Appeal number: FTC/67/2012

CUSTOMS DUTIES — tariff classification — replacement mounting for sat-nav device — whether BTI correct — whether mounting proper to heading 3926 (articles of plastics), 8302 (miscellaneous articles of base metal), 8529 (parts for certain devices), 8708 (parts and accessories of motor vehicles) — classification to 8302 correct — appeal determined accordingly

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and –

TOMTOM INTERNATIONAL BV **Respondent**

Tribunal: Judge Colin Bishopp
Judge Nicholas Aleksander

Sitting in public in London on 12 June 2013

Ms Sadiya Choudhury, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the appellants

Mr Stephen Cock, customs consultant, for the Respondent

DECISION

Introduction

1. The issue in this appeal is the correct classification for customs duty purposes of a mounting bracket designed to be used in conjunction with a satellite navigation, or global positioning system, device used in cars and other road vehicles. The item replaces the standard mounting supplied with the device (commonly known as a "sat-nav" or "GPS") when that mounting is for some reason unsuitable for the vehicle. The item with which we are concerned consists of a flat rectangular plate, a suction cup operated by a lever, and a shaft connecting the two. The plate is designed to accommodate a sat-nav device manufactured by the respondent to this appeal, TomTom International BV ("TomTom"). The suction cup may be attached to the vehicle's windscreen or to a circular plate, supplied with the bracket, which has a self-adhesive pad by means of which it can be secured to the top of the vehicle's dashboard, or another suitable surface. The assembly may be removed, if the suction is released by moving the lever, so that the mounting and the sat-nav device can be used in another vehicle, or simply concealed in order not to attract thieves. The connecting shaft is flexible, enabling the plate, and with it the sat-nav device, to be angled in order that the latter can be seen safely and conveniently by the user.

2. The classification for customs duty purposes of goods imported into the member States of the European Union is prescribed by Council Regulation 2658/87/EEC and the Combined Nomenclature ("CN"), the annually revised Annex 1 to the Regulation. There are no revisions material to this case. The CN is used for various purposes, but its principal function is the determination of the rate of duty payable on goods when they are imported, and that is the only function we need to consider. There are various rules, to which we shall come, which govern the interpretation and application of the CN. We begin, however, with a description of the chronology and of the various classifications which have been proposed in this case.

3. We add for the benefit of those coming afresh to it that the CN is divided into Sections, each consisting of one or more Chapters. Each Chapter contains several headings, divided into sub-headings, which may be (and usually are) further sub-divided. Each of the successive divisions, starting with the Chapters, results in, and is identified by, a two-digit code, and those codes are concatenated. Of the complete code, the first eight digits provide the tariff classification. A further two (or occasionally four) digits may be added to form another code, known as the Taric, which is used for other purposes: see arts 3 and 5 of Regulation 2658/87/EEC. Although we shall refer to longer codes, only the first six digits are of significance for present purposes—that is, in order to determine the appeal we need not descend further than the sub-headings, and for the most part we can confine ourselves to the four-digit heading codes.

4. TomTom's original position was that the mounting was properly classified to code 8529.9097.90. On 3 September 2009 TomTom's UK agent, Mr Stephen Cock, who also represented TomTom before us, wrote to the appellants, H M

Revenue and Customs ("HMRC"), requesting a binding tariff information, or BTI, in that code. A BTI, as its name implies, constitutes a ruling on which an importer may rely about the correct classification of the item described in it: see Council Regulation 2913/92/EEC, arts 11 and 12.

5. Instead, HMRC issued a BTI in sub-heading 3926.90. TomTom was dissatisfied with the BTI and Mr Cock engaged in correspondence with HMRC, in the process stating that TomTom had changed its position, and now argued for classification in sub-heading 8708.99. HMRC were not to be persuaded, however, that the BTI should be varied and reissued, and TomTom appealed to the First-tier Tribunal ("the F-tT") (Judge Sandra Radford and Mr Ian Abrams), who accepted TomTom's alternative case and determined that the kit should be classified within heading 8708. They specified sub-heading 8708.90 rather than the suggested 8708.99, but this is an obvious mistake as there is no sub-heading 8708.90, and we take it that 8708.99 was intended. HMRC now appeal, with permission of this tribunal, against the F-tT's conclusion.

6. It is agreed between the parties that the mounting consists of both plastics and metal components and that every part of it is essential for its effective operation, save for a corrugated, cylindrical sheath, made of plastics, which has the purely cosmetic function of concealing the metal shaft. There is no finding by the F-tT (and we understand there was no evidence before them) of the proportions of metal and plastics, by weight, volume or value, used in the manufacture of the mounting, or of the exact nature of the metals and plastics so used. They did find, at [82], that the most important part of the mounting was "the metal support which took the weight of the GPS device", the support being (as is made clear elsewhere in their decision) the flexible metal shaft. In the same paragraph they went on to add that "the largely plastic base incorporated a metal spring and metal hinge rod which are essential in allowing the suction cup to engage and disengage."

7. It is common ground that the correct classification of a sat-nav device is to heading 8526 which covers "Radar apparatus, radio navigational aid apparatus and radio remote control apparatus", and that the standard mounting, when packaged and supplied with a sat-nav device as a single unit, may be included in that heading. However, it is also common ground that a replacement mounting such as this, produced and supplied separately as a substitute for the original mounting, cannot be so classified, and that there is no heading or sub-heading which could be said to be designed specifically to include such an item.

8. The heading suggested by TomTom's application for a BTI, 8529, covers "Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528", and if the mounting were properly to be regarded as a "part" this heading would appear to be suitable for an article designed for use with a device, such as a sat-nav, classified to heading 8526. However, despite his having originally sought a BTI in heading 8529 Mr Cock accepted before us that although the mounting might possibly be considered an accessory to a sat-nav device it could not properly be described as a "part" of such a device, and he did not now argue for that heading; rather, he said the F-tT were right to conclude that heading 8708 was

correct. We shall come to heading 8708 shortly; we need first to expand on the abandonment of heading 8529 as a possibility.

9. That the mounting cannot be regarded as a "part" of a sat-nav device follows from the judgment of what is now the Court of Justice of the European Union ("CJEU") in *Turbon International GmbH v Oberfinanzdirektion Koblenz* (Case C-276/00) [2002] ECR I-1406. The products in issue in that case were ink cartridges designed for ink-jet printers, and the question was whether they fell within heading 8473 of the CN, which includes "Parts and accessories, (other than covers, carrying cases and the like) suitable for use solely or principally with machines of heading Nos 8469 to 8472". Printers are classified within tariff code 8471.6040. At para 30 the Court said:

> "… it should be observed that the word 'part', within the meaning of CN heading 8473, implies a 'whole' for the operation of which the part is essential (see *Peacock* [(Case C-339/98 [2000] ECR I-8947], paragraph 21) and this is not so in the case of the cartridge at issue in the main proceedings. While it is true that, without an ink-cartridge, a printer is not able to carry out its intended functions, the fact remains that the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge. The inability of the printer, in the absence of an ink-cartridge, to transcribe on to paper the work produced with the aid of a computer is caused by lack of ink rather than a malfunctioning of the printer."

10. The mounting, as it seems to us, makes the use of the sat-nav device more convenient or safer, but it is not necessary for the functioning of the device itself. Accordingly Mr Cock was right to accept that it cannot represent a "part" of a sat-nav device in the sense that the word is used in the tariff, as interpreted by the Court, and it necessarily follows that heading 8529, which is confined to parts, is not available.

11. Chapter 39 relates to "Plastics and articles thereof" and the heading of that Chapter to which the mounting was classified by the disputed BTI, 3926, covers "other articles of plastics and articles of other materials of headings 3901 to 3914". Those headings describe various types of plastics materials, and it is undisputed that the plastics components of the mounting fall within one or other of them. The full code set out in the BTI is 3926.9097.90 which is arrived at after progressively eliminating various items of specific application before arriving at a residual "other" classification of plastics articles. We observe in passing that HMRC did not rely on code 3926.30.00, which includes "Fittings for furniture, coachwork or the like". It is evident from the F-tT's decision that it was largely because of their finding that the most important part of the mounting was the flexible metal shaft that they rejected HMRC's classification of it to a heading appropriate to plastics articles.

12. Recognising that the mounting does not consist entirely of plastics materials Ms Sadiya Choudhury of counsel, who represented HMRC before us, suggested that classification in Chapter 83 of the CN, which relates to "Miscellaneous articles of base metal", might instead be appropriate. The Section Notes to Section XV of the CN, a section which includes Chapter 83, make it clear that "base metal" includes all metals other than precious metals, and alloys of them: see

particularly notes 3, 5 and 6. Although, as we have said, the F-tT made no finding about the nature of the metal components of the kit, it was agreed before us that they were of base metals or of alloys of base metals, and we do not need to delve further into these provisions. If this Chapter is adopted, the most appropriate heading, Ms Choudhury suggested, is 8302 which includes "Base metal mountings, fittings and similar articles suitable for … coachwork, … brackets and similar fixtures …". More specifically, code 8302.30.00 includes "Other mountings, fittings and similar articles suitable for motor vehicles."

13. The heading now advanced by TomTom, and which the F-tT accepted to be correct, is 8708. It covers "Parts and accessories of the motor vehicles of headings 8701 to 8705"; those headings include motor vehicles of various types, among them the cars, vans and lorries in which sat-nav devices are most commonly used. Sub-heading 8708.99 is reached after various other articles designed for specific purposes are identified and represents, again, a residual "other" classification.

14. The manner in which the CN is to be interpreted and applied, particularly in cases of doubt, is determined by the General Interpretative Rules, or GIRs, which also find their authority in Regulation 2658/87/EEC. There are six rules, not all of which are relevant in any particular case, and we shall need to refer in this decision only to rules 1, 2, 3 and 6. Rule 1 dictates the approach to be adopted and is of application in every case. It provides that:

> "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."

15. Rule 6 extends that approach to sub-heading level:

> "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 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."

16. Rule 3 is as follows:

> "When … goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
>
> (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. 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;
>
> (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;

(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."

17. The F-tT made various references to rules 1 and 3, but in reaching the conclusion that heading 8708 was appropriate they expressly relied on the Harmonised System Explanatory Note ("HSEN") to heading 8708. As their title indicates, the HSENs are notes to the Harmonised System, a classification system devised by what is now the World Customs Organisation, which has been adopted throughout most of the world and on which the CN is based. The HSENs are a useful aid to interpretation, but are not binding: see, among many other examples of statements to this effect, the judgment of the CJEU in *DFDS* (Case C-396/02 [2004] ECR I-8439 at para 28. The relevant HSEN reads:

"This heading covers parts and accessories of the motor vehicles of heading 8701 to 8705 provided the parts and accessories fulfil both the following conditions:

(i) they must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles; and

(ii) they must not be excluded by the provisions of the Notes to Section XVII …"

18. The Note goes on to provide a long list of examples of the parts and accessories the heading includes. Although it is clear that the list is not intended to be exhaustive, it is conspicuous that all of the items listed are necessary for the functioning of a vehicle or, as in the case of seat belts and airbags, its safe use. In addition, they are all items which ordinarily remain fixed in the vehicle; in the case of seat belts the relevant HSEN includes only those "designed to be permanently fixed into motor vehicles for the protection of persons". Sat-nav devices do not appear in the list.

19. The Notes to Section XVII (which includes Chapter 87 and therefore heading 8708), so far as relevant to this case, provide that

"2. The expressions 'parts' and 'parts and accessories' do not apply to the following articles, whether or not they are identifiable as for the goods of this section: …

(b) parts of general use, as defined in note 2 to Section XV, of base metal (Section XV), or similar goods of plastics (Chapter 39).…"

20. The only passage of relevance in the definition of "parts of general use" as it is set out in Note 2 to Section XV is:

"Throughout the nomenclature, the expression 'parts of general use' means: …

(c) articles of headings … 8302 …."

21. The F-tT's conclusions, and the reasons why they arrived at them, are set out at [90] and [91] of their decision:

> "[90] … We found that the main function of a vehicle was to take its driver from place to place. We found that the Mount was part and parcel of the GPS device which performed a service relative to the vehicle's main function by issuing instructions as to the correct route to take to get from place to place and adapted the vehicle for the particular operation of driving somewhere specific. Without the Mount the driver could not see the GPS and so we regarded it as part and parcel of the GPS.
>
> [91] Overall we found that in accordance with the HSEN to CN 87.08 the Mount 'was identifiable as being suitable for use solely or principally' with the vehicles within heading 87.01 to 87.05."

22. Both parties accept that, as the word "part" has a particular meaning when it is employed in the CN, the use in [90] of the phrase "part and parcel" was unfortunate, but that it did not carry with it the implication that the F-tT had found that the mounting was a part of the sat-nav device with which it was to be used. We agree; although, as we shall explain, we do not accept the F-tT's reasons or their conclusions, we do not see within these paragraphs any finding that the mounting is a "part" of the sat-nav device for which it is designed. Moreover, at [84], the F-tT said that

> "… the Mount was an accessory for a motor vehicle because that was the only vehicle in which it could be used.…"

HMRC's submissions

23. For HMRC, Ms Choudhury argued that rule 1, alone, made it clear that the mounting could not fall within heading 8708, and that the F-tT's conclusion was not correct. The mounting may be, and probably is, properly described as an accessory to a sat-nav device, and it is the absence of any clear classification for such an accessory which has led to the present dispute.

24. Although the correct classification of a sat-nav device is in heading 8526, and not within the heading suitable for accessories for motor vehicles, 8708, such a device might nevertheless be regarded as an accessory to a motor vehicle. However, even if that were the case, it could not lead to the conclusion that the mounting was an accessory to a motor vehicle. It had no effect on the operation of the vehicle; its purpose was merely to make it possible for the driver to use the sat-nav device safely. Thus it was no more than an accessory to an accessory, and that was not enough to bring it (as rule 1 required) within the terms of the heading.

25. In addition, she said, the F-tT's findings of fact made it clear that the mounting did not satisfy both limbs of the test which, by application of the relevant HSEN, govern classification in heading 8708 (see para 17 above). HMRC accept that the mounting is "suitable for use solely or principally with the above-mentioned vehicles" (*ie* those listed in headings 8701 to 8705), and that limb (i) of the test is met; but argue that, had the F-tT considered limb (ii) properly, it would have concluded that the mounting was a "part of general use", that is one falling within either Chapter 39 (consistently with the BTI) or heading 8302 (HMRC's suggested alternative), and correspondingly excluded from heading 8708. The F-tT did not consider this part of the test at all. Had it done so, its own conclusion that it was the flexible metal shaft which was the most

important part of the mounting would have led it to the right answer by application of rule 3 of the GIRs.

26. The F-tT purported to apply the rule at [84], which in full reads as follows:

> "We found in accordance with GIR 3(a) the most specific description was that the Mount was an accessory to a motor vehicle because that was the only vehicle in which it could be used. We found that in accordance with GIR 3(b) it was the metal which gave it its essential characteristic because without the metal it could not hold the GPS device. We therefore disagreed with HMRC's contention that it was its plastic components which gave it its essential characteristics."

27. What the F-tT failed to do, said Ms Choudhury, was carry that analysis to a conclusion. They rejected the argument that the mounting was a plastics article of general use on the ground that it was the metal component which gave it its essential character, and to that extent they applied rule 3(b) correctly; but they did not go on to consider what was logically the next question, namely whether their own conclusion of fact implied that the mounting was a base metal article of general use, falling within heading 8302. Had they done so, they would have reached the conclusion that, although there is no entirely satisfactory classification available, heading 8302 is appropriate while 8708 is not.

28. As a further alternative she suggested that if the tribunal had not been persuaded to the view that heading 8302 was right, they might instead have decided upon heading 7326, which includes "Other articles of iron or steel".

TomTom's submissions

29. Mr Cock argued that both the metal and the plastics parts of the mounting are essential to its function. It is true, as the F-tT found, that without the support of the metal shaft the sat-nav device could not be held in a suitable position, but the same was true of the plastics plate which accommodated the sat-nav device itself, and of the plastics suction cup without which the mounting could not be attached to a windscreen. It followed, he said, that the classification could not be determined by rule 3(b), and indeed rule 3 as a whole was of no assistance in this case.

30. Contrary to HMRC's case, the F-tT did not find, even inferentially, that a sat-nav device was an accessory to a motor vehicle, and they could not do so consistently with the CN. Accessories to motor vehicles fall within heading 8708 but, as HMRC agree, a sat-nav device is proper to heading 8526, and in applying the CN one cannot treat an item proper to one heading as if it could also be included in another. Accordingly the argument that the mounting was an accessory to an accessory was wrong.

31. There is also no finding by the F-tT that the mounting is an accessory to a sat-nav device; and such a finding, if it had been made, would have been irrelevant to application of the tariff as it does not contain a heading for accessories to such devices. What the mounting does is hold a sat-nav device in use in a motor vehicle in a position in which the driver may safely look at it while the vehicle is in motion; that was clearly identified by the F-tT, at [4], as its function. The F-tT went on to find, at [84], that the mounting is an accessory to a

motor vehicle because that was the only place in which it could be used, and they were right to do so. The mounting is designed to be used in a motor vehicle, and only in a motor vehicle.

32. The heading which HMRC now favour, 8302, and specifically sub-heading 8302.30, includes "Other mountings, fittings and similar articles suitable for motor vehicles". However, perusal of the examples provided in the HSEN to the heading of articles which fall within it show that they are fixed to the vehicle, and not removable as the mounting is. In addition, the HSENs, at (C), indicate that the sub-heading does not include "parts or accessories of Section XVII"—within which heading 8708 is to be found.

33. None of the headings proposed by HMRC can be right, said Mr Cock. Heading 3926 relates to articles of plastics, and 8302 to articles of base metal; the mounting fits neither description, since it is composed of, and necessarily composed of, both plastics and metals. Thus rule 3(b) is not engaged, since neither the metal nor the plastics components give the mounting its essential character. For similar reasons heading 7326, too, is inappropriate. Of the suggested possibilities, only 8708 is left; and classification to that heading is appropriate and correct, in the light of what the CJEU said in its judgment in *BVBA Van Landeghem v Belgische Staat* (Case C-486/06) [2007] ECR I-10663:

> "23 First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general 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 notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-0000, paragraph 27).
>
> 24 Second, 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 C-400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-0000, paragraph 18)."

34. The intended use of the mounting was as the F-tT had determined, a means of enabling the driver of a motor vehicle to see the sat-nav device it was designed to hold. It is specifically an aid to the driver of a motor vehicle and the conclusion that it is correspondingly an accessory to a motor vehicle is right.

Discussion and conclusions

35. We begin by eliminating heading 7326 from further consideration. It is appropriate to "articles of iron or steel"; but there was no evidence before the F-tT, nor is there any before us, that the metal components of the mounting consist of or include either iron or steel. We can also eliminate heading 3926, the heading adopted for the disputed BTI, in view of the F-tT's finding that it is the base metal shaft which "gave it its essential characteristic" (we assume this phrase is intended to mean the same as the "essential character" used in rule 3(b)). Although we shall need to return to this point in order to deal with one of Mr Cock's arguments, it is

clear that if the choice were between only 3926 and 8302 the F-tT's finding would necessarily dictate the latter in preference to the former. We are left, therefore, with headings 8302, favoured by HMRC, and 8708, favoured by TomTom.

36. We do not think that HMRC's argument based on the HSEN to heading 8708 and Note 2 to Section XV takes us anywhere. It begs the question because it amounts, in effect, to the contention that the mounting must be proper to heading 8302 on the grounds that it is excluded from heading 8708 by reason of its being a "part of general use" falling within heading 8302. For much the same reason, we do not find that HSEN (C) to heading 8302 (which excludes from that heading articles within Section XVII), on which Mr Cock relied, steers us to a conclusion.

37. Mr Cock also argued, as we have said, that the examples of articles within sub-heading 8302.30 given by the HSENs were all of items which were normally fixed to the vehicle. That is true, but it is at least as true of the articles listed in the HSENs to heading 8708, and we find little in this argument which helps TomTom. The argument might support the conclusion that neither classification is appropriate, but it is necessary to bear in mind that these are examples provided by a non-binding HSEN, and there is nothing in the terms of either heading—and it is to the terms of the headings which we are required by rule 1 to look—which excludes removable items. In our view there is nothing in this point which steers us in one direction rather than the other.

38. We also find little to help TomTom in *BVBA Van Landeghem*. The F-tT said, at [4], that the mounting "allows [the sat-nav] to be viewed safely by the driver of the vehicle while the vehicle is in motion". No-one would quarrel with that description; but it does not follow from it that the "objective characteristics" or "intended use" of the mounting, the features identified by the Court in that case, lead to the conclusion that the mounting is an accessory to the vehicle. It does not enhance the functioning of the vehicle; rather, it enhances the utility of the sat-nav. It does so by holding the sat-nav securely; but the vehicle is unchanged. The sat-nav, by contrast, is not; it is held securely whereas without the mounting the driver, or more safely a passenger, would have to hold it or some means of wedging it would have to be found. Using ordinary language, the better conclusion in our view is that the mounting is an accessory to a sat-nav device but, as we have said, no such classification is to be found in the CN and a place must be found by a different route.

39. Ms Choudhury accepted, even if obliquely, that neither heading 3926 nor heading 8302 is entirely satisfactory, since they do not cater for an article which consists of, and relies for its functioning on, both plastics and base metal components. It is, perhaps, surprising that the CN does not include a heading for articles of that kind, nowadays commonplace, which cannot be readily classified elsewhere, but neither party suggested any other possibility and we know of none ourselves. Nevertheless, the GIRs do recognise the need to find a way of classifying goods of mixed components. The last sentence of rule 2(b) provides that

> "The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3."

40. Thus we agree with Ms Choudhury that rule 3 is engaged.

41. Rule 3(a) requires one to favour the "most specific description" over more general descriptions. Heading 8302, in full, is

> "Base metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base metal hat-racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal."

42. That description, in our view, is, and is intended to be, of a very general nature. By contrast, the description used in heading 8708, "Parts and accessories of the motor vehicles of headings 8701 to 8705" is not only concise but also more specific since it covers parts and accessories of only a limited class of goods. However, when one comes to the sub-headings, as rule 6 requires, the reverse is the case: sub-heading 8302.30 includes "Other mountings, fittings and similar articles suitable for motor vehicles" whereas sub-heading 8708.99 is merely "Other". Plainly the article with which we are concerned fits the description of sub-heading 8302.30, provided it is of base metal, since inclusion within Chapter 83 is available only for base metal articles. It also fits within sub-heading 8708.99, provided it is properly regarded as an accessory to a motor vehicle, but only by virtue of the fact that "Other" captures any item which has not found its place earlier in the heading.

43. The conclusion we have reached in respect of the application of rule 3(a) is that, assuming classification within either heading 8302 or heading 8708 is otherwise possible, the F-tT erred in preferring the latter as it applied rule 1 without regard to rule 6, which is set out in the F-tT's decision but which does not feature in their reasoning, even though the BTI states that the classification had been arrived at by the application of rules 1 and 6. In our judgment, if there is a legitimate choice to be made between 8302.30 and 8708.99, the former provides the "most specific description" and is to be preferred. We do not find it necessary to resort to the "tie-breaker" provision in rule 3(c). The remaining question is therefore whether classification within heading 8302 is possible.

44. As we have recorded, the F-tT found that it was the metal shaft which gave the mounting its "essential character". Mr Cock did not entirely accept that conclusion, maintaining that it was inconsistent with the agreed fact, which the F-tT recorded and accepted, that every part of the mounting with the exception of the cosmetic sheath was essential to its function. But it does not seem to us that "essential to function" and "essential character" need to have the same meaning, and we do not consider that rule 3(b) proceeds upon the assumption that they do. As we have said, rule 3 is engaged when classifying goods of more than one material. It is possible, and may frequently be the case, that the "most specific description" (rule 3(a)) or the "essential character" (rule 3(b)) reflect the function of the article, but function is not part of the test in either of the sub-rules, and we see no reason why, on occasion, function and the most specific description or essential character should not diverge.

45. The F-tT's conclusion that the metal shaft gave the mounting its essential character is, in our judgment, a finding of fact with which we can interfere only if it is shown to be irrational in the sense explained by the House of Lords in

Edwards v Bairstow [1956] AC 14. Neither party suggested that the finding was of such a character; Mr Cock's complaint was much milder. It therefore follows, by application of rule 3, that classification is to be determined upon the footing that the mounting is made of base metal. Classification within sub-heading 8302.30 is, therefore, possible and in our judgment that is the correct classification.

Disposition

46. We accordingly determine the appeal by replacing the F-tT's finding in that way. We invite the parties to make written submissions on the manner in which that determination is to be given effect, if they are unable to agree on the matter.

Colin Bishopp **Nicholas Aleksander**

Upper Tribunal Judges
Release date: 11 October 2013