*CUSTOMS DUTIES - tariff classification under Combined Nomenclature - high speed camera - whether "digital camera" under subheading 8525 80 30 or "video camera recorders - only able to record sound and images taken by the television camera" under subheading 8525 80 91 - camera properly classified as "digital camera- appeal dismissed*

**[2012] UKUT 275 (TCC)**
**FTC/63/2011**

**IN THE UPPER TRIBUNAL**
**(TAX AND CHANCERY CHAMBER)**

**BETWEEN**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS ("HMRC")**

**Appellants**

**-and-**

**PHOTRON EUROPE LTD ("PHOTRON")**

**Respondents**

**Tribunal:**

**The Honourable Mr Justice Peter Smith**
**Sitting in public in London on 26th June 2012**

**Representation:**
**Andrew Macnab instructed by HMRC for the Appellants**
**Valentina Sloane instructed by Arle House Ltd for the Respondents**

## DECISION

**I dismiss the Appellant's appeal on grounds on one and two but for the reasons set out below, allow the appeal in respect of ground 3**

## REASONS

### Introduction

1. This is an appeal by the Commissioners for Her Majesty's Revenue and Customs ("HMRC") against the decision of the First-Tier Tribunal ("FTT") [2011] UKFTT 334 (TC).

2. By that decision the FTT allowed the appeal of the Respondent (Photron Europe Ltd) ("Photron") against 2 decisions of HMRC relating to the tariff classification for the purpose of customs duty of specialist high speed camera products imported into the European Union by it.

3. Those decisions were:-

    1) A decision by the HMRC on review dated 4th April 2007 to refuse a claim for repayment by Photron made on 2nd February 2007 for repayment of customs duty paid on the importation of Photron's Fastcam APX range of cameras during the period of 27th October 2004 to 30th August 2006.

    2) A decision by the HMRC again dated 16th November 2007 (by reason of the failure of the HMRC to determine the review within the relevant statutory period) of Photron's application for a Binding Tariff

Information ("BTI") in respect of two cameras (the 1024 PCI Fastcam-X and the 512 PCI Fastcam-X models). Photron submitted that the correct tariff classification was as ***"digital cameras"*** under sub heading 8525 80 30 of the Combined Nomenclature Classification. On 16th November 2007 Mr David Harris of Tariff Classification Office of the Customs and International Duty Liability Office of the Commissioners informed Photron that the HMRC were classifying its cameras under sub heading 8525 80 91 of the Combined Nomenclature Classification as ***"video camera recorders – only able to record sound and images taken by the television camera"*** and BTI notifications on that basis were issued by the Commissioners on 16th November 2007.

4. The FTT reversed those decisions. In addition it made ancillary orders directing repayment which Photron acknowledged it had no power to do. It does not therefore challenge HMRC's appeal on that point. Equally there was some criticism expressed of the way in which HMRC provided information to the Customs Code Committee in December 2008. As Mr Macnab who appears for HMRC pointed out to the FTT those matters was not part of their duty. Nevertheless the FTT felt it appropriate to raise these matters because they were matters which concerned them in a way in which the HMRC conducted itself.

5. The concerns are set out in paragraph 101 of the Decision.

6. I agree that these matters should not form part of the Decision of the FTT and I do not propose to deal with them in this judgment either. The position is not clear and Mr Macnab gave me reasons as to why the missing material

complained of by the FTT was not actually provided. That might be arguably correct but it is a pointless exercise (and an unnecessary one) to investigate this matter further and I do not propose to do so.

7. The FTT therefore reversed the decisions of the HMRC. Accordingly it designated Photron's cameras as digital cameras rather than video camera recorders. The difference is in duty. Video cameras attract a duty of 4.9% on importation whereas digital cameras attract no duty. Why these differing rates should apply are matters of the Byzantine nature of the application of customs duties to different products which is always difficult to comprehend. It is reinforced in this case by the plain fact that what might have been considered a digital camera 10 years ago and a video recorder 10 years ago by reference to its then respective characteristics bears no relation to those devices now. To a large degree both types of device have virtually the same characteristics and facilities.

NATURE OF APPEAL

8. The appeal before me is not a true appeal. It is limited to a review. As regards factual findings the only way for challenge is on the basis of the well known decision of ***Edwards v Bairstow*** namely a challenge to the FTT's decision on the basis that it came to a conclusion that no reasonable tribunal could have made. HMRC does not allege that. Nevertheless on reading the Appellant's Notice and the skeleton argument and hearing Mr Macnab's submissions it became clearer and clearer as the hearing went on that in effect HMRC were challenging what was in my view a factual finding namely was the Photron device a digital camera or a video camera recorder. To my mind HMRC's

appeal was a classic disguised factual challenge dressed up as questions of law.

9. As regards the law there is no disagreement between the parties as to the applicable law. That was the position before the FTT.

DECISION OF THE FTT

10. After a short introduction and summary of its decision they then set out the relevant law which as I have said is agreed to be a correct summary of the law.

11. The harmonised system of customs duties within the European Union determines duties that are applicable for the purposes of imported goods. The European Union is a party to the International Convention on the Harmonised Commodity Description and Coding System. Article 1 of the Council regulation 2658/87 and article 20.3 of the Council regulation 2913/92 provide that the rates of customs duties on goods imported in the EU are to be determined on the basis of the Combined Nomenclature Classification ("CNC"). That is a system whereby all products are classified under headings and sub-headings and each classification is given an 8 digit number or code or in some cases 10 digits. Further article 12 of the regulations requires a member state to issue a BTI (namely a binding tariff information) upon written request of an importer determining a classification of the goods.

12. The CNC is amended from time to time. Prior to January 2007 the CNC classified video cameras and digital cameras within chapter 85 of the CNC under the CNC code of 8525-40 with a sub heading ***"still image video cameras and other video camera recorders; digital cameras".*** There is a

further classification within this sub heading of ***"still image video cameras; digital cameras-digital cameras"*** which are given the CNC code of 8525-40-11 and were free of duty. Other video cameras which record sound and images taken by a television camera are given the code 8525-40-91.

13. The Netherlands customs in October 2006 had issued a BTI to Photron in respect of their cameras determining that it was classified as a digital camera under 8525-40-11.

14. With effect from 1st January 2007 chapter 85 was amended so that ***television cameras, digital cameras and video camera recorders*** were classified under CN 8525-80. Within that heading there were further sub headings of ***digital cameras*** given the CN code 8525-80-30 (free of duty) and ***video camera recorders*** only able to record sound and images taken by a television camera given the code 8525-80-91. No party contended the changes from 1st January 2007 had any significant impact.

15. The European Commission issues Explanatory notes to the CNC known as "CNENs" which are published in the Official Journal of EU. They do not have force of law and cannot alter the meaning of a CNC but are regarded as an important aid to the interpretation of the meaning and scope of a classification.

16. On 23rd October 2007 the European Commission issued an explanatory note in relation to the two sub headings for digital cameras and video camera recorders:-

> ***" 8525 80 30 Digital Cameras***

***Digital cameras of this subheading are always capable of still image recording, whether on the internal storage medium or on interchangeable media.***

***Most cameras of this subheading have the design of a traditional photographic camera and do not have a foldable viewfinder.***

***These cameras may also have video-capture capability to record sequences of video. Cameras remain classified in this sub heading unless they are capable, using the maximum storage capacity, of recording, in a quality of 800.x 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video.***

***Compared to the video camera recorders of subheadings 8525 80 91 and 8525 80 99, many digital cameras (when functioning as video cameras) do not offer an optical zoom function during video recording.***

***Unaffected by the storage capacity, some cameras automatically terminate the recording of video after a certain period of time.***

***8525 80 91 and 8525 80 99 Video camera recorders***

***Video camera recorders of these subheadings are always capable of recording sequences of video, whether on an internal storage medium or on interchangeable media.***

***In general, the digital video camera recorders of these subheadings have the design which differs from digital cameras of subheading 8525 80 30. They often have a foldable viewfinder and are frequently presented together with a remote control. They always offer an optical zoom function during video recording.***

***These digital video camera recorders may also have still image recording capability.***

***Digital cameras are excluded from these subheadings if they are not capable, using the maximum storage capacity, of recording, in a quality of 800 x 600 pixels (or higher) at 23 frames per second (or higher) at least 30 minutes in a single sequence of video.***

FUTURE ANALYSIS OF FTT DECISION

17. After summarising the principles the FTT then went on to consider the background events to Photron's appeal. Photron obtained the BTI classification of their high speed cameras from the Netherland's Customs Authorities as a digital camera on 13th October 2006. As a result of that classification it sought repayment of duty mistakenly (it contended) paid on its cameras imported before that BTI classification. Those claims were made in October 2006 and accepted by HMRC and duty repaid in November 2006. On 2nd February 2007 Photron submitted a third claim for repayment which covered the period 27th October 2004 to 13th August 2006 before the BTI was issued by the Netherland's Authorities. That was rejected and is the subject matter of decision 1 of the FTT.

18. Behind the scenes of Photron bringing the proceedings to the tribunal (11th April 2007) the matter was considered by the Customs Code Committee at its 428th Meeting in July 2007. The eventual result was the regulation CNEN published on 23rd October 2007. After that Photron applied to HMRC for a BTI in respect of 2 models of its Fastcam cameras. The decision of HMRC to issue a BTI classifying them as video camera recorders is the second challenge before the FTT.

19. In early 2008 HMRC determined to bring the issue of classification of high speed cameras before the Customs Code Committee. They submitted a report by Mr Clues. That submission was the subject matter of the criticism of HMRC by the FTT below. The Committee considered HMRC's case and also the stance of the Netherland's Customs Authority and its decision to issue a BTI categorising these cameras as digital cameras.

20. In October 2009 the Customs Code Committee issued a classification statement as follows:-

> ***"A national tribunal has found that the product is to be classified as a digital camera and not a video camera.***
>
> ***The product is capable of capturing and storing a sequence of images which, after further processing, can be viewed either as individual images (JPEG) or as a video sequence (MPEG). The images are of a higher resolution than those captured by "normal" video cameras. The video sequence is of a limited duration compared to "normal" video cameras depending on the storage capacity of the individual product.***
>
> ***A discussion on what constitutes a video sequence took place. Does the number of files stored by the camera matter? Does the format of the files influence the classification?***
>
> ***Following some minor textual amendments, a classification statement as reproduced in Annex XII was adopted."***

21. The classification statement referred to is as follows:-

> ***"A rectangular shaped camera comprising a lens and electronic circuitry, including internal memory. The lens is mounted on the front and a cable is connecting the camera to an automatic data-processing (ADP) machine. The camera can also operate in stand-alone mode.***
>
> ***The product is designed to capture a sequence of images at a shutter rate of 1000 frames per second at a maximum resolution of 1024 x 1024 or 109500 frames per second at a lower resolution of 128 x 16. The captured images may be viewed individually or played back as a slow motion video. They may be subject to analysis in a laboratory or similar environment for studying, for example, ultra-high speed phenomena such as automotive crash tests.***
>
> ***Given that the product is designed to capture, at high speed, images of a given event for subsequent viewing as a video sequence at a lower frame rate, it constitutes a video camera recorder. Therefore, classification as a digital camera of CN code 8525 80 30 is excluded.***
>
> ***By virtue of GIR 1 and 6, the product is to be classified under CN code 8525 80 91 as a video camera recorder only able to record sound and images taken by the television camera (see also the CN Explanatory Notes to subheading 8525 80 99)".***

22. It concluded that a high speed camera was a video recorder because it was designed to capture at high speed images of a given event for subsequent viewing as a video sequence at a lower frame rate.

23. As the FTT pointed out the classification statement is not European Union legislation and differs from a CN Explanatory Note and was not binding but was something to which the FTT should give careful consideration.

24. The FTT then went on to consider the evidence and they summarised those in paragraphs 43- 56.

25. It then went on in paragraphs 57–62 to identify the features and characteristics of a video camera recorder.

26. I need not set out the details as the factual findings are not challenged.

27. The FTT then went on to record the competing submissions and then came to a decision and reasons for the decision in paragraphs 77-99.

28. The key paragraphs of the decision are paragraphs 83-92 as follows:-

> ***"83. Miss Sloane offered the view that the essential difference between a digital camera and a video camera recorder lies in their respective functions: the purpose of a digital camera is to capture images for viewing as still photographic images, whilst the purpose of a video camera recorder is to capture images for viewing as a video sequence – as a "movie". The still images captured and stored by the digital camera may be viewed in rapid succession (where they have been captured in rapid succession), but they will not give a true or high quality video sequence; conversely, a still frame or image may be isolated from a video sequence captured by a video camera recorder, but that will not be a true or high quality still image. In other words, although there may be some apparent overlap in functions, what a digital camera does best (and uniquely does it to the best standard) is capture and record in digital format still photographic images and what a video***

***camera recorder does best (and uniquely does it to the best standard) is capture moving images for viewing as a video sequence. We agree that this provides a reasonable and effective definition of each type of camera: it is based on the objective characteristics and properties of the different cameras as ascertained from their respective uses; it is also consistent with the terms of the CNENs relative to each type of camera."***

***84. We now need to turn to the question of whether the Appellant's Fastcam cameras best answer to such definition of a digital camera or to such definition of a video camera recorder.***

***85. The Commissioners' case, as advanced by Mr Macnab, was straightforward: the Fastcam cameras take photographic images of events in motion at very high speeds to capture that motion for subsequent analysis, and those images can be viewed in slower motion for the purposes of that analysis – a moving image is captured for viewing as a video sequence. The cameras are therefore more correctly described as video camera recorders than as digital cameras.***

***86. On the basis of the evidence before us, including the demonstration we saw of the Fastcam camera in action, we do not agree. Whilst it is the case that the special properties of the Fastcam camera (in particular those properties which enable it to capture thousands of images per second at a high resolution and to store those images on a computer using the proprietary software which is part of the camera "package") enable it to photograph events which occur at the highest speeds, it does so in order to obtain still images of the highest possible quality of particular points in time in the course of the event in question: it does not do so in order to obtain a record of the event as a video sequence or moving image.***

***87. Mr Brown made this critical distinction clear in the course of his evidence: in his witness statement he described a pioneering experiment in the field of speed photography where the photographer took rapid photographs of a horse trotting to capture the one photograph which proved that a horse has, at one moment in its trotting movement, all its hooves off the ground – what was photographed by the series of images was the event of the horse trotting, but this was to obtain a single image of a particular point in time in the course of that event, not to obtain a record of the horse trotting.***

***88. If we look at the physical properties and characteristics of the Fastcam cameras we see that they are consistent with***

*this function – recording and storing the highest quality still images of a particular point in time. Thus:*

*(1) The shutter incorporated into the sensor is specifically designed to record a high quality and blur-free image by capturing all the pixel values comprising the image at the same moment; it is also designed to set aside the image (once captured) at the highest speeds possible to enable the next such image to be captured;*

*(2) Although the number of pixels in an image is reduced when the very highest frames per second shots are taken, the camera retains high resolution capability in order to produce the highest quality images;*

*(3) The electronic "trigger" facility in the camera enables the camera to capture a single image at a pre-determined point in time, or a series of images, each at a pre-determined time;*

*(4) Each image recorded is stored on a computer (using the software supplied with the camera) as a separate image and is therefore capable of being identified, edited and viewed individually and given its own caption or other unique data by way of identification;*

*(5) Images recorded by the camera are saved in one of a number of digital bitmap formats designed for storing and retrieving still images;*

*(6) The camera has no viewfinder or zoom capability – it is statically directed to capture specific images at specific times in the course of the event to be photographed; and*

*(7) Although a sequence of recorded images can be viewed in quick succession (subject to computer capability and capacity), the resulting "moving image" is of a poor standard since the images are uncompressed.*

*89. Similarly, if we turn to the uses made of the Fastcam cameras, it is clear that in the industrial and engineering processes, and in the scientific and academic research in which they are used, the requirement is to have a single image, or a series of individual images, or synchronised images from different angles, each of the highest quality and clarity to enable a particular moment or sequence of moments in the course of a process or event to be observed and analysis and measurement made. (Mr Macnab criticised the Appellant's case in regard to the uses and application of the cameras, in particular on the grounds that no evidence was given by any user-customers. The evidence we had was that*

***given by Mr Hilton and in various published scientific papers where experiments had been conducted using the cameras in the course of those experiments. It was clear to us that Mr Hilton had a comprehensive knowledge of the Appellant's customers and of the uses to which they put the cameras they purchased: that is exactly as one would expect where Mr Hilton and his colleagues are marketing a highly specialised and technologically sophisticated and expensive product to a small and specialist market where the Appellant relies on customer experience and feedback to develop its products. The Appellant's evidence on this matter was adequate to enable us to have a clear understanding of the uses to which the cameras are put.) A user may see the separate images played in rapid succession, but that is likely to be for the purpose, as in the demonstration to us, of rapidly identifying and isolating, for detailed examination, the smaller number of individual images which record the exact moment or series of moments in which the uses is particularly interested for the purposes of his analysis and research.***

***90. Therefore, in both its properties and its use the Fastcam cameras accord with the definition of a "Digital camera", that is, a camera which captures and records in digital format still photographic images.***

***91. Our view is reinforced if we enquire whether the Fastcam cameras have the characteristics of a video camera recorder: they clearly do not. A video camera recorder has special properties which are designed to give the best quality moving images when recorded images are played back as a video sequence. These are set out in paragraphs 60 to 62 above. In summary, the rolling shutter incorporated into the sensor of a video camera recorder is designed to "smooth" the sequence of images recorded by the video camera recorder when they are played back – quality of image is thereby compromised in order to improve the video sequence experience for the viewer; likewise, the compression of images and their storage in the special video MPEG format is again designed to give the best "movie" playback, albeit at the cost of quality of image. Further, a video camera recorder is designed to record lengthy continuous sequences, consistent with its function of recording for playback the entirety of events as they take place.***

***92. Mr Macnab argued that the global shutters and other specialist technology found in the Fastcam cameras which produce the high quality images should be seen as no more than differences of degree, and not as defining characteristics of the cameras. We do not agree. Such items are the essence of the cameras: they are the means by which the cameras***

***deliver what their users require, namely still and individual images, usually recorded in rapid succession, of the highest resolution and quality. It cannot be said that a global shutter as used in the Fastcam cameras, with its particular properties, is simply different by degree from a rolling shutter used in a video camera recorder – they are different in essential character in that they function quite distinctly and differently and they do so to achieve the different purposes for which they are respectively designed.***

***93. Miss Sloane had a secondary submission to make to us: if the Fastcam cameras can be regarded as having video camera recorder properties, so that they fall in the video camera recorder CN classification as well as the digital camera CN classification, then we should apply the "tie-breaker" of Note 3 of Section XVI of the CN, and look to the principal function, which in her submission is as a digital camera. We do not need to do so. In our judgment the Appellant's cameras are properly, and only, classified as digital cameras. However, should we be held to be wrong in this conclusion, we would agree that the application of the "tie-breaker" in Note 3 would result in the conclusion for which Miss Sloane argues.***

***94. We need to refer to the classification statement in Annex XII to the summary report of the Customs Code Committee headed: "Statement on the classification of "High Speed Camera". This was issued following the October 2009 meeting of the Customs Code Committee (see paragraphs 30 to 33 above). As we have mentioned, it is not binding on us as it is not a statement of law, but we should have regard to it since it is an indication of the law which the Commission might eventually promulgate.***

***95. It is clear from the summary report of the October 2009 meeting of the Customs Code Committee that, to the extent that the Committee was dealing with the Appellant's Fastcam cameras, it was doing so under at least one critical misapprehension. That report states: "The product is capable of capturing and storing a sequence of images which, after further processing, can be viewed either as individual images (JPEG) or as a video sequence (MPEG)". The images captured and stored by the Fastcam cameras are not stored in MPEG format and cannot be viewed as a video sequence in that format. As we have made clear, we regard that as one of the key properties which distinguishes the Fastcam cameras as a digital camera and not as a video camera recorder. This misapprehension implicitly underlies the Statement itself, which says:***

> ***"Given that the product is designed to capture, at high speed, images of a given event for subsequent viewing as a video sequence at a lower frame rate, it constitutes a video camera recorder. Therefore, classification as a digital camera of CN code 8525 80 30 is excluded."***
>
> ***In our finding the Fastcam cameras are not designed to capture images of a given event for subsequent viewing as a video sequence. They are designed to capture individual still images of points in time in the course of a given event for subsequent viewing as still images – the moment the hammer strikes the nail in the rather prosaic demonstration we saw, or the different angles of the nail entering the wood at different moments – not to provide a viewing of the "movie" of the event as it occurs.***
>
> ***96. Accordingly, the Statement, even if we were required to apply it as a matter of law, would not require us to reach a different decision.***
>
> ***97. Therefore it is our decision that the Appellant's Fastcam cameras are to be classified under the subheading: 8525 80 30, "Digital cameras". In relation to the classification which obtained before 1 January 2007 they are to be classified under the subheading: 8525 40 11 "Still image video cameras; digital cameras – digital cameras".***

29. In my view the FTT's decision as set out in those paragraphs is a factual decision based on an analysis of the relevant characteristics and purposes of video camera recorders as opposed to digital cameras. In my view, the challenge to the decision by HMRC is in reality a disappointment as to the factual findings and as I have said earlier in the judgment, disguised as a question of a law. Given that, it is not suggested that the FTT's decision is so unreasonable it could not be sustained.

30. In my view, the reasoning and the conclusion is one which I would concur in. It seems to me that the position is more complicated in 2012 then it might have been when the earlier definitions of digital cameras and video camera recorders in the nineties where considered.

31. Both digital cameras and video camera recorders operate under the same basic principle namely that a camera and a video camera recorder both take a series of still pictures. In the case of the high speed camera, the purpose of the series of still pictures is to view the still pictures in a sequence for the purposes of detailed examination of what happened, for example, when viewing a crash sequence frame by frame. A video camera recorder also takes series of still photographs but then plays them back at a speed that is designed to give the impression that a continuous picture is created when it is not. There is nothing new in that principle. Photron produced a flip card which shows something moving by flicking an object on a page slightly moved forward, so that itself is very similar to things that (some) children at school used to do on their notebooks i.e. draw a little beetle on the side of the notebook and move it along the pages and flick the pages and the beetle appears to move. Another example is in Wild West films where because of the speed of the replaying of the camera, wheels are sometimes seen going backwards because the wheels have their own motion. However, the purpose of video camera recorders is in effect to deceive the eyes that the series of still pictures is actually a moving picture. Video camera recorders regularly have a still facility but that is ancillary to their primary use. Video camera recorders also have extensive memories, that is, because the amount required to store what becomes a moving picture is larger.

32. When one looks at digital cameras, they nowadays regularly have a moving camera facility. It is well demonstrated by mobile phones which have snapshot cameras, video cameras incorporated in them. The high speed camera takes a succession of stills. It does it at a very high rate up to 1000

pictures a second. It is theoretically possible to watch those pictures in a video sequence but no-one can realistically believe that the purpose of the pictures is to watch it in such a short time frame. The purpose is to enable a large number of pictures for a very short time sequence to be viewed ***individually*** to see how things change in that very narrow time frame. Similarly, the high speed camera whilst it has a memory to store the pictures, it is a very small size because it is not intended to record lengthy video moving pictures.

33. The appeal by HMRC is essentially a re-run of the submissions summarised by the FTT in paragraph 85 of their decision. Mr Macnab argues the purpose is more described as taking pictures to be viewed as a video sequence.

34. In coming to their conclusion the FTT departed from the classification statement issued in October 2009 referred to above. The FTT dealt with the Classification Statement in paragraphs 95 and 96 set out above. I can see no grounds for criticism of that decision. The Classification Statement is not a statement that is binding as to law but the FTT clearly had regard to it but did not accept it.

35. I equally accept as per paragraph 96 that if the FTT and I are both wrong on viewing these exercises as a matter of fact then the question of law as so framed must be considered. In my view the FTT's decision, if this is a question of law, is impeccable. They have considered all relevant arguments and have come to what in my view is a correct decision on the question of the status of the high speed camera. HMRC's primary submission is that the object of both types of cameras as a digital and video camera recorders is simply to record images. Thus it is submitted that recording a series of images

to be seen in a moving characteristic (frame by frame) is applicable to video cam-recorders and that exercise is the same as the high speed cameras. The falsity of this argument is that it would be equally applicable in a modern digital camera if someone took instantly a whole series of pictures to view a sequence. It would also be applicable if the digital camera was used in its video camera mode. However, those operations in the case of digital camera are ancillary to the main purpose which is to take a single still photograph.

36. The converse is applicable to video camera recorders. The primary purpose is to take a number of still photographs (because that is how all cameras operate) but to present them in a sequence at a speed which gives the impression that there is a continuous moving image when there is not. However, the primary purpose is to present what is taken as a series of still photographs ***as a moving image.*** It is not sufficient in my judgment to assert that the purpose of all these cameras is simply to record images (see HMRC, see skeleton on appeal, paragraph 40). If that is the sole purpose, all three types of cameras under debate would have to be considered as being identical. That description applies to digital cameras, high speed cameras, and video camera recorders. It follows that there must be something more for there to be a meaningful difference in classification between digital cameras and moving video cameras. That is in my view, answered by the simple question ***"what is the purpose of the relevant device".***

37. When that question is posed, the answer is clear as regard to high speed cameras namely that the purpose is to view a sequence of still pictures. As I have said, one simply would not view the pictures taken at the speed in a

moving sequence in a high speed camera because it would disappear within a blink of an eye and it is not susceptible to any kind of meaningful analysis. This in my view is the flaw in HMRC's arguments as deployed both before the FTT and me.

38. For all of those reasons, whether the matter was a question of fact or law, there is in my view no basis for interfering with the decision of the FTT.

ALTERNATIVE GROUNDS

39. Reference was made in the decision of the FTT to what was called ***"the tie breaker".*** That is a provision that in the CN classification, note 3 of section of XVI should be applied where there is more than one function available to a camera. In that case the principal function should be considered the relevant one. The FTT dealt with this in paragraph 93 above.

40. In my view, their decision in this regard is correct also. If the analysis requires the FTT and me to look at digital cameras, video camera recorders and high speed cameras on the basis that they have more than one use, in my view the principal use of a high speed camera is to take a series of still pictures. On that analysis its principal function is that of a digital camera.

41. I would therefore also, if necessary dismiss HMRC's appeal on that basis also.

42. In conclusion therefore I dismiss the appeal on grounds on one and two but for the reasons set out above, allow the appeal in respect of ground 3, and set aside the FTT's order directing repayment.

30 July 2012