdowns produced in the witness evidence. Mr Lach confirmed that the costs table only reflects the cost of materials and not labour or research and development costs.

Regulation and BTIs

124. HMRC's approach is supported by the Regulation. Classification regulations can be applied by analogy to identical or similar goods to those classified in the regulation as set out in *VTech* at [20] to [22]; *Krings* at [35]; and *Anagram* at [32]. The Product is sufficiently similar to the Regulation Product that it ought to be classified in the same way under the Monitor Code held to apply in that case.

125. In the 2014 Regulation the classification of the Regulation Product changed from 8528 59 40 to 8528 59 70. The change between the two regulations reflected numbering at the eight digit level, not the four digit level at which the current dispute is being conducted. The reasons refer to "essential character", a term used in GIR 3(b). This is best read as being concerned with preventing the remote controls the item was presented with, which were not contained in the housing along with the other functions, from impacting classification.

126. The preparatory materials published when the Regulation was issued also support HMRC's view. Such material may be used as an aid to the interpretation of secondary legislation, if it has been published (as it has been in this case) or is otherwise accessible to all the persons affected by the measure (see *Vaughan & Robertson, Law of the European Union* at [91] and [92]). Such materials may reveal the events lying behind the adoption of a provision, which may assist in identifying its purpose (see *Mikx* (Case 90/85) at [17] and [18]).

127. The minutes of the Customs Classification Committee show the Committee considered whether the item was to be classified as a video reproducing apparatus (8521), radio navigational apparatus (8526), radio broadcasting apparatus (8527) or a monitor (8528). A majority concluded that the item should be classified as a monitor under GRI 3(c) due to the design and function of the Regulation Product, which precluded any particular function being identified as the principal function.

128. The appellant's reasons for seeking to distinguish the Product from the Regulation Product are unpersuasive, relying on a mixture of insignificant factors, circularity, speculation and general unparticularised assertions as follows:

(1) The appellant states that the design and concept of the Product is not that of a "multi-media centre for motor vehicles" but rather is that of a "satellite navigation system" This is a question begging statement of the conclusion the appellant argues for.

(2) The difference in screen measurements is not significant. The Product's screen has a diagonal measurement of 6.5 inches whereas the Regulation Product's screen has a diagonal measurement of 7 inches. The difference in

diagonal measurements which was considered relevant at [65] of *Kamino* was 41.73 inches versus 23 inches. There is no indication in the text of the 2014 Regulation that this was a driving factor in the classification.

5 (3) The appellant states there is nothing to indicate that the DVD function of the Regulation Product does not operate whilst the vehicle is in motion as is the case with the Product. This is wholly speculative. It is also unlikely, given the adverse safety implications of a DVD function, for a product to be used in motor vehicles working when the vehicle is in motion. Even if there were such a difference, it is unlikely this would be sufficient to affect classification.

10 (4) The appellant notes that there is very little description of the GPS capabilities (if any) of the Regulation Product, which the appellant states indicates that the GPS function is not as sophisticated as the GPS and navigational system which make up the Product. The appellant notes in particular that it has itself released to the market new generations of navigation devices which are fundamentally different to the Product. However, the
15 appellant does not specifically identify (even potential) differences in function and why those would be relevant for classification purposes. Furthermore, whilst technical developments in the industrial sector may justify steps by European institutions to amend the CN, failing such an amendment, the interpretation of the CN cannot vary as and when technology changes (see the
20 *Analog* (Case 122/80) at [12] and *Rank Xerox* (Case C-67/95) at [22]).

(5) The appellant's assertion that the Regulation Product had no principal function and no essential character whereas in their view the Product does have one (as a satellite navigation system) is again a question begging statement of
25 the conclusion the appellant argues for, rather than an identification of a specific relevant difference.

129. HMRC approach in the present case reflects a settled approach to items similar to the Product across a number of member states, evidenced in BTIs from the UK, Germany, The Netherlands, France, Romania and the Czech Republic. The tribunal
30 should exercise care before departing from this settled approach (see *Intermodal Transports BVv Staatssecretaris van Financien* (Case C-495/03) at [34]).

Discussion

130. The issue is the correct classification of the Product under the CN. The appellant argues that the Product is to be classified, under the Radio Receiver Code
35 as a "radio navigational receiver" as liable to customs duty at 3.7%. HMRC's position is that it is to be classified as a "monitor" as liable to duty at 14%.

Classification under GIRs – objective characteristics test

131. It is not disputed that the correct approach is to seek to determine the classification according to the rules in the GIR:

40 (1) Rule 1 of the GIR provides that classification is to be determined according to the headings and any relative section or chapter notes. The titles of

sections, chapters and sub-chapters are provided for ease of reference only. Rule 6 provides that the same principle applies as regards classification in subheadings, on the understanding that only subheadings at the same level are comparable.

5 (2) Under GIR 3:

(a) If goods are prima facie classifiable under two or more headings, the heading which provides the most specific description is to be preferred. However, when two or more headings each refer to part only of the material or substances contained in mixed or composite goods or to
10 part only of the items put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixed or composite goods which cannot be classified by reference to 3(a), are to be classified as if they consisted of the material or
15 component which gives them their essential character in so far as this criterion is applicable.

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

20 132. It is established in the cases (as cited by the parties) that the decisive criterion for the classification of goods for customs purposes is 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 (or subheading as appropriate). The cases also
25 establish that the intended use of a product may constitute such an objective criterion for its classification, if it is inherent to the product, and that inherent character is capable of being assessed on the basis of the product's objective characteristics and properties.

133. The parties are agreed that applying the test under GIR 1 by reference to the objective characteristics of the Product, the Product is classifiable prima facie under a
30 number of headings in chapter 85. Accordingly the CD function may be said to correspond to sound reproduction (8519), the DVD function to video reproduction (8521), the radio function to radio broadcast reception (8527), the satellite navigation function to radio navigational reception (8526) and the monitor function to monitor as in 8528.

35 134. The notes to section XVI which includes chapter 85 seek to provide a solution to classification by reference to "principal function", broadly, where a machine has a number of functions or a number of components which contribute to a clearly defined function:

(1) Under note 3 to section XVI, goods which are designed to perform a
40 number of 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.

(2) Under note 4 where a machine consists of individual components which are intended to contribute together to a clearly defined function, the whole falls to be classified in the heading appropriate to that function.

135. We accept that as set out in *Kip*, the principal function test set out in note 3 is to be applied essentially at the GIR 1 level. That case concerned the classification of a product housing a large format document laser printer module, a large format digital scanner module and a computer running on windows operating system (connectable to all kinds of network environments). The CJEU said that in the case of such a multifunctional device, GIR 1 must be applied first by reference, where appropriate, to the principal function test. Only where the functions performed by the product are classifiable under multiple headings and are of equivalent importance is it necessary to consider the remaining GIRs. In that case it would be necessary to classify the machine by application of GIR 3(b), according to the module which is identified as determining the essential character, provided such identification is possible. It is only if that is not possible that, in accordance with GIR 3(c), the product is to be classified under the heading which occurs last in numerical order among those which equally merit consideration.

136. Following the approach in *Kip*, therefore, the first question is to assess whether note 3 is applicable on the basis that the Product is “designed to perform a number of complementary or alternative functions” such that it is to be classified by reference to its “principal function”. We do not consider that note 4 is potentially relevant, as it is clear that there is no single clearly defined function to which all the individual components of the Product contribute.

Application of note 3 to section XVI

137. There is no further definition or guidance in the CN itself as to the meaning of the term “function” in this context. The normal dictionary meaning of function when used as a noun is a role or the purpose for which something is designed or exists. On its natural meaning the test requires us to look at what roles the Product is designed to perform.

138. We consider it clear, looking at the objective characteristics of the Product as set out in the facts described in 6 to 23 above, that it is designed to perform a number of alternative functions beings the following:

(1) A comprehensive satellite navigation system which is operated through the touch screen and/or by voice command and enables a large variety of methods of obtaining and storing directions and place and location information. This is achieved through sophisticated technology in the form of software accessed though a processing chip and stored on the HDD (for which 75% of the space on the HDD is set aside).

(2) A comprehensive audio system which can be subdivided into:

(a) a system for receiving radio-broadcasting,

(b) a system for playing music from a variety of media such as CDs and DVDs which can be recorded and stored on the HDD,

(c) a system for playing music by the connection of external devices such as an iPod, USB Flash drive or Bluetooth devices

5 all of which functions can be accessed by the buttons and switches on the panels or the remote controls on the steering wheel and controlled through the touch screen or by voice command.

(3) A video or DVD system image reproducing apparatus albeit that such function is limited given that it does not operate (as regards visual content) when the vehicle is in motion.

(4) As a monitor in the sense that the monitor provides the medium through which information for the support of many of the above functions is provided.

139. We note that the Product also provides a connector for enabling a Bluetooth handsfree telephone connection with storage of telephone data and the display of visual images from a rear view camera (designed to assist with parking).

140. As set out above, applying the test under GIR 1 by reference to the objective characteristics of the Product, a number of the above functions correspond with different headings in chapter 85 of section XVI. The question then becomes whether any one of the identified functions can be said to be the “principal” function such that the classification should be by reference to that function as set out in note 3. Again looking at the natural meaning of this term, we regard this as requiring that for classification to be by reference to it, the role or purpose in question must be the main one. The criteria for establishing what is the main function have been considered in a number of cases as cited by the parties.

25 *Authorities on principal function test*

141. In *BSkyB* the CJEU considered the correct classification of a “sky+ box” which is a set-top box with a communication function and a hard disk. The taxpayer argued it should be classified as “television reception apparatus” whereas the tax authority said it was “recording apparatus”.

30 142. The CJEU noted the facts as follows (at [33] to [38]):

35 “33. The Sky+ box is a satellite television receiver. Such receivers receive and decode digital television signals transmitted over the satellite television platform of broadcasters such as Sky.. The signal is decoded only when it is sent to be displayed on a television screen...

35 The Sky+ box is specifically designed and programmed to receive and decode only digital television signals made available by Sky’s satellite platform.

36. The Sky + box does not have a video display screen. It contains a modem for internet access and, through that, has a function of interactive information exchange.

5 37. The Sky+ box has a hard disk. Half of the disk storage capacity is used by Sky's services for use of the video on demand service. The other half is for the end user to record television content received from Sky's satellite television platform. The Sky+ box cannot record video content from any other external source including television receivers, cameras or video recorder. The box
10 cannot play video content from external media such as DVDs or video tapes. Nor is it capable of recording video content onto external media.

15 38. The end user does not need the Sky+ box's hard disk in order simply to watch television directly. In that case, the box functions solely as a reception apparatus for television. However, the box cannot function using the built-in hard disk alone. Without receiving a digital television signal, since even when it is playing content from the hard disk, it can only work when it is receiving such a signal from the Sky satellite platform.

20 143. The CJEU noted that, on the basis of the above facts, the Sky+ box clearly had both the function of recording and of receiving television signals. They said that it is, therefore, a machine adapted for the purpose of performing two or more complementary or alternative functions within the meaning of note 3 to section XVI of the CN. At [72] they went on to state that:

25 "It must therefore be ascertained which of the two functions of recording and reception of television signals is the principal one and which is ancillary".

30 144. The CJEU rejected (at [73]) the submission that the goods could be classified according to the number of hours of programming that could be stored on the hard disk as that criterion was not defined in the CN or HSEs and was not consistent with the principle of legal certainty. They also noted (at [74]) that the fact that the reception of television signals was indispensable for the box to function does not allow any conclusion to be drawn as to the principal function. The fact that a function is indispensable does not by itself mean it is the principal function as a function may
35 be indispensable whilst remaining secondary or ancillary.

40 145. It was noted (at [75]) that the box could not record or play video content from external media or record video content onto such media. Whilst those elements are not objective characteristics and properties of the box, but pertain rather to the interaction between the functions and recording of receiving television signals, the CJEU considered they shed some useful light on the intended use of the Sky+ boxes.

146. At [76] the CJEC noted that intended use of a product may constitute an objective criterion for classification if it is inherent to the product. At [77] they state that, in applying that test, it is necessary to take into account what consumers would consider to be ancillary or principal. They conclude as follows:

5 “78. It appears... that set top boxes such as the Sky+ box are sold to television service providers such as Sky, who make them available to their customers to enable them to access the programmes they offer.

79. It therefore seems that consumers subscribe to service providers such as Sky principally in order to be able to access the television programmes offered and that, in order to be able to do so, they must obtain a set-top box such as a Sky+ box. The television recording function which is, in addition, available on that model, is merely an ancillary service that it offers.

80. The interaction between the functions of the Sky+ box described in para 75 above, which makes the recording function dependent on the reception of television signals, shows that consumers who choose that product are seeking primarily, not a recording function, but rather a function of decoding television signals, although their choice may be influenced by the fact it has a recording function or the number of hours of programming that can be recorded.

81. It follows from all those considerations that the Sky+ box is principally intended to be used to receive television signals and that function is inherent to that apparatus. It therefore constitutes its principal function and the recording function is only secondary”.

25 147. As the parties have noted, the same test was adopted in the *Amazon* case.

148. In the *Hewlett Packard* case the issue was whether a product which combined the functions of a printer, photocopier, facsimile machine and scanner was to be classified as a printer or a facsimile. The Attorney General’s opinion (at [40]) (and as affirmed by the CJEU at [24]) set out the approach as being one of comparing the relevant functions as follows

35 “It will be appropriate to determine the principal function of the machines at issue by examining carefully what they provide in terms of performance of the various functions which they can carry out, and comparing such performance with that of machines which are specifically designed for those different functions, having regard to their degree of independence from the computer to which they are designed to be connected and to the significance or otherwise of the absence of a fax card at the time of importation.”

149. The appellant also referred to the cases of *Neckerman* and *Weiner* as supporting the position that a product can be classified according to its principal use. In the *Neckerman* case the issue was the correct classification of clothing which the taxpayer

had declared as pyjamas and the German authorities reclassified as upper garments and trousers. The CJEU noted there was no definition as such of pyjamas in the CN and therefore the “objective characteristics of pyjamas, which is capable of distinguishing it from other ensembles, can be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear” (at [7]). They continued at [8] and [9]:

“If that objective characteristic can be established at the time of the customs clearance, the fact that it may also be possible to envisage another use for the garments will not preclude them from being classified for legal purposes as pyjamas.

It follows that, for a garment to be classified as pyjamas for customs purposes, it does not have to be solely or exclusively meant to be worn in bed. It suffices if that is the main use for which it is intended.”

150. The *Weiner* case similarly related to the classification of clothing as nightdresses or dresses. The Court referred to *Neckermann* and concluded at [15] that

“since the goods in question are intended to be worn essentially in bed they must be regarded as “nightdresses” even though they may be used for other purposes.”

151. In the *RMS* case the appellant refers to, this tribunal considered the classification of the 3rd generation Apple ipod Nano as “video recording or reproducing apparatus” or “sound recording or reproducing apparatus”. In applying the principal function test the tribunal adopted the approach (at [65]) of looking at which function would, if removed, most impact on the functional utility of the device. The tribunal based this on the approach the CJEU took in the *Turbon* case as regards the essential character test.

152. On that basis they considered it was clearly the audio function which was the principal function. Removal of the audio function would render the product a flawed device with a screen size, design, video compatibility and memory inadequate for proper use. By contrast, removal of the video function would not have such a significant input on the Nano (as they noted was reflected in the fact that its first and second generation predecessors did not have a similar video capability). The tribunal referred to *Turbon* as regards the similar approach taken as regards the essential characteristics test.

153. At [68] the tribunal noted that “objectively determined use” was relevant:

“It is clear from Sony that we must look at the objectively determined use when considering the product’s objective characteristics. Indeed, when considering its objective characteristics we don’t really see what else could be considered other than its (objectively determined) intended use as the question of its primary function.

154. At [69] they continued that customer perception was relevant:

“It is also clear from the Sony case that customer perception is relevant. The way people use and view the nano is relevant provided it is reflected in the physical characteristics of the device. The consumer’s view as contained in the survey and the numerous reviews to which we have been referred in the main (with a few exceptions) state that the screen and storage are too small for the product to be used routinely as a video device and the best use of the product is as an audio device. We do not accept that, because the survey was not carried out at point of entry, this would make any difference to the conclusions contained therein.”

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10 *Marketing and presentation materials as evidence of intended use/principal function*

155. There is dispute between the parties as to what matters the tribunal may have regard to in applying the relevant tests. HMRC cited the cases of *Farfella Fleming*, *Kubota*, the Attorney General’s decision in *Kamino* and *VTech Electronics* as support for the proposition that “subjective matters” such as price, reputation, market recognition and targeted use do not determine the principal function. HMRC say that a number of materials the appellant refers to are not matters to be taken into account in line with these principles.

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156. In the *Farfella Fleming* case the CJEU considered whether glass paperweights could qualify for an exemption from customs duty as original works of art as they were executed by famous glassware artists and served no functional purpose as paperweights. The CJEU stated at [20] that since the customs authorities can rely only on objective criteria relating to the external characteristics of goods, even where these goods are hand-made by artists, they must be regarded as goods of commercial character because they appear similar to comparable articles manufactured industrially or as works of craftsmanship. The CJEU, therefore, found as follows:

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“That conclusion is not invalidated by the fact that the paperweights in question are produced by hand in limited editions by well-known artists and are collected by collectors and displayed in museums without ever being used as paperweights. Just as an artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification.”

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157. In *Kamino* the CJEU had to consider the question as to the correct classification of a colour LCD monitor which, although marketed for use with automatic data processing machines, would also have other uses, such as for playing games. In his opinion, which appears not to have been disapproved by the CJEU, the Attorney General rejected the idea that a product’s “intended commercial use, in other words its

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“target use” should be taken into account in order to determine its normal use”. The concern was (at [74]) that if significance is attached to elements such as the product’s declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. The relevant parts of the opinion are at 72 to 76 as follows:

5 “72. In my view, there is no doubt that the technical characteristics of the
product constitute the fundamental criterion to be taken into account in
that connection. In the case of the monitors at issue, it will plainly be
characteristics like the resolution, the 40 screen aspect ratio (the width of
10 the screen in relation to its height), the available connectors, the
possibility of adjusting the height and screen tilt angle, the presence of
certain specific ergonomic features designed to facilitate close ‘desktop’
use and so forth, which the national court will have to analyse in order to
determine whether or not the product is normally used in connection with
an automatic data-processing system.

15 73. The possibility of taking account of the product’s intended
commercial use, in other words its ‘target’ use, in order to determine its
normal use, seems to me to be more problematical. In my view, that
option should be excluded.

20 74. It is in fact clear that if significance is attached to elements such as
the product’s declared use, as indicated on its packaging or in advertising
material, there is an increased risk of abuse. In a variety of fields,
instances of products which are surreptitiously presented as being
25 intended for uses other than their real use, in order, for example, to
circumvent sales bans or rule out producer liability, are in fact anything
but infrequent, even though the relevant public is actually perfectly well
aware of the real intended use of the products in question.

30 75. The position set out above seems to me, moreover, to be consistent
with the case-law of the Court which, while in principle accepting the
possibility of taking a product’s intended use into account in order to
determine its customs classification, has, nevertheless, stressed that that
intended use must be based on specific and objective criteria.”

35 158. This approach has recently been followed in this tribunal in the *Vtech* case and
in the Upper Tribunal in *Barrus*. In *Barrus* the Upper Tribunal were considering the
correct classification of vehicles for the transport of goods as “dumpers designed for
off-highway use” (as contended by the appellants) or under the residual subheading
40 “other, with compression ignition internal combustion piston engine”. The Upper
Tribunal decided, citing *Kamino*, that this tribunal had erred in law in finding that the
vehicles came within the dumper heading. The reason was that the tribunal had made
its assessment of the correct classification of the vehicles not only by reference to the
objective characteristics inherent in the products, but, also by reference to the actual
45 use that the vehicles were put by particular importers and the possible use to which
they could be put. In that regard, the evidence on which the findings of fact were
made went beyond the scope of relevant evidence for the purpose of classification

being, as it was, based on witness evidence as to the use that the vehicles were put and the marketing material that suggested possible uses. The Upper Tribunal, therefore, rejected the appellant's submission that such evidence can properly assist in the evaluation exercise.

5 159. At [50] of the *VTech* case in this tribunal, the tribunal noted that *Barrus* sets an authority to the effect that marketing materials and a product's targeted use are not to be taken into account but that this did not preclude such material being relevant in all cases:

10 "...Upper Tribunal were not excluding information from being relevant by reason only that it might be described in loose general terms as "marketing material" but were intending to exclude specifically, that kind of marketing material that does not deal with objective characteristics and properties. So, for example, suppose that an advertising brochure contained a detailed circuit diagram of an electronic device....the circuit diagram would clearly set out the objective characteristics of the device in
15 question and so would be relevant to the question of classification. The appellant acknowledges that these cases mean that reference to marketing material in the context of targeted use is not permitted. However, the appellant asserts that the relevant materials in this case are being relied on as evidence of the intended use, as objectively determined, which is
20 permitted."

Application of principal function test in this case

25 160. In short, the appellant argues that the Product is to be classified solely under the Radio Receiver Code on the basis that, having regard to the objective characteristics of the Product and its intended use as determined by such objective characteristics, the radio navigation function is the principal function of the Product. HMRC say that no such principal function can be discerned. It cannot in their view be said that any of
30 the functions are more dominant than another; they are of equivalent importance.

161. Looking at the cases, on the authority of *BSkyB* (as followed in *Amazon*) the correct approach is first to determine what the functions of the Product are applying the usual classification principles of looking at objective characteristics (as we have done above). The CJEU then said it was necessary to decide which of such functions
35 was the principal one (and which ancillary) by looking at the main intended use of the product taking into account what consumers would regard as the main use and, essentially, provided that such main use can be discerned from the objective features of the product itself. The CJEU decided the Sky+ box in issue was principally intended to be used to receive television signals rather than for recording purposes
40 based on the three key findings: that the boxes were made available by Sky to consumers to enable them to access Sky's programmes, that it followed that consumers subscribed to Sky to obtain those programmes for which they needed a box and that the fact that the recording function was dependent on the reception of

television signals indicated that the consumer would choose the box primarily because of its function of decoding television signals.

162. In other cases, such as *Hewlett Packard*, the CJEU has taken a different approach essentially of looking at the comparative performance of the various functions, in particular, when tested against other machines specifically designed for that particular function. In the UK, this tribunal in *RMS* followed the *BSkyB* approach of looking at the main intended use of the product) (as to which the view of the consumer was relevant) but also adopted a comparative test in looking at the effect on the Product of the removal of a particular function (as the CJEU has done in relation to the essential character test).

163. As regards what information we can look at in applying these tests, the Attorney General in *Kamino* and the Upper Tribunal in *Barrus* are authority that evidence of intended commercial use or “targeted use”, such as statements in the seller’s marketing materials, is not determinative of the “normal use” of the product. The concern set out by the Attorney General is that determining such normal (or intended use) by reference to the seller’s declared intent as to the market for the product opens the way for abuse; a product may be marketed for a use which all know is not the real intended use of the product. So he concluded that the primary concern must come back to determining such use according to the objective characteristics of the product. However, this clearly does not preclude us from having regard to marketing and other materials, such as the owner’s manual in this case, to the extent that the material contain information on the objective characteristics of the relevant item.

Principal function test conclusions

164. On the authority of *BSkyB* we have approached this by looking to establish the main inherent use of the Product taking into account what the consumer is likely to be seeking from the Product. The starting point in our view is that the key objective features of the Product demonstrate that it has two main inherent intended uses: (a) as a comprehensive and sophisticated navigation system (as supported by the written descriptions and diagrams in the owner’s manual) and (b) as a comprehensive audio system via radio, CD and connection to external devices. The Product also has a DVD, provides a connection to enable a driver to use a phone on a hands free basis and has a monitor. In our view these other functions cannot be described as anything other than ancillary intended uses (as set out in further detail below).

165. As noted in *BSkyB* the CJEU based their conclusion on three key findings. The first was that the reason why the set top boxes were made available by Sky to consumers was so that consumers could access television programmes offered by Sky. In this case, we consider that the Products are made available by Honda primarily so that the consumer has access to a sophisticated and comprehensive satellite navigation system.

166. We do not base this on Honda’s description of the Product in its marketing materials as a satellite navigation system. We accept that having regard to the vehicle manufacturer’s declared or advertised use of the Product is not appropriate on the

basis of the decision in *Kamino* and *Barrus*. Rather we base this on the evidence that the Product was specifically made by the appellant for Honda with a focus on the satellite navigation function (as an upgrade from the radio/CD provided in basic model cars) and that the technology for the navigation system is the element of the Product which has required the most research and development input by the appellant/Alpine group. The comprehensive and sophisticated nature of the technology required for the navigation system is illustrated by the range of options which the driver has for the use of the system as set out in the owner's manual. We do not see that there is anything in these cases which prevents us from having regard to this evidence. It is objective evidence which demonstrates the importance of the navigation system's technological components, which are objective characteristics of the Product, in the concept and design of the Product. This is evidence of why Honda sells the Product and what the consumer is seeking from it.

167. In *BSkyB* the CJEU went on to conclude that it followed from the fact that Sky was making available the Sky+ boxes to enable consumers to access their television programmes, that consumers subscribed to such services principally in order to access those programmes for which they needed a set-top box. Similarly, on the basis the satellite navigation system forms the most sophisticated and technologically advanced part of the Product, it follows that what consumers are primarily seeking from the Product is the comprehensive navigation system thereby provided. Another way of demonstrating this, as in the *RMS* case, is to consider what the effect would be on the Product if the navigation function were removed. We accept the evidence of Mr Lach that, if the navigation function were removed, the Product would be a very overpriced radio/CD player as the pricing would exceed that for such a piece of equipment by around 9 times.

168. HMRC argue that this pricing differential is not relevant on the basis of the *Farfalla* case. We do not accept this. In taking this view we are not seeking to classify the Product according to price or value, as was the case in *Farfalla* if regard was had to the fact that the paperweights in question had a higher value than a regular paperweight due to their higher artistic value. We are comparing the various functions of the Product in terms of their importance to the consumer by reference to the objective characteristics of the Product. The technological features applicable to the satellite navigation system are such an objective feature. The extent to which they are key to the Product from the consumer's perspective is demonstrated by the fact that the pricing of the Product would have to be much lower if the navigation function were removed.

169. The third factor in the *BSkyB* case was the interaction of the television reception and recording functions of the Sky+ boxes. In that case the CJEU found that the recording function was entirely dependent on the television reception function such that it must be taken that for the consumer the principal function was the television reception. In this case, whilst one function is not so entirely dependent on another, nevertheless the interaction of the functions supports the view that intended inherent use is as a satellite navigation system. The navigation system essentially is the default setting of the Product, its visual content is in effect given priority over that relating to other functions, to some extent its audio content overrides that of the audio radio/CD

function and we accept the DVD function exists primarily to enable updates to be made to the navigation system. In particular, we note the following:

- 5 (1) The Product is designed automatically to engage the navigation function when the vehicle is switched on as we saw when the Product was demonstrated to us.
- (2) The navigation function remains to some extent engaged even when the user chooses not to actively use it in that it remains in the background and any audio service being used is interrupted by traffic information.
- 10 (3) When it is actively engaged, whilst the user may operate the audio functions at the same time, that is again interrupted when the navigation system gives directions and by traffic updates.
- (4) If the navigation system and audio systems are used at the same time, the navigation visual information is displayed principally on the screen with the audio information icons reduced to a small section only.
- 15 (5) The DVD function exists primarily to enable the navigation system to be updated on an annual basis if the user chooses to do so. The DVD system is otherwise very limited in that it only operates visually when the vehicle is stationary such that it cannot be taken to have a material function otherwise.

170. We note that the technology and components of the Product are to some extent
20 shared to enable the delivery of each of the functions. However, each part of the Product contributes to the navigation function in some way. For example, one of the radio tuners enables the navigation system to obtain traffic information, the screen enables the navigation information to be displayed to the user and the voice command allows the user to access the system safely whilst driving. We also note in this respect
25 that essential components of the Product such as the HDD and PWBs are primarily used to support the navigation function. For example, the HDD is used for storage relevant to the navigation system as to 75% and two of the PWBs mainly support that system.

171. We note that the appellant has also pointed to other relevant factors being that
30 the Alpine group is particularly well known for its satellite navigation devices and that it has gained market recognition as such indicating customer satisfaction with its satellite navigation products. As regards the fact that Alpine is well known in the satellite navigation market and has market recognition and has been involved in this market for many years, this does not inform our assessment in any material way. The
35 most it demonstrates is that the group's focus is on navigation equipment such that in general terms their focus when developing products such as the current one is on the navigation specification rather than, for example, the audio function. However, the test requires us to look at the specific characteristics of the Product itself and such general information can of its nature not really be of assistance in that regard.

40 172. In any event we regard the above considerations as sufficient basis for us to conclude that the principal function of the Product, in terms of its main inherent use, is as a satellite navigation system.

173. As regards the radio and CD function, we acknowledge that some particular drivers may well use those functions as much or more than the navigation function. However, actual use is not the test here. The question is the main intended use as evidenced by objective characteristics in terms of the design and essential features of the Product. We have concluded that, for all the reasons set out above, such main intended use is as a satellite navigation device. That the Product can and no doubt is also used as a radio and CD/music player does not detract from that conclusion.

174. As regards the monitor clearly it has a role to play in that it is the medium whereby both navigational visual information is displayed as well as information relating to the other uses of the Product. However, in our view, that the monitor has this role does not demonstrate that it is the main function of the Product. As noted above, principal function on its natural meaning refers to the main reason or purpose for which an item is designed to operate. The monitor is merely the medium through which a user can access and utilise the relevant services so that the device can be used for the purposes for which it is designed – in plain terms, as a satellite navigation service, as a radio, as a CD and DVD player, for hands free phone access and as a visual device for the “safety” camera. It seems no more appropriate to describe the screen as being a principal function of the Product than it would be to describe any of the other individual components which enable the systems to be used (such as the tuners or the PWBs) as themselves being a function of the Product. On its plain meaning the principal function test is not looking at the Product on a component by component analysis as such but by reference to what services those components produce for the user. Whilst the monitor enables the relevant services to be provided, the use of the monitor is not an end in itself.

175. We note that HMRC rely on the Regulation as supporting their case. It is clear from the case law on this topic that for a Regulation to be binding to goods other than those of the trader in question, those goods must be identical to those whose classification is determined by the regulation or sufficiently similar and caution is to be exercised. The Product is not identical to the relevant goods covered by the Regulation for the reasons set out by the appellant. As to whether the Product and the goods are sufficiently similar, we simply do not have sufficient information to assess that. We note that HMRC regards the appellant’s points on potential differences such as that the Product may be more technologically advanced as regards satellite navigation and that it does not have remote control (which could indicate greater use as a multi-media centre than as regards the Product) are somewhat speculative. We agree but so is any supposition that they are sufficiently similar given the lack of detailed information sufficient to make such a comparison. Given that difficulty, our view is that we must determine the classification of the Product according to its own objective characteristics under the applicable tests and not by reference to guesswork as to the similarity with the goods covered by the Regulation.

176. Essentially our view is the same as regards the BTIs produced by HMRC. We agree with the approach taken in *VTech* that it would not be right to determine classification by reference to BTIs where there is no real evidence available as to the precise nature of the goods considered in those BTIs.

177. We note that we are not saying that this should be the approach in all cases. In some cases it may be apparent from the description of the goods involved that they are identical or there is a sufficient similarity. The difficulty in this case is that we are dealing with a product which involves sophisticated technology which is developing all the time, as the appellant has stated in evidence. On that basis we cannot simply assume that a product which has a superficially similar description to that in issue is sufficiently the same or similar.

GIR 3 and essential characteristics test

178. In case we are wrong on the above test, we have considered also the application of GIR 3. Our view is that, if it were necessary to consider GIR 3, classification cannot be determined according to the Radio Receiver Code or the Monitor Code being held to constitute a more specific heading. We cannot see that one heading is more specific than the other. It is necessary, therefore, to proceed to consider the essential character test in GIR 3(b).

179. We note that this test essentially looks to the essential character of goods by reference to its material or components which may be weighed according to bulk, weight, value or role of a constituent material (see for example explanatory note VIII to GIR 3(b)).

180. As the appellant notes in a number of cases the CJEU has approached this issue by looking at whether the goods would retain their characteristic properties if one or other of their constituents were removed from them. In *Turbon* the issue was the classification of ink cartridges without an integrated print head for use in Epson Stylus Color inkjet printers: The CJEU held at [21] to [23]:

“20. Since the product at issue is composed of different materials and neither of the two subheadings mentioned above is more specific than the other, the sole provision to which recourse may be had for the purpose of classifying the goods is general rule 3(b) (see, to that effect, case 253/87 Sportex [1988] ECR 3351, paragraph 7).

21. Under that general rule, 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....

22. In the same way, as stated by paragraph VIII of the explanatory notes to the HS on general rule 3(b), the factor which determines the essential character of the goods may, depending on the type of goods, be determined for example, by the nature of the material or component, its bulk, quantity, weight or value, or the role of a constituent material in relation to the use of the goods.

23. Even if an ink cartridge is constructed in such a way that the printer does not function in the absence of that cartridge, the fact remains that the ink contained in the cartridge is the most important factor for the purpose of using the goods at issue. In fact, the ink is not inserted in the printer in order to make the printer itself function but specifically to supply it with ink. Therefore, the ink must be regarded as determining the essential character of an ink cartridge, such as that at issue in the main proceedings.

181. In the *Sportex* case referred to in *Turbon* the CJEU was tasked with considering the classification of pre-impregnated carbon fibres which could fall to be classified under two separate headings. At [8] the court said:

“In accordance with that general rule of interpretation, it is necessary, in carrying out the tariff classification of a product, to identify, from among the materials of which it is composed, the one which gives it its essential character. This may be done by determining whether the Product would retain its characteristics properties if one or other of its constituents were removed from it.”

182. In *Rank Xerox Manufacturing (Nederland) BV v Inspector der Invoerrecht en Accijnzen* (Case C-67/95) [1997] ECR I-5401 in considering the classification of a machine comprising a scanner, digital memory and laser printer the CJEU said at [30]:

“In the case of composite articles which "are prima facie classifiable under two or more headings"; general rule 3 in Section I of the CN, and more particularly paragraph (c) thereof, is applicable. The rule concerning specific descriptions in paragraph (a) is excluded since the relevant tariff headings fall within different Chapters; the rule in paragraph (b) does not apply since the apparatuses in question display no feature enabling their character to be determined.”

183. In this case our view is that the essential character of the Product is as a radio receiver whether regard is had to the comparative roles of the components (for the reasons set out in relation to the principal function test) or to the cost or value of the component parts. We accept the appellant’s evidence that the cost or value of the components representing the navigation function are the greater part of the cost or value. We note that the appellant confirmed that the costs table produced looks to materials rather than labour or research and development but we accept the appellant’s evidence that the research and development costs of the navigation components is much greater than that of the other components (looked at individually).

Processor or controller

184. In his evidence, Mr Lach described the function of the major components of the Product. We invited the parties to consider whether, if GIR 3(b) was relevant, the

component that gave the product its essential character was the processor or controller. That made the various elements work together to produce the highly sophisticated Product that we saw. A processor or controller would be classified as code 8542, free of duty.

5 185. The parties declined the opportunity to make detailed representations on this point. As we are satisfied that we can determine the correct classification without reference to GIR 3 (b), we have not considered it further.

Conclusion

10 186. We are satisfied that the principal function test set out in note 3 to section XVI decides the issue in favour of the appellant. If we are wrong on that and we should apply the essential characteristics test in GIR 3(b), then we also find in favour of the appellant.

15 187. For all the reasons given above we consider that the Products are correctly classified under the Radio Receiver Code as subject to duty under commodity code 8526 9120 as liable to customs duty at 3.7%. The appeal is allowed and HMRC's decision to the contrary is quashed.

20 188. 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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**HARRIET MORGAN
TRIBUNAL JUDGE**

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RELEASE DATE: 20 JUNE 2016