TC05432

Appeal number:TC/2013/05262

CUSTOMS DUTY – Combined Nomenclature – classification – various pieces of equipment used in CCTV installations – automatic data processing machines – machines for the conversion and transmission of images – video recording apparatus – objective characteristics – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

MORETON ALARM SERVICES (MAS) LIMITED   Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S   Respondents
REVENUE & CUSTOMS

TRIBUNAL: JUDGE JONATHAN CANNAN
MR JOHN WILSON

Sitting in public in Manchester on 6 and 7 July 2016

Mr Hammad Baig instructed by Equipe Limited for the Appellant

Mr Richard Chapman of counsel instructed by the General Counsel and Solicitor of HM Revenue & Customs for the Respondents

DECISION

Introduction

1.   The Appellant carries on the business of sales, installation and technical support of CCTV, intruder alarms and associated electrical Machines. The appeal itself concerns the correct classification for customs duty purposes of various pieces of equipment imported by the Appellant in the period April 2010 to October 2012. The Respondents contend that the equipment was imported using incorrect commodity codes and as a result they issued a C18 post clearance demand on 7 May 2013 in the sum of £40,496 covering both customs duty and VAT. The C18 demand was confirmed in a review decision dated 17 July 2013.

2.   Following the review decision the Respondents reduced the amount claimed by £1,840 in relation to imports in April 2010 which they accepted were out of time to for the purposes of the demand.

3.   The Appellant has previously acknowledged that customs duty and VAT totalling £10,752 was properly due and indicated that it does not challenge the C18 to that extent. The dispute concerns customs duty and VAT totalling approximately £29,000 comprised as follows:

1)   £20,000 relating to certain "PC based" equipment. There were two types of such equipment, the "IW Machine" and the "SA Machine". We shall describe them together as the "PC Based Machines" which is a convenient shorthand not intended to pre-judge any of the issues we must decide.

2)   £9,000 relating to the importation of what were variously described as "Nano embedded DVRs" and "encoders" which were "non-PC based". We shall describe these as "the Nano Machines".

4.   The Appellant accepts that it used incorrect commodity codes for all the goods imported, but that in relation to the PC Based Machines and the Nano Machines they should have been classified to a heading which gave a zero rate of customs duty. HMRC contend that they should have been classified to headings which gave a rate of 13.9% duty.

5.   HMRC contend that the PC Based Machines should be classified under Chapter 85 of the Combined Nomenclature ("CN") which covers all electrical machinery other than machinery and apparatus covered by Chapter 84. The Appellant contends that they should be classified under Chapter 84 which covers various items of machinery and mechanical appliances. The competing headings of chapters 84 and 85 for the PC Based Machines are as follows:

Appellant's Classification		Respondents' Classification	
8471	**Automatic Data Processing Machines**	**8521**	**Video Recording or Reproducing Apparatus, whether or not incorporating a video tuner**

6.   It is important to record at this stage that Notes 5(A) and (E) of the Chapter Notes for Chapter 84 read as follows:

" (A) For the purposes of heading 8471, the expression "automatic data processing machines" means: machines, capable of:

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

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

7.   The CN refers to "automatic data processing machines". Both parties used the shorthand of a "computer" to describe goods which fall to be classified under heading 8471 and where appropriate we shall do the same.

8.   The parties agreed that the Nano Machines were classified under Chapter 85. The competing headings of Chapter 85 for the Nano Machines are as follows:

Appellant's Classification		Respondents' Classification	
8517	**Telephone Sets, including telephones for cellular networks …; other apparatus for the transmission or reception of voice, images or other data …**	**8521**	**Video Recording or Reproducing Apparatus, whether or not incorporating a video tuner**
62	- Machines for the reception, conversion and transmission or regeneration of voice, images or other data, including switching and routing apparatus		

9.   We have previously decided following various procedural breaches that the Respondents should be barred from cross-examining the Appellant's expert witness and from making submissions on the Appellant's case in relation to the Nano Machines. That decision was released under the reference *Moreton Alarm Services (MAS) Ltd v Commissioners for HM Revenue & Customs [2016] UKFTT 192 (TC)* and set out the procedural history of the appeal. At [65] to [70] of that decision we reserved for further argument the point as to whether we can or should summarily allow the appeal in relation to the Nano Machines without any consideration of the merits. We return to that issue below.

10.   We heard evidence from expert witnesses instructed by both parties and we saw a demonstration of the PC Based Machines and the Nano Machines. We heard submissions from Mr Baig for the Appellant in relation to both types of machine and from Mr Chapman for HMRC in relation to the PC Based Machines.

11.   The Appellant's expert witness was Mr Philip Buttifant, the Forensic Services Manager of Computer Science Labs. Mr Buttifant has 22 years experience in the RAF as a technician and instructor dealing with electronics, data communication and digital communication systems. He joined Computer Science Labs from the RAF in 2008. Since then he has been involved in forensic investigations and data recovery from CCTV and computer based systems.

12.   The Respondents' expert witness was Mr Darren Thomas who is a professional software developer and author with a degree in computer software engineering. He has 25 years experience of analysing, developing and documenting computer systems as an independent consultant.

13.   There was no question that both witnesses were qualified to give expert evidence as to the detailed nature and functionality of the machines in issue. They each produced reports, and subsequently attempted to produce a joint statement of areas of agreement and disagreement. For reasons which are not entirely clear no joint statement was agreed.

Findings of Fact

14.   Our findings of fact inevitably involve a certain level of technical terminology. Both parties are familiar with the terminology and we have not attempted to define all the terms used. Based on the evidence before us we make the following findings of fact, distinguishing between the PC Based Machines and the Nano Machines.

(1)   The PC Based Machines

15.   There are two versions of the PC Based Machines, namely the IW Machine and the SA Machine. They might each be supplied by the Appellant to its customers as part of a CCTV installation. The relevant features of the IW Machine at the time of importation may be summarised as follows.

16.   It is housed in a desktop PC type casing containing a motherboard with an Intel processor. It has an 8Gb solid state drive (SSD) with an IDE connector and on

importation it is pre-loaded with an embedded version of the Windows 7 operating system. A SSD, unlike a traditional hard disk drive, does not operate using magnetic spin or moving parts. It is a read/write drive akin to a USB memory stick or a SD Card. The reference to Windows being embedded is a reference to the fact that it comes pre-installed on the SSD. It is also a more restricted version of Windows than appears on a standard desktop PC or notebook. Mr Buttifant accepted that the fact the operating system is embedded in this way together with the fact that it had been configured to automatically start the digital video recording (DVR) software removed the immediate ease of access to the Windows desktop when the IW machine was started up.

17.   The IW Machine operates using a 300 Watt power supply. It has 4 Gb of RAM with no additional memory slots to add more RAM. The machine has 2 USB slots and a monitor connection. There is a LAN card installed which enables the machine to be connected to the internet via a cable. There is a DVR card connected to the motherboard which can be connected to up to 16 external video sources. The DVR card is attached by screws to the casing which has been specifically designed to accommodate it. Mr Thomas described the DVR card as being hardwired. In fact there was some confusion in relation to terminology. It was connected by a plug connector to the motherboard. The DVR card is similar to a video card and enables the machine to display images from a camera on a monitor. The IW Machine has an expansion slot which allows for installation of another card for additional functionality, for example a graphics card, a sound card or a networking card. Mr Thomas had not identified this expansion slot during his examination of the machine because it was obscured and there was no outlet in the chassis casing for a connection. However he accepted during cross-examination that it was present.

18.   The casing itself has a front fascia panel which gives access to some of the connections described above. It also has control buttons similar to a household DVR, such as play, pause and fast forward buttons. These commands can be used when viewing CCTV images. The fascia has a small LCD display which shows the status of the machine, its temperature and other information.

19.   Mr Thomas described the fascia as being hardwired. Again there was some confusion in relation to terminology. The fascia was connected to the motherboard via a plug connector. It could be easily removed and replaced with a different type of fascia if required. In order to do so it would be necessary to open the casing to unplug the fascia. Similar control buttons are occasionally seen on fascias of standard desktop PCs.

20.   When the machine is switched on and connected to a monitor it automatically executes the pre-loaded DVR software. The DVR software enables the machine to store images including video on the cloud or on any other storage device. Images could be stored on the machine itself but that would require a separate hard disk drive to be connected.

21.   The IW Machine can be connected via the internet so as to display and record images from a remote CCTV camera. Mr Baig told us and we accept that the machine

was designed as it was to enable images to be stored remotely from the premises being monitored by CCTV. Any intruder at those premises could not therefore destroy or remove the stored images. Having said that, it is a matter for customer preference as to whether the machines are located at the premises being monitored or remotely.

22.   Once the DVR software has loaded it is still possible to access the Windows desktop by using the command "111 Ctrl l". That key sequence is specific to the DVR software and is not identified in any of the literature provided in connection with the IW Machine. Once accessed the Windows desktop is identical to that on a standard Windows PC save that there is no Start Button or Start Menu at the bottom of the screen. It is still possible however to access the Windows control panel, navigate the SSD and start other applications. The SSD can be formatted, existing software can be removed and other software can be installed subject to the capacity of the SSD. An additional hard drive could also be installed if required. A standard internet browser such as Firefox could be installed enabling the machine to access the internet.

23.   The Appellant installs additional software on the IW Machines after importation depending on the customer's specific requirements. For example, customers might require software which can remotely control lighting at the premises being monitored.

24.   The SA machine is similar to the IW Machine but it has the following principal differences. It is imported with an embedded version of the Windows XP operating system. It has a 2Gb SSD with a SATA connector and 3.12Gb of RAM. It has 3 expansion slots for installing further cards for additional functionality and 4 slots for installing additional RAM and/or hard drives. It uses a 220 Watt power supply.

25.   The fascia of the SA Machine is more like a standard PC and does not contain the DVR type control buttons seen on the IW Machine.

26.   Both the IW Machines and the SA Machines are manufactured by Aver Media in Taiwan. The DVD cards and the software they operate are both Aver products. It is possible to buy an Aver DVR card with software for installation on a standard desktop PC. The software can be used with any DVR card.

27.   Both machines were demonstrated for us and they had similar functionality. On start up the Windows operating system boots up and the DVR software automatically loads. Once the DVR software has loaded it is possible to allocate numbered functions on the opening page of the DVR software to run other types of software which can be loaded. The numbered functions have to be configured for particular applications, for example internet browsing. One form of software that the Appellant might add to the system for a particular customer is called "Teamviewer" which allows the machines to access or be accessed by another computer at a remote location.

28.   There was an issue between the experts as to how the PC Based Machines could be re-programmed so that the DVR software did not automatically load on start up. It was clear from a demonstration which Mr Buttifant attempted several times that this was not straightforward and indeed Mr Buttifant was unable to demonstrate to us how it would be done. He maintained that it could be done by pressing the key F8 when

the machines were started. That should give access to the BIOS ("Basic Input/Output System") which initialises the hardware during the booting process however it could not be demonstrated to us. Having said that Mr Thomas accepted that the BIOS could be reconfigured so that the PC Based Machines would go straight to the Windows desktop on start up.

29. Prior to the hearing Mr Thomas had not seen the sequence "111 Ctrl l" demonstrated and was not aware that it could be used to access the Windows desktop when the DVR software had loaded. It is not clear why that was the case and we do not criticise Mr Thomas in this regard. Having seen the key sequence demonstrated Mr Thomas accepted that the IW Machines and the SA Machines were freely programmable within the meaning of Note 5(A).

30. It would be possible to remove the Windows operating system and install a different operating system such as Linux or DOS. This could be done by connecting an input device to the machines such as a DVD reader. It is also possible to go to the command prompt in Windows to perform a simple arithmetical calculation. Mr Buttifant demonstrated this for us. He also demonstrated that the PC Based Machines can be used to format an external storage device to a standard Windows file format and to give a name to a device such as a USB stick.

31. We were provided with promotional material for both the IW Machine and the SA Machine. This described the IW Machine as an "Embedded hybrid DVR" which "builds on the success of the previous generation of IWH series DVRs". The SA Machine was described as a "Hybrid and Standalone DVR" and as a "PC-based DVR". There was no suggestion in the promotional material that the PC Based Machines could be used other than as DVRs, although we accept that the detailed technical specification identified in the promotional material indicates that they are PC type machines.

32. It was not disputed that the price of the PC Based Machines was much greater than any customer would pay for a desktop PC of that specification were it not for its function as a DVR in a CCTV installation.

33. We did not have copies of the user guides for the PC-Based Machines. Mr Buttifant had seen them and acknowledged that there was nothing in the guides about how to use them as anything other than DVRs. In cross examination Mr Buttifant accepted that the principal function of the PC Based Machines as they were imported was as a DVR.

34. Mr Thomas referred to the "architecture" of the PC Based Machines. He described the SA Machine as having "ATX" architecture" and the IW Machine as having non-ATX architecture. He concluded in his report that "the underlying Product hardware of the [SA Machine] is in essence, a standard PC. The [IW Machine] hardware is not". At the end of his cross-examination he accepted that both the SA Machines and the IW Machines in terms of their hardware satisfied all four requirements in Note 5(A).

(2)   The Nano Machines

35.   The Nano Machines also form part of the hardware which the Appellant supplies to customers as part of CCTV installations.

36.   The images from a CCTV camera can be transmitted to a router and then over the internet to a Nano Machine from which they can be displayed on a monitor. Alternatively the Nano Machine might be in the same location as the camera and will be directly connected to the camera but will enable the images to be transmitted via the internet to a remote location where the images can be stored. Some CCTV cameras can themselves convert analogue images to digital for transmission over the internet. In that case the Nano Machine would not be required.

37.   The Nano Machines can convert an analogue input to a digital output and vice versa. They are capable of storing the images to the cloud, to an external hard drive or to any computer. They have an HDMI connection, a USB connection and a LAN connection for those purposes. They can also be connected to electronic point of sale unit in order to display images.

38.   The Nano Machines have a SSD and use the Linux operating system. They can be connected via a SATA connection to a hard disk drive. There is space inside the casing for a hard disk drive but they are not shipped with one. Users can and often will install a hard disk drive.

39.   Mr Buttifant described the functionality of the Nano Machine as follows:

"The most common application of these devices is as an encoder to take in CCTV camera inputs and convert the video signal into a digital form for transmission via the internet or other digital means to a remote location where the video information is monitored and/or stored."

40.   The material before us contained a Classification Opinion from the World Customs Organisation which described a "digital encoder" for the purposes of heading 8517 62 as follows:

"…converts analogue or digital video, audio and data signals of the source information (such as CATV (Cable television) programming) into digital signals by means of compressing and encoding techniques in compliance with the MPEG-2 standard."

41.   We were not addressed on the status of the Classification Opinion. However as a matter of fact Mr Buttifant's evidence was that this closely described the function of the Nano Machines. His evidence was not tested in cross-examination but we did not see anything plainly wrong with his evidence. We accept therefore that this is how the Nano Machines functioned and were intended to be used.

Reasons

(1)   The PC-Based Machines

42.   We start by considering the legal framework of classification, including the General Rules for the Interpretation of the Nomenclature ("GIRs"). The relevant GIRs for present purposes are as follows:

> " 1. The titles of sections, chapters and sub chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
>
> …
>
> 3. When by application of Rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description…
>
> …
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b) they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration."

43.   It is well established that classification involves identifying and classifying goods by reference to their objective characteristics at the time of importation. The approach to classification issues was summarised by Arden LJ in *Amoena (UK) Ltd v Commissioners for Her Majesty's Revenue and Customs [2015] EWCA Civ 25* as follows:

> " 53. I start with the general approach to interpretation of the CN.
>
> 54. It is clear from the Opinion of Advocate General Kokott in *Uroplasty* that the court must apply a structured approach. At the first stage it must determine the intended use and material composition of the article. Next the court must make a provisional classification by reference to section and chapter headings. Then the court must make a combined examination of the headings and Notes, applying GIRs 2 to 5 in case of conflict. The interpretation of the headings and EN should be consistent with the HS. Finally the article must be placed under the appropriate subheading. The relevant paragraphs in the Opinion are as follows:
>
> > 42.   First, the intended use and material composition of the article must be precisely determined. Next, in the light of the wording of the headings of the relevant sections and chapters a provisional classification must be undertaken according to the article's intended use and material composition. There must then be considered whether on a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters a definitive classification may be reached. If not, then in order to resolve the

conflict between the competing provisions recourse must be had to Rules 2 to 5 of the general rules. Lastly, classification must be made under the subheadings.

43.   Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first subheading can be compared only with the wording of other first subheadings of the same heading; and the wording of a second subheading can be compared only with the wording of other second subheadings of the same first subheading.

44.   In this exercise the wording of the headings and the explanatory notes of the CN are to be interpreted so as to be consistent with the Harmonised System. The Court has consistently held that the explanatory notes drawn up, as regards the Harmonised System, by the World Customs Organisation, may be an important aid to the interpretation of the individual tariff headings, although they do not have legally binding force.

55. The CJEU emphasised that the determination of the characteristics and properties of the article must be an objective one, and that the wording of the CN must prevail over the EN, which cannot alter the scope of the headings:

40   According to settled case-law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs tariff purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters (see, in particular, Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 13; Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 47; Case C-445/04 *Possehl Erzkontor* [2005] ECR I-0000, paragraph 19; and Case C-500/04 *Proxxon* [2006] ECR I-0000, paragraph 21).

41   The Explanatory Notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those Notes must therefore be consistent with the provisions of the CN and cannot alter their scope (see, in particular, Case C-130/02 *Krings* [2004] ECR I-2121, paragraph 28, Case C-467/03 *Ikegami* [2005] ECR I-2389, paragraph 17, and *Proxxon* paragraph 22).

42   For the purposes of classification under the appropriate heading, it is important, finally, to recall that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see *Krings* paragraph 30, *Ikegami*, paragraph 23, and *Proxxon*, paragraph 31)."

44.   Where a product has a principal function and one or more ancillary functions, classification must be made having regard to the principal function. In *Hauptzollamt Hannover v Amazon EU Sarl Case C-58/14* the CJEU was concerned with the customs classification of electronic books. It stated as follows:

" 21   The referring court rightly states that the CN does not contain any subheading the wording of which expressly refers to an electrical apparatus whose principal function is that of reading.

22   However, it cannot be concluded that, in default of a subheading in the CN corresponding exactly to the principal function of such an apparatus, the apparatus must be classified under a specific subheading on the basis of one of its ancillary functions.

23   The tariff classification of a product must be made having regard to its principal function. Thus, Note 3 to Section XVI of Part Two of the CN provides that a machine which has a number of functions must be classified according to its principal function.

24   Similarly, the Court has previously pointed out that, for the purposes of classifying a product, it is necessary to take into account what consumers would consider to be ancillary or principal (see, to that effect, judgment in *British Sky Broadcasting Group*, C-288/09 and C-289/09, EU:C:2011:248, paragraph 77).

25   A product is therefore classified having regard, not to one of its ancillary functions, but to its principal function, even in a situation such as that at issue in the main proceedings where there is no CN subheading corresponding specifically to that principal function."

45.   It is clear that the reference to a principal function encompasses the principal intended use which may be an objective criterion for the purposes of classification. In *British Sky Broadcasting Group plc v HM Revenue & Customs Case C-288/09* the CJEU was concerned with the classification of Sky+ Boxes where customers were purchasing a product primarily for the function of decoding TV signals rather than for its recording function. The CJEU stated as follows:

" 76   It should be recalled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties (see Case C-309/98 *Holz Geenen* [2000] ECR I-1975, paragraph 15; Case C-201/99 *Deutsche Nichimen* [2001] ECR I-2701, paragraph 20; and Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36).

77   In that regard, as the Commission acknowledged at the hearing, it is necessary to take into account what consumers would consider to be ancillary or principal.

78   It appears, both from the orders for reference and the observations submitted to the Court, 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 do so, they must obtain a set-top box such as a Sky+ box. The television programme recording function which is, in addition, available on that model, is merely an additional service that it offers.

80   The interaction between the functions of the Sky+ box described in paragraph 75 of this judgment, 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."

46.   We were also referred to the decision of the ECJ in *Ikegami Electronics (Europe) GmbH v Oberfinanzdirektion Nurnberg Case C-467/03*. The issues in that case were similar to the issues in the present case, indeed the competing classifications were headings 8471 and 8521. It was cited to us for the principles to be applied rather than any parallel with the facts. Having said that it is necessary to identify the nature of the goods to understand the reasoning of the ECJ. The goods were described as follows:

> " In addition to a keyboard and a built-in glide mouse, the apparatus has a video digitiser board for four video cards with connector ports for up to eight television cameras, image movement control, a main board with a processor and three hard disk slots, a video storage device, sound, LAN, graphics and modem cards, a hard disk and a CDRW drive. The Windows ME operating system, software for the digital recorder, and the software for the CDRW drive are pre-'installed on the hard disk."

47.   The ECJ was concerned with Chapter Notes 5(A) and 5(E) of Chapter 84. Note 5(E) was in a slightly different form to that applicable at the time of the present importations but there was no material difference. The question referred was whether a digital recording machine, such as that at issue in the main proceedings, was to be regarded as performing a specific function other than data processing within the meaning of Note 5(E) to Chapter 84. The ECJ considered that the machine in question had to be regarded as performing a specific function going beyond automatic data processing. It concluded at [31] as follows:

> "31. In the light of all the foregoing, the reply to the question referred for a preliminary ruling must be that a machine which, for video-'surveillance purposes, records signals from cameras and, after compressing them, reproduces them on screen, performs a specific function other than data processing within the meaning of Note 5(E) to Chapter 84 of the CN."

48.   Mr Baig submitted that a machine supplied with pre-installed software which automatically runs on start up is still a computer. He gave the example of a computer in a public library which automatically defaults to a library catalogue on start up. He submitted that the PC Based Machines should not be viewed as DVRs simply because they came with DVR software which executed automatically on start up.

49.   Mr Chapman submitted that a machine could operate both as a computer and as a DVR and that such functions were not mutually exclusive. He summarised his submissions as follows:

(1) If the PC Based Machines were not freely programmable then Note 5(A) meant that they could not be classified under Chapter 84.

(2) Even if the PC Based Machines were computers within Note 5(A) they could still have a specific function which meant that they were properly classified in a heading other than Chapter 84 by virtue of Note 5(E).

(3) If Chapter 85 offered a more specific description of the objective characteristics of the PC Based Machines then it was appropriate to classify them to Chapter 85 by virtue of GIR 3(a).

(4) If it was necessary to resort to GIR 3(c) (commonly called the tie-breaker), then classification under Chapter 85 was appropriate.

50. Mr Buttifant's evidence was that the four requirements in Note 5(A) were satisfied for both PC Based Machines in the state they were in at the time of importation. Following the demonstrations provided during the course of evidence and cross-examination by Mr Baig, Mr Thomas also accepted that the hardware of both PC Based Machines satisfied the four requirements of Note 5(A).

51. In the light of Mr Thomas' evidence that the PC Based Machines were freely programmable, Mr Chapman did not seek to maintain his first submission. We are satisfied that the PC Based Machines satisfied all the requirements of Chapter Note 5(A). The machines could therefore in principle be classified under heading 8471 as automatic data processing machines. However we must also have regard to Chapter Note 5(E) which provides that machines incorporating an automatic data processing machine which perform a specific function other than data processing are to be classified in the heading appropriate to that function.

52. We must first consider the objective characteristics and the intended use of the PC Based Products; in particular their principal intended use or function.

53. It is significant that the PC Based Machines automatically load the DVR software when started up. The start up process can be re-programmed, but it was clear from Mr Buttifant's demonstration that to do so is not a straightforward task. Further it is clear from the marketing material that the PC Based Machines are sold as DVRs. The functionality of the IW Machine as a DVR is also indicated by the fascia which contained buttons clearly identifying its intended function as a DVR.

54. The Appellant contends that the small capacity of the SSD is not a hindrance to a classification of the PC Based Machines as computers. They can use the cloud to store and execute software in the same way that the latest notebook and tablet devices operate.

55. We accept that is the case. It is possible to use the PC Based Machines as fairly basic computers. They share many of the basic characteristics of standard PCs. Indeed Mr Thomas accepted that the SA Machine was in essence a standard PC although in his opinion the IW machine was not because of its architecture. However we agree with Mr Chapman that the capability or capacity of the machines does not in the circumstances of this case define their essential characteristics.

56. The fact that the PC Based Machines can be used not only as DVRs but also as computers is not determinative for the purposes of classification. The key issue is to identify the essential character of the PC Based Machines including their principal intended use or function. A machine can be a computer whilst still having the principal function or essential character of a DVR.

57. Mr Baig argued that the fact the PC Based Machines were "locked down" in the sense that they automatically ran the DVR software when started up was relevant only to the question of whether they were freely programmable. Mr Thomas accepted that they were freely programmable so the lock down was not relevant to classification. We do not accept that submission. The fact they are locked down is an objective factor from which, together with other objective factors, we can identify the inherent character of the goods.

58. It seems to us that the following objective factors are most pertinently relevant in identifying the objective characteristics of the PC Based Machines:

(1) They are designed to accommodate the DVR card and to run the DVR software.

(2) They run an embedded version of Windows which is relatively inaccessible.

(3) They are marketed as DVRs.

(4) The price paid for the PC Based Machines is greater than a customer would pay for a desktop PC of the same specification.

(5) They are intended primarily to function as, and be used as, DVRs.

59. Mr Baig submitted that we should consider the PC Based Machines by reference to the hardware, irrespective of the particular software installed at the time of importation. The hardware of the PC Based Machines was, he submitted, clearly a computer. We were not referred to any authority which would support such an approach. It is the objective characteristics of the goods at the time of importation that we must identify. Those objective characteristics include the goods as a whole. The fact that the PC Based Machines can be reprogrammed to fulfil other tasks of a computer in the way described in Note 5(A) does not alter the fact that their principal intended use is clearly that of a DVR.

60. Mr Baig relied on the ECJ decision in *B.A.S. Trucks BV v Staatssecretaris van Financien Case C-400/05*. In that case the ECJ stated the established principles of classification which we have set out above. The case involved heading 8704 which covered dumper trucks with an explanatory note stating that they were generally fitted with off road wheels and could work over soft ground. The wheels and tyres of the vehicles in question were also designed in such a way that they could be used on paved roads. The importer contended that the fact they could be driven on paved roads did not preclude them from having been designed for off-highway use. The ECJ held that the fact the trucks in question were also capable, incidentally, of being driven on roads was not a decisive factor in their classification when they were designed primarily to be driven on uneven ground.

61.   Mr Baig argued by analogy that in the present case the fact that the PC Based Machines had software which meant that they could be used as DVRs did not mean that they were to be classified as DVRs. We accept that argument as a matter of principle but in our judgment the PC Based Machines were designed as DVRs. Any intended use by customers as a computer is merely incidental to the principal function and intended use as DVRs. Indeed Mr Buttifant accepted that the principal function of the PC Based Machines was that of DVRs.

62.   In the light of our findings as to the objective characteristics of the PC Based Machines and their intended use we consider that their essential character is that of DVRs and as such we would provisionally classify them to heading 8521. There is nothing in heading 8471 or Chapter Note 5(A) which would cause us to reconsider that classification. Indeed it is supported by Chapter Note 5(E). We were not referred to any explanatory notes relevant to classification. In those circumstances we do not need to resort to GIR 3(a) or (c) and there are no competing sub-headings.

63.   We find therefore that the PC Based Machines fall to be classified under heading 8521 as video recording or reproducing apparatus.

(2)   The Nano Machines

64.   As stated above, there remains an issue as to whether we should summarily determine the appeal in relation to the Nano Machines. Mr Baig invited us to do so without regard to the evidence or the merits. Mr Chapman submitted that we should still make findings of fact and reach a decision on classification, albeit without the benefit of submissions from the Respondents.

65.   Having heard the evidence it seems to us that we can deal with the evidence and the merits quite briefly in any event. We have accepted Mr Buttifant's evidence that the Nano Machines are digital encoders which convert a source video signal into a digital signal for transmission to a remote location.

66.   Mr Baig submitted that the Nano Machines were "other apparatus for the transmission or reception of voice, images or other data" in heading 8517. He submitted that they were within sub heading 8517 62 which refers to machines "for the reception, conversion and transmission of … images, including … routing apparatus".

67.   For the reasons give above, the distinction between heading 8517 and heading 8521 applicable to video recording apparatus involves consideration of the intended use and specific function of the Nano Machines

68.   In the light of Mr Buttifant's evidence, we are satisfied that the Nano Machines are clearly to be classified under heading 8517 62 by reference to their objective characteristics. There is no more appropriate heading. In those circumstances it is not necessary for us to decide the extent of our jurisdiction to determine the appeal summarily.

Conclusion

69.   For the reasons given above we dismiss the appeal in relation to the PC Based Machines and we allow the appeal in relation to the Nano Machines.

70.   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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 OCTOBER 2016