Neutral Citation: **[2026] UKUT 00037 (TCC)**

Case Number: UT-2024-000124

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Hearing venue: Rolls Building, London

Heard on: 21 and 22 October 2025
Judgment date: 28 January 2026

Before

MR JUSTICE CAWSON
JUDGE VINESH MANDALIA

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellant

And

ELECTRIC MOBILITY EURO LIMITED (1)
SUNRISE MEDICAL LIMITED (2)

Respondents

REPRESENTATION:

For the Appellants: Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

For the Respondent: Timothy Lyons KC and Philippe Freund, counsel, instructed by Fieldfisher LLP

DECISION

INTRODUCTION

1. His Majesty's Revenue and Customs ("HMRC") appeal against a decision of the First-tier Tribunal (Tax Chamber) ("the FtT') released on 3 July 2024 ("the Decision"). The FtT allowed the appeals by Electric Mobility Euro Limited and Sunrise Medical Limited ("EME and SM") arising from C18 Post Clearance Demand Notes ("the C18s") and customs reclaim concerning the importation of 'mobility scooters'. The issue at the heart of the appeal before the FtT was the correct classification of the mobility scooters and parts for the same, imported by the appellants under the Combined Nomenclature ("CN").

2. In summary, HMRC claimed the correct classification for customs purposes falls under heading 8703 of the CN: "*motor cars and other motor vehicles principally designed for the transport of persons"* attracting a duty of 10%. The FtT disagreed and found, as claimed by EME and SM, that the mobility scooters are classified under heading 8713 of the CN: *"carriages for disabled persons"*, and are free of duty. The FtT found therefore that the appeals succeeded and concluded that it did not need to address further arguments by EME and SM concerning the validity or otherwise of Commission Regulation (EC) No 718/2009 of 4 August 2009 ("the 2009 Regulation") concerning a three and a four wheeled vehicle with an electric motor powered by two rechargeable 12v batteries and a number of other characteristics.

3. On 29 August 2024, the FtT granted HMRC permission to appeal to the Upper Tribunal on three grounds, namely that the FtT erred: (i) in deciding not to apply the 2009 Regulation by analogy on the basis that the scooters were not "sufficiently similar"; (ii) in departing from the dicta of Lawrence Collins J (as he then was) in *Vtech Electronics (UK) Plc v HMRC* [2003] EWHC 59 (Ch) ("*Vtech Electronics*"), that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from the Court of Justice of the European Union ("the CJEU") that the Regulation is invalid; and (iii) in deciding that it was neither necessary nor possible to have regard to the 2009 Regulation because the CJEU has already spoken on the present classification question.

4. There is a cross-appeal by EME and SM set out in a Rule 24 Reply dated 28 October 2024. EME and SM claim: (i) in the event that the Upper Tribunal does not follow the FtT in considering it unnecessary to address arguments on the invalidity of the 2009 Regulation, it ought to uphold the decision of the FtT for the alternative and/or additional reason that the 2009 Regulation is invalid; (ii) the FtT erred in concluding that the distinctions relied upon by EME and SM between the mobility scooters described in the 2009 Regulation and the imported mobility scooters did not amount to "material differences"; and (iii) the FtT also erred in concluding that if regard were to be had only to the left-hand column of the 2009 Regulation, the imported scooters would have been similar to those described in it because, so it is said, the imported mobility scooters, or alternatively some of them, are not similar to those identified in the 2009 Regulation which cannot be applied by analogy.

THE DECISION OF THE FTT

5. The FtT set out the relevant legal framework and at paragraph [28] of the Decision said:

> "We make findings here about the objective characteristics, or design features, of the imported mobility scooters, so far as relevant to the primary legal issue in this appeal – whether those

mobility scooters were "for" "disabled" persons, as those concepts are interpreted in the binding legal authorities (principally, *Invamed CJEU*[1] and *Invamed CA*[2]*)*.

6. The FtT considered the oral evidence to be helpful, but said it was not, on the whole, determinative. The FtT said that was because the authorities required the decision to be based on the objective characteristics of the imported mobility scooters, and the opinions of the witnesses was not of any direct assistance in that exercise, albeit they provided some assistance regarding matters to think about. The FtT described the imported mobility scooters at paragraph [30]:

> "The imported mobility scooters came in 29 different models, 18 models of the first appellant and 11 models of the second appellant. All the models bore the core design features of a 'mobility scooter', which we would articulate as follows: battery-powered, relatively slow-moving (in practice, walking speed or thereabouts) vehicles with one seat, a low (i.e. near the ground) floor (or 'platform'), a steering device, three or four wheels, and no covering. Their dimensions were: not much wider than the person sitting on the single seat; and not much longer than required to accommodate the seat, the steering device, and the wheels. These core design features can be readily apprehended, visually, by looking at the photographs elsewhere in this decision (which are not of the imported mobility scooters themselves, but are of other 'mobility scooters', which have the same core design). There was a range of size amongst the imported mobility scooters, from the shorter and narrower (which tended to be the slower, the somewhat less comfortable, the less sturdy, and so the less appropriate for outdoor use), to the wider and longer (and somewhat faster, more comfortable, more sturdy, and so more appropriate for outdoor use); but all conformed to the core design as just set out."

7. The FtT went on, at [31], to refer to the variants within the core design amongst various models including variations to width, length, wheels, speed, additional features and ease of transportation but did not consider the variations (within the core design features) to be material to the legal issue to be decided. At paragraph [32], the FtT said:

> "The following aspects of the brochures for the models of mobility scooter in question have, in our view, some relevance to their objective characteristics:
>
> (1) brochures for the first appellant's mobility scooter models bore the logo, "Your new route to independence";
>
> (2) several of the brochures referred to the mobility scooter's connection with the customer's "independence" and/or "freedom" and/or ease of life;
>
> (3) the owner's manual for the first appellant's mobility scooter models had one of the following statements, in the section headed "Intended use of the vehicle":
>
> > "These vehicles are designed for use by adults with a disability (up to the maximum recommended weight - see Technical Specification sheet) …";
> >
> > or
> >
> > "This vehicle is designed to help any single disabled adult (up to the maximum recommended weight) who requires a scooter for mobility …"."

8. The reasons for the FtT's decision are set out at paragraphs [33] to [60] of the Decision. The FtT said, at [34]:

> "The primary question in this appeal, based on heading 8713 as interpreted in *Invamed CJEU* and *Invamed CA*, is whether the imported mobility scooters, judged by their objective characteristics or design features, are intended for use solely by persons with a non-marginal limit on their ability to walk."

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[1] *Invamed Group and Others* (C-198/15, EU:C:2016:362).
[2] *Invamed Group and Others* [2020] EWCA Civ 243.

9. In answering that question, the FtT noted that "a non-marginal limit on one's ability to walk" can cover a range of forms of disability, and it is important to keep in mind the spectrum when considering who the mobility scooters are solely designed for. The Tribunal said:

> "36. In our view, is clear from their design features that the imported mobility scooters are designed for persons with a non-marginal limit on their ability to walk (note that at this stage of the analysis we have not put the word "only" before the word "for" – we will turn to that shortly): a relatively small, relatively slow, one-person vehicle clearly enables such persons, without assistance from someone else, to get from A to B (where A and/or B may be indoor locations inaccessible to large vehicles like cars or buses) where, otherwise, due to their disability, they would simply not be able to do so, or doing so would cause them significant pain, or take them significantly longer than the time taken by those without such limitation. So, for example, many of the imported mobility scooters would (judging from their design) enable such persons, without assistance from someone else, to move around environments where the 'norm' would be to walk: indoor spaces (e.g. homes; shops; restaurants); and outdoor public spaces normally reserved to pedestrians (e.g. pavements; parks; squares).
>
> 37. Clearly, the imported mobility scooters do not enable the user to fully replace the walking function e.g. they do not go up or down stairs, or across very uneven surfaces. However, this does not detract from the fact that (judging from their design) the scooters enable those with a non-marginal limit on their ability to walk to move, or 'mobilise', independently, in ways that they would otherwise not be able to do (or, would not be able to do without excessive pain, or without taking an excessive period of time)."

10. The FtT went on to find that the mobility scooters are intended solely, or uniquely, for those with a non-marginal limit on their ability to walk, essentially because those able to walk (to include those with only a marginal limit on their walking ability) have better alternatives than, for example, being lumbered with a cumbersome vehicle, working out what to do with it if it is used to reach a bus stop or train station, or for moving long distances outdoors. The Tribunal said:

> "43. The repeated references in the marketing material to the scooters providing "independence", "freedom", and ease of life, are further evidence that, objectively, the imported mobility scooters are both for those with a non-marginal limit on their ability to walk, and exclusively for them (as this kind of "messaging" to the consumer would be, at best, confusing, and, more likely, quite off-putting, to the walking-able)."

11. The FtT referred, at [44], to the conclusions of the FtT in *Invamed Group Ltd and Others v HMRC* TC05502 following a reference to the CJEU (*Invamed Group and Others* (C-198/15, EU:C:2016:362) (*"Invamed CJEU*")), and concluded, at [45], that the imported mobility scooters fall within heading 8713 of the CN. It then went on to consider whether the 2009 Regulation affects that classification. The FtT said, at [46]:

> "Our starting point here is that the imported mobility scooters are not identical to the vehicles in the 2009 Regulation; the question is whether the classification regulation is to be applied by analogy."

12. In addressing that question, the FtT said:

> "47. We find that, if we looked only to the left hand column of the 2009 Regulation, we would have concluded that the imported mobility scooters were similar to those in the regulation: the regulation vehicles bear the core design features of 'mobility scooters', as we have found them. We do not find it helpful, as the appellants invited us to do, to find distinctions in the fine details, or specifications, of the regulation vehicles, as these are not in our view material differences."

13. The FtT went on to say however, that the case law is clear that it would be wrong to pay attention only to the left hand column: the 'Reasons' column must also be taken into account

in determining the scope of the Regulation. The FtT referred to the decisions of the ECJ in *Hewlett Packard BV v Directeur General des Douanes et Droits Indirects (C119/99)* [2001] E.C.R.I-3981 ("*Hewlett Packard BV*") and Mr Lawrence Collins J in *Vtech Electronics,* and said:

> "49. Here, the 'reasons' column in the 2009 Regulation says that classification under heading 8713 is excluded "as the vehicle is not specially designed for the transport of disabled persons and it has no special features to alleviate a disability". The HSEN and the CNEN are then referred to. It seems to us the situation is akin to that in *Hewlett Packard*, in that the 'reasons' column of the regulation makes a statement that echoes one of the key factual variables in deciding the correct heading: in *Hewlett Packard*, it was a statement that the fax function was the principal function; in the 2009 Regulation, it is a statement that the vehicles are not specially designed for the transport of disabled persons. What *Hewlett Packard* tells us is that one cannot infer from such a statement in the "reasons" column about a factual characteristic of the product in question, that every product like the one in the left hand column, inevitably has that factual characteristic; rather, one is to infer the reverse – that, to fall within the regulation, the product must in fact have the factual characteristic mentioned in the 'reasons' column. In our case, we have found that the imported mobility scooters do not have the factual characteristic of being "not specially designed for the transport of disabled persons" (interpreting "disabled" in line with *Invamed CJEU*); we therefore conclude that, for this reason, and exercising the "great care" required, the imported mobility vehicles are not sufficiently similar to the vehicles in the 2009 Regulation, such that the regulation should be applied here by analogy."

14. The FtT was also persuaded by EME's and SM's alternative argument, based on a line of CJEU authorities starting with *Stryker EMEA Supply Chain Services BV* (C-51/16) ("*Stryker"),* that where the CJEU has, through a preliminary ruling, given "all the information necessary to classify a product under the appropriate CN heading", then application of a classification regulation to that product by analogy is (1) not necessary; and (2) not possible. The FtT referred to the preliminary ruling of the CJEU in *Invamed CJEU,* and concluded, at [55]:

> "…if the CJEU has spoken as to how to go about classifying mobility scooters (and it clearly has), it is unnecessary to go through the (painstaking) process of applying a classification regulation by analogy."

15. The FtT rejected the argument by HMRC that the *Stryker* line of cases was inconsistent with what was said by Lawrence Collins J in *Vtech Electronics*, namely that where products are similar, the classification regulation is to be followed unless and until declared invalid by the CJEU. The FtT said:

> "56. … However, *Stryker* and *Medtronic* (CJEU authorities that did not exist when *VTech* was decided) each clearly acknowledge the general principle behind following classification regulations (consistent interpretation, equal treatment, etc); yet in each case the CJEU immediately went on to state that, in the given circumstances, application of the regulation by analogy was unnecessary/impossible. This seems to us very clear guidance by the CJEU on the point and so, to that extent, stronger authority than *Vtech* at [22]."

16. The FtT went on to say:

> "58. We are of course aware of what was said in *Invamed CA* at [22] about the 2009 Regulation, had it applied, being "binding and definitive" – but this clearly obiter statement was, equally clearly, not attempting to encapsulate the whole of the law as regards applying classification regulations by analogy, in a single sentence."

17. The FtT acknowledged that, in 2021, the Commission issued a further classification Regulation, 2021/1367, that classified another vehicle (which had all the core design features of a 'mobility scooter') to heading 8703, but said that made no difference to its analysis, both

because of its timing and its approach in law regarding the application of the 2009 Regulation by analogy. The FtT concluded:

> "60. It follows from the foregoing that, in our view, the 2009 Regulation does not affect the classification of the imported mobility scooters to heading 8713."

THE APPEAL TO THE UPPER TRIBUNAL

18. HMRC's main argument in this appeal is a simple one, namely that the FtT was wrong to classify, for customs purposes, the imported mobility scooters as *"carriages for disabled persons"* under heading 8713 of the CN. The question of the appropriate classification has been the subject of litigation over many years both in the UK and internationally. HMRC argue that legislators have, over the years, sought to introduce regulations making the classification position clear including, in particular, the 2009 Regulation. HMRC point to the fact that in *Invamed v HMRC* [2020] EWCA Civ 243 ("*Invamed CA")*, at [22], Patten LJ noted that it was common ground between the parties that the 2009 Regulation had come too late to apply to the imported goods that featured in that appeal but said, albeit *obiter* and therefore not binding on us:

> "22. … Had it applied then it would have been binding and definitive for present purposes subject only to a possible challenge to its validity in the CJEU."

19. HMRC identify that the FtT found, at [47], that the core design features of the imported 'mobility scooters' are similar to those set out in the 2009 Regulation, without any material differences. However, HMRC submit that the FtT then erroneously side-stepped the 2009 Regulation by concluding that the imported mobility vehicles are not sufficiently similar to the vehicles identified in the 2009 Regulation under CN heading 8703 10 18, such that the regulation should be applied thereto by analogy.

20. The response to the appeal by EME and SM is, in summary, that there is no basis for (i) interfering with the decision of the FtT or (ii) challenging the FtT's reasoning in relation to the 2009 Regulation. However, even if the FtT erred in its reasoning as to the application of the 2009 Regulation (which is strongly denied), the 2009 Regulation would not be applicable because, contrary to the findings of the FtT, the imported mobility scooters are materially different to the vehicles covered by the 2009 Regulation.

21. EME and SM assert that the FtT, using its experience and having regard to a substantial body of oral and written evidence and guided by *Invamed CA* and *Invamed CJEU,* in correctly interpreting and applying the law, has drawn the correct line in this case and that there is no justification for re-drawing it.

THE LEGAL FRAMEWORK

22. The Legal Framework that applies to this appeal is, as the FtT noted, broadly uncontroversial. It is set out in paragraphs [8] to [27] of the Decision of the FtT. The importations took place prior to 31 January 2020 or during the "implementation period" when EU law applied.

THE COMBINED NOMENCLATURE

23. The Combined Nomenclature Regulation (Reg (EEC) No.2658/87 of 23 July 1987) provides the legal basis for the Community's Tariff. It is based on the Harmonized Commodity Description and Coding System used worldwide and operates to provide a systematic classification for all goods in international trade. Six General Rules of Interpretation ("GIR's") govern the principles of the Tariff classification procedure.

(i) The first step is to establish the correct 4-digit Heading number. General Interpretative Rule 1 states (in pertinent part) that classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes and where appropriate according to the provisions of the other Rules.

(ii) Rule 2 deals with incomplete, unfinished, unassembled or disassembled articles.

(iii) Rule 3 provides for the classification of goods which, prima facie, fall to be classified under two or more headings. Classification is effected as follows:

GIR 3(a) – the more specific heading is preferred;

GIR 3(b) – composite goods and goods put up in sets for retail sale, which cannot be classified under GIR 3(a), are classified as if they consisted solely of the component which gives them their essential character;

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

(iv) Rule 4 allows for goods to be classified with those most akin.

(v) Rule 5 deals with the packing materials and containers.

(vi) Rule 6 extends the scope of the other Rules to sub-heading (6-digit) level.

24. The CN is reproduced in the Integrated Tariff of the United Kingdom ("the UK Tariff"), an annual publication that is regularly updated. The CN uses an eight-digit numerical code to classify products. The first four digits are referred to as headings; eight-digit level numbers are referred to as subheadings. Here, it was common ground that the imported mobility scooters fall within the following parts of the CN:

(1) Section XVII "Vehicles, aircraft, vessels and associated transport equipment" and

(2) Chapter 87 "Vehicles other than railway or tramway rolling stock, and parts and accessories thereof".

25. The relevant CN headings and subheadings in this appeal are:

8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars:
8703 10	Vehicles specially designed for travelling on snow; golf cars and similar vehicles
8703 10 18	Other
…	
8713	Carriages for disabled persons, whether or not motorised or otherwise mechanically propelled:
8713 90 00	Other
8714	Parts and accessories of vehicles of heading 8711 to 8713.

26. It is now well established that in the interests of legal certainty and for 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 of the notes relating to the sections or chapters: *Invamed*

CJEU, at [18]. *Amoena Ltd v HMRC* (C-677/18) ("*Amoena Ltd")* and *Medtronic GmbH v Finanzamt Neuss* (Case C-227/17) ("*Medtronic GmbH")*, at [34].

27. Those objective characteristics and properties of products must be capable of being assessed at the time of customs clearance; *Amoena Ltd* (C-677/18) at [41].

28. Although the intended use of a product may, admittedly, constitute an objective criterion for classification, that is only to the extent that that use is inherent in that product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties: *Amoena Ltd* (C-677/18) at [44].

CLASSIFICATION REGULATIONS

29. Council Regulation (EEC) No 2658/87 on the tariff and statistical nomenclature and on the Common Customs Tariff states in the recitals;

> "Whereas it is essential that the combined nomenclature and any other nomenclature wholly or partly based on it, or which adds subdivisions to it, should be applied in a uniform manner by all the Member States …" and
>
> "Whereas, in order to ensure uniform application of the combined nomenclature, it is necessary for the Commission to be assisted by a committee responsible for all questions relating to the combined nomenclature, to the Taric and to all other nomenclatures based on the combined nomenclature ; whereas this Committee must be operational as soon as possible prior to the date of application of the combined nomenclature"

30. Article 7 confirms the Commission shall be assisted by a 'Nomenclature Committee' composed of the representatives of the Member States and chaired by the representatives of the Commission.

31. The EU Commission has power under Articles 57 and 58 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code to make classification regulations directing a product to be classified to a particular heading or subheading.

32. Our attention has been drawn to a number of authorities from which we have drawn together the following propositions:

i) The Council of the European Union has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, a broad discretion to define the subject-matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures referred to in Article 9 of Regulation No 2658/87 does not authorise it to alter the subject-matter and the scope of the tariff headings: *Anagram International Inc. v Inspecteur van de Belastingdienst — Douanedistrict Rotterdam* (C-14/05) at [18] *("Anagram International").*

ii) It is desirable that in cases of doubt there should be some mechanism for specifying the classification of goods in the CN, and the Commission has a power to adopt regulations for that purpose. Where there is real doubt, it is important that the Commission should be able to resolve that doubt within the Community in the interests of legal certainty, but it is also important that Community law should not find itself at odds with the intended tenor of the harmonised system. The concern not to limit unduly the Commission's power to settle genuinely doubtful cases by way of regulation must be qualified by the need to control the exercise of that power where it brings the Community into conflict with the uniform international practice

which the harmonised system seeks to achieve. *Cabletron Systems Ltd and The Revenue Commissioners* (Case C-463/98) *("Cabletron Systems")* and *Kubota (UK) Ltd v The Commissioners for HMRC* UT-2020-000203 ("*Kubota UT*") at [45].

iii) Classification regulations resolve classification difficulties and seek to ensure consistency and the equal treatment of traders; *Medtronic GmbH* at [59] and *Hewlett Packard BV* at [18].

iv) If a classification regulation is not directly applicable to goods which are not identical, but only similar to the goods covered by that regulation, the latter is applicable by analogy to such goods. In that regard, it suffices that the goods to be classified and those covered by the classification regulation are sufficiently similar. *Amoena Ltd* (C-677/18) and the Opinion of Advocate General Mischo in *Hewlett Packard BV* at [22]-[23].

v) The 'application by analogy' of a classification regulation, to products similar to those covered by that regulation facilitates a coherent interpretation of the CN and the equal treatment of traders: *Anagram International* (C-14/05) and *LEK farmacevtska družba d.d. v Republika Slovenija,* (C-700/15) at [76 and 83] *("LEK")*, and the Opinion of Advocate General Mischo in *Hewlett Packard BV* at [22]-[23].

vi) If reasoning by analogy did not extend to goods such as those contemplated by the Commission regulation, it would encourage undertakings to circumvent that classification by making marginal modifications to the characteristics of their products for the purpose only of escaping the consequences of an economically unfavourable classification; the Opinion of Advocate General Mischo in *Hewlett Packard BV* at [23].

vii) In the interpretation of a classification regulation, in order to determine its scope, account must be taken inter alia of the reasons given; *Rank Xerox (C-67/95) [1997] ECR I-5401, paragraph 26) ("Rank Xerox")* and *Hewlett Packard BV* at [20].

viii) A determination by the Commission is not called into question by the classification by a National Court such as the Supreme Court of the United Kingdom; *Amoena Ltd* (C-677/18) at [48].

33. The position in domestic law as regards the application of classification regulations was explained by Lawrence Collins J in *VTech Electronics* at [21] to [23] (applied by the Upper Tribunal in *Cozy Pet v HMRC* [2024] UKUT 00096 (TCC) at [13]):

> "21. Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, Article 249 (formerly Article 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.
>
> 22. It is common ground between the parties that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from the European Court that the Regulation is invalid. In Case C-119/99 *Hewlett Packard BV v. Directeur Generale des Douanes* [2001] ECR I-3981, Advocate General Mischo said (in reasoning which was followed and approved by the Court) that classification regulations are adopted "when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute." (para 18). He went on:

> "20. It should be borne in mind that a classification regulation is adopted … on the advice of the Customs Code Committee when the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute.
>
> 21. It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or to a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.
>
> 22. The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product."

But, he said, the approach adopted by a classification regulation for a particular product could not unhesitatingly and automatically be adopted in the case of a similar product: "On the contrary, as always, where reasoning by analogy is employed great care is called for." (para 24)

> 23. Regulations may be declared invalid, but only by the European Court (or, in a direct action commenced by a private party, by the Court of First Instance of the EC): Case 314/85 *Firma Foto-Frost v. Hauptzollamt Lubeck-Ost* [1987] ECR 4199, para 17. Unless and until that happens, national courts are of course obliged to give effect to a regulation.
>
> 24. A classification by Commission Regulation is invalid, if the error made by the Commission is "manifest," for example if it is based on an interpretation which is inconsistent with the Community's international obligations, or does not take account of the Explanatory Notes or the GIRs: see e.g. Case C-463/98 *Cabletron Systems Ltd* [2001] ECR I-3495, para 22 the Court annulled part of a regulation, holding that the Commission had committed a manifest error of classification in determining that network cards and cables used in conjunction with computers to transfer information through a network should be classified as telecommunications equipment under CN 8517 rather than under CN 8471 which applies to automatic data processing machines."

THE ROLE OF THE CJEU

34. On behalf of EME and SM, Mr Lyons KC submits that the CJEU in this context has a general function. Its role, he says, is not to classify products itself because it simply does not have the evidence to do that and it will always, therefore, defer to the national authorities' assessment of fact. In *Invamed CJEU at [16]*, the Court said:

> "16. ...when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria the implementation of which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so…
>
> 17. However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see judgment of 22 December 2010 in *Lecson Elektromobile*, C-12/10, EU:C:2010:823, paragraph 15 and the case-law cited)."

35. Mr Lyons KC points to the fact that in *Invamed CJEU*, the CJEU also accepted that the words "disabled persons" in heading 8713 include persons affected by a non-marginal limit on their ability to walk and is not restricted to those who also suffer from other limiting factors whether mental or physical: see at [33]-[34]. It must follow that if the objective characteristics

of the vehicles demonstrate their intended use as being by persons with non-marginal walking difficulties alone, then they are properly classifiable under heading 8713.

THE JURISDICTION OF THE UPPER TRIBUNAL

36. Before we turn to the main arguments in the appeal before us, it is helpful for us to acknowledge the limited jurisdiction of the Upper Tribunal since a central plank to the response by EMA and SM is that the FtT reached a decision open to it, and there are no grounds upon which the Upper Tribunal should interfere with the decision of the FtT. The submissions made by Mr Lyons KC and the authorities we have been referred to are uncontroversial. There is, Mr Lyons KC submits, a finding that the imported mobility scooters are intended solely, or uniquely, for those with a non-marginal limit on their ability to walk, that underpins, consistent with the decision of the CJEU in *Invamed CJEU* and *Invamed CA,* the FtT's conclusion that heading 8713 of the CN is applicable.

37. We accept the Upper Tribunal is not entitled to find an error of law simply because it does not agree with the decision, or because the Tribunal thinks the decision could be more clearly expressed or another judge can produce a better one. Baroness Hale put it in this way in *AH (Sudan) v SSHD* [2007] UKHL 49 [2008] 1 AC 678), at [30]:

> "Appellate courts should not rush to find such misdirection simply because they might have reached a different conclusion on the facts or expressed themselves differently."

38. In *The Commissioners for Her Majesty's Revenue & Customs v Procter & Gamble UK* [2009] EWCA Civ 407 (a case relating to the classification for VAT purposes of Pringles), Jacob LJ highlighted, at [9], that an appeal court should be slow to interfere with an overall assessment or 'value-judgment'. The FtT here, Mr Lyons KC submits, looked at a wide range of evidence and reached a decision with which we should be slow to interfere, particularly where the specific findings of fact are inherently an incomplete statement of the impression made, and where we are concerned with an appeal from a special Tribunal. Jacob LJ addressed the question of adequacy of reasons at [19]:

> "…It was not incumbent on the Tribunal in making its multifactorial assessment not only to identify each and every aspect of similarity and dissimilarity (as this Tribunal so meticulously did) but to go on and spell out item by item how each was weighed as if it were using a real scientist's balance. In the end it was a matter of overall impression. All that is required is that "the judgment must enable the appellate court to understand why the judge reached his decision" (*per* Lord Phillips MR in *English v Emery [2002] EWCA Civ 605, [2002] 1 WLR 2409* at 19]) and that the decision "must contain … a summary of the Tribunal's basic factual conclusion and statement of the reasons which have led them to reach the conclusion which they do on those basic facts" (*per* Thomas Bingham MR in *Meek v Birmingham City Council [1987] IRLR 250*). It is quite clear how this Tribunal reached its decision. In the words of Sir Thomas Bingham in *Meek* the parties have been told "why they have won or lost.""

39. Finally, in *Invamed CA*, the Court of Appeal, reversing the decision of the Upper Tribunal, concluded that the FtT had not erred in classifying certain electric mobility scooters as "carriages for disabled persons, whether or not motorised" under heading 8713 rather than as "motor cars and other motor vehicles principally designed for the transport of persons". Patten LJ said:

> "73. where the line is to be drawn in any given case is a matter for the FtT based on the evidence and using its own expertise. Unless it can be shown to have misdirected itself about the legal test to be applied or to have reached a decision which on the correct application of the test was not open to it on the facts then the Upper Tribunal had no jurisdiction to interfere: see Tribunals, Courts and Enforcement Act 2007 ss. 11 and 12."

40. Standing back, Mr Lyons KC submits the FtT came to a decision that is unimpeachable by a superior court, i.e. that the FtT here came to a decision that was open to it and which ought not therefore to be disturbed on appeal. In the course of submissions, he expressed himself in the following terms:

> "They came to a decision which is, in my view, unimpeachable by a superior court. I don't say that another tribunal would not come to a different decision, no doubt it's perfectly possible , but they came to a decision which cannot be overturned and which is perfectly reasonable."

(Day 1/118:7-12)

DECISION

41. Here, we are concerned with the 2009 Regulation, which remains in force, albeit, as a matter of domestic law, it "ceases to have effect" in relation to imports made following the UK's departure from the EU; Paragraph 1(1) of Schedule 7 to the European Union (Withdrawal) Act 2018.

42. As it is central to the issues in this appeal, it is helpful for us to set out material text of the 2009 Regulation.

Description of Goods	Classification (CN code)	Reasons
(1)	(2)	(3)
1. Four-wheeled vehicle with an electric motor powered by two rechargeable 12 V batteries. It is approximately 48 cm wide, 99 cm long and 58 cm high (with the backrest folded down), with a total weight without batteries of approximately 34,5 kg. The maximum load is approximately 115 kg. The vehicle has the following characteristics: — a horizontal platform connecting the front and rear sections, — small wheels (approximately 2,5 × 19,0 cm) with anti-leak tyres, — an adjustable seat without armrests and grips whose height can be set in one of two positions, and — a steering column that can be folded down. The steering column has a small control unit including a contact switch, a horn, a battery output display and a button to set the maximum speed. The vehicle has two thumb-operated levers for accelerating, braking and reversing. There are anti-tip wheels at the back of the vehicle to prevent it from tipping over. It has an electronic dual braking system.	8703 10 18	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8703, 8703 10 and 8703 10 18. The vehicle is a special type of a vehicle for the transport of persons. Classification under heading 8713 is excluded as the vehicle is not specially designed for the transport of disabled persons and it has no special features to alleviate a disability. (See also the Harmonised System Explanatory Notes to heading 8713 and the Combined Nomenclature Explanatory Notes to subheading 8713 90 00.) The vehicle is therefore to be classified under CN code 8703 10 18 as a motor vehicle principally designed for the transport of persons.

When its batteries are fully charged it has a maximum range of approximately 16 kilometres and can reach a maximum speed of approximately 6,5 km/h. The vehicle can be disassembled into four light components. It is designed for use at home, on footpaths and in public spaces, for activities such as shopping trips. (*) See image 1.		

GROUND 1: THE FTT ERRED IN DECIDING NOT TO APPLY THE 2009 REGULATION

43. On behalf of HMRC, Mr Pritchard submits the classification of mobility scooters has presented challenges to many customs authorities and that by the 2009 Regulation the EU Commission sought to bring clarity to the difficult question of classification in this area. Put simply, having found at paragraph [47] that the core design features of the imported mobility scooters (i.e. the physical characteristics set out at paragraph [30]) are similar to those in the Regulation without any material differences, the FtT should have applied the 2009 Regulation by analogy, and should have done so without further enquiry. There are, Mr Pritchard accepts, small differences in features including length and weight, but that, he submits, cannot begin to explain why some mobility scooters are specifically designed for disabled persons whilst others are not.

44. Mr Lyons KC submits that there is an unchallenged finding by the FtT that the imported mobility scooters are designed and intended solely or uniquely for those with a non-marginal limit on their ability to walk, underpinning the conclusion that CN 8713 is applicable and that the 2009 Regulation does not apply.

45. Mr Lyons KC submits that while classification Regulations such as the 2009 Regulation apply to products the same as those considered by the Customs Code Committee, they do not apply to broad classes of products such as mobility scooters that encompass products with widely varying objective characteristics. He submits that the FtT were made aware of a large number of differences between the products and the vehicles covered by the 2009 Regulations concerning, inter alia, size, wheel size, range, speed, tyres, maximum load and the number of parts into which the vehicle could be disassembled. The FtT said that the imported mobility scooters shared some core design features, but the FtT found, as a fact, that the imported mobility scooters were specifically designed for the sole use of disabled persons. The 2009 Regulation, Mr Lyons KC submits, does not identify products by their "core design features" but is much more specific as to dimensions and other specific features. He submits that measurements set out in a classification regulation matter and where the regulation adopts the word "approximately", that provides some leeway, but does not allow one to disregard the specifications entirely and look simply at the core design features.

46. Mr Lyons KC submits that the FtT quite properly considered the 'Reasons' column in the 2009 Regulation which confirms "*Classification under heading 8713 is excluded as the vehicle is not specifically designed for the transport of disabled persons and it has no special features to alleviate a disability".* Here, having found that that the imported mobility scooters are designed and intended solely or uniquely for those with a non-marginal limit on their ability to walk, it was, it is submitted, impossible to apply the 2009 Regulations to the imported scooters. The finding, Mr Lyons KC submits was fundamental to the classification in the CN and the relevance of the 2009 Regulation.

47. Notwithstanding these submissions, we accept HMRC's contention that the FtT erred in not applying the 2009 Regulation. It is now well established that the purpose of the Classification Regulations is to seek to ensure consistency and equal treatment of traders. A key purpose of the Classification Regulations is therefore to ensure the uniform application of the CN in cases where there are difficulties identifying the correct classification. The passage from Mr Lyons KC's submissions referred to in paragraph 40 above recognises the possibility that another Tribunal might come to a different decision with regard to classification on the same fact[3]. This, we consider, highlights a concern that the 2009 Regulation was addressing. The fact that a different Tribunal considering the same core design characteristics, might reach a different decision, would serve to undermine the need for consistency and equal treatment amongst traders. It would lead to uncertainty, and it demonstrates the significance that attaches to Classification Regulations as a mechanism for specifying the classification of goods in the CN, in cases of doubt. The classification regulations are binding in their entirety from the date they enter into force. Where the 2009 Regulation concerns products that are identical, or similar, the classification regulations must be followed unless there is a declaration from the CJEU (or now the appropriate tribunal or court in the UK) that the 2009 Regulation is invalid.

48. The FtT identified the core design features of the 29 different models of imported scooters at paragraph [30] of its decision, and at paragraph [31] referred to the variants within the core design amongst various models. The FtT said that the core design features can readily be apprehended visually by looking at the photographs elsewhere in the decision. The images referred to by the FtT are all images of mobility scooters to which CN 8703 applies. At paragraph [21] of its decision the FtT referred to the CNEN that applies from 4 January 2005 in respect of heading 8713. The CNEN refers to an image of a motor driven scooter that is excluded from CN 8713 and is classified in heading 8703. The two other images of motor scooters that feature in the decision are the images that appear in the 2009 Regulation. The FtT does not identify in its decision any different physical characteristics between the imported scooters and the mobility scooters referred to in the 2009 Regulation.

49. The FtT accepted, at [47], that looking only to the left hand column (i.e. column 1) of the 2009 Regulation, it would have concluded that the imported mobility scooters were similar to those in the Regulation. Although the FtT was right to say the 'Reasons' column must be taken into account in determining the scope of the Regulation, we consider that the FtT fell into error in its analysis. We reject the submission made by Mr Lyons KC that the 'Reasons' column makes it clear that the regulation was not concerned with products which were intended solely for disabled persons, that is, those with a non marginal limit on their ability to walk.

50. The FtT referred to the decision of the CJEU in *Hewlett Packard BV*, in considering the relevance of the 'Reasons' column. There, the relevant classification regulation concerned a multifunction fax machine essentially consisting of a modem, scanner and a printing device. The 'Reasons' column explained that "the telecommunication (facsimile) function is the principal function of this item of equipment". By way of analogy, the FtT here said, at [49], that the 'Reasons' column in the 2009 Regulation provides that "classification under 8713 is excluded as the vehicle is not specifically designed for the transport of disabled persons and has no special features to alleviate a disability". The FtT said:

> "49. … In our case, we have found that the imported mobility scooters *do not have* the factual characteristic of being "not specially designed for the transport of disabled persons" (interpreting "disabled" in line with *Invamed CJEU*); we therefore conclude that, for this

[3] After we had circulated a draft of this Decision, Mr Lyons KC pointed out that he had not sought to concede that another tribunal could have correctly concluded on the evidence before the FtT that the products were not specially designed for disabled persons and could therefore be classified under CN Heading 8703. However, this does not undermine the point that a tribunal might possibly come to a different conclusion, hence the need for clarity.

reason, and exercising the "great care" required, the imported mobility vehicles are not sufficiently similar to the vehicles in the 2009 Regulation, such that the regulation should be applied here by analogy."

51. The CJEU in *Hewlett Packard BV* was concerned with a multifunction device that had, as Mr Pritchard submits, at least two separate functions and the classification question was whether the product should be classified as a 'printer' or a 'fax machine'. The CJEU held, at [22], that "the regulation in question only applies if the telecommunication (facsimile) function is in fact the principal function of the machine to be classified.". Here, there is a key distinction in that a mobility scooter has only one principal function. The 'Reasons' set out in the third column of the 2009 Regulation do not, we consider, in any way attempt to qualify the essential description of the goods set out in column 1. The 2009 Regulation describes the physical characteristics of the goods in detail. The reasons do no more than provide an explanation why classification code 8703 applies, rather than classification under heading 8713, and does so in a manner consistent with the relevant Explanatory Notes to resolve any uncertainty.

52. Further, and in any event, the 2009 Regulation explains that classification is excluded under heading 8713 for two reasons, separated by the word "and": "the vehicle is not specially designed for the transport of disabled persons **and** it has no special features to alleviate a disability" *(our emphasis)*. The focus of the FtT in its finding that the mobility scooters are intended solely, or uniquely, for those with a non-marginal limit on their ability to walk, was the difference that the imported scooters make to the lives of disabled persons contrasted with non-disabled person. The FtT does not address whether the imported mobility scooters have any special features to alleviate a disability, in the way, for example, an electric wheelchair may. It would, we consider, have been necessary, at the very least, for the FtT to have identified some such special feature before it could properly have found that CN heading 8713 was an appropriate classification.

53. It follows from what we consider to be the erroneous analysis of the FtT, that its conclusion, at paragraph [49], that the imported mobility scooters are not sufficiently similar to the vehicles in the 2009 Regulation, such that the 2009 Regulation should be applied by analogy, cannot be reconciled with the FtT's finding, at [47], that if it had looked only to the left hand column of the material text of the 2009 Regulation referred to in paragraph 42 above, it would have concluded that the imported mobility scooters were similar to those referred to therein. HMRC accept the mobility scooters here are not the same as the mobility scooters referred to in the 2009 Regulation. The 'application by analogy' of the Regulation was therefore required to ensure a consistent and coherent interpretation of the CN. We accept, as Mr Pritchard submits, that having found that the core design features were the same and therefore the products were "similar" the FtT should have applied the 2009 Regulation by analogy. We accept HMRC's contention that the factual enquiry embarked on by the FtT here was unnecessary, and indeed inappropriate, because it was clear that the 2009 Regulation applied by analogy.

54. We are fortified in our conclusion by the reference made by both Mr Pritchard and Mr Lyons KC to the decision of the CJEU in *BG Technik cs a.s v Generální ředitelství cel* (Joined Cases C-129/23 and C-567/23) ("*BG Technik").* The decision of the CJEU post-dated IP completion day (i.e. it was after 31 December 2020), but it is a decision that the Upper Tribunal may have regard to so far as it is relevant to the matters that arise in this appeal. In that case, the CJEU considered whether heading 8713 of the CN must be interpreted as meaning that it covers a product such as a four-wheel vehicle with an electric motor, one adjustable and rotating seat fitted with armrests, a separate steering column and a number of other features found on mobility scooters. The Court held at [57] that heading 8713 must be interpreted as meaning that it does not cover such a product.

GROUND 2: THE FTT ERRONEOUSLY DEPARTED FROM THE DECISION IN VTECH ELECTRONICS (UK) PLC

55. In light of our conclusion upon the first ground of appeal, we can address this second ground in short form. It was, as Mr Lyons KC accepts, uncontroversial in this appeal that where the 2009 Regulation concerns products which are similar to those in issue, the classification must be followed unless and until there is a declaration from the CJEU that the Regulation is invalid. Mr Lyons KC submits this second ground of appeal is little more than another way of putting the contention in the first ground, that the FtT was wrong to take account of the reasons set out in column 3 of the 2009 Regulation.

56. Mr Lyons KC refers to the fact that Lawrence Collins J, in *VTech Electronics* at [24], highlighted that in the case of a 'similar product' as here, where reasoning by analogy is employed, great care is called for. He submits the FtT here properly found, having regard to the 'Reasons' column that it was addressing products that were different from the products referred to in the 2009 Regulation.

57. In *Belkin Ltd v HMRC* [2022] UKUT 00244 (TCC) the Upper Tribunal referred to the significance of classification regulations as summarised by Lawrence Collins J in *Vtech Electronics.* There, the Upper Tribunal, at [61], considered the "superficial similarities in terms of appearance of the product considered in the Classification Regulation and Belkin's". Paying particular attention to the care required where reasoning by analogy is employed, the Upper Tribunal considered it unsafe to draw the analogy suggested by HMRC. The Upper Tribunal held that the Belkin product was not a generic wireless charger with a generic AC adapter, but a charger meant to be used with a specific device. That is quite different to the position here where the 2009 Regulation addresses mobility scooters and there is nothing inherent in the characteristics that are different to the mobility scooters imported by EME and SM.

58. We have already set out our reasons for concluding that the FtT erred in deciding not to apply the 2009 Regulation by analogy. It follows that the FtT erred in failing to follow the 2009 Regulation, in the absence of a declaration that the 2009 Regulation is invalid in some relevant respect.

GROUND 3: THE FTT ERRED IN DECIDING THAT IT WAS NEITHER NECESSARY NOR POSSIBLE TO HAVE REGARD TO THE 2009 REGULATION

59. The focus of the third ground of appeal is upon what is in effect the second reason given by the FtT for their decision, namely that it was neither necessary nor possible to have regard to the 2009 Regulation. Mr Pritchard submits the FtT erroneously concluded that it was neither necessary nor possible to have regard to the 2009 Regulation because in the *Stryker* and *Medtronic GmbH* line of CJEU cases, the CJEU had acknowledged the relevant classification Regulation, but immediately went on to state that, in the given circumstances, application of the Regulation by analogy was unnecessary/impossible. Here, Mr Pritchard submits, it was necessary and indeed possible to follow the 2009 Regulation because the Regulation was introduced to ensure uniformity. He argues that the effect of the decision of the FtT is that there is a lack of uniformity and divergence. Post Brexit, under Article 5 of the Windsor Framework, there is a 'dual tariff' arrangement within the UK whereby goods that are 'at risk' of being moved from Northern Ireland to the EU are subject to customs duties applicable in the EU. If, following the decision in *BG Technik,* mobility scooters fall to be classified under heading 8703 in the EU, but under heading 8713 in Great Britain, there is 'non-alignment', which cannot have been intended.

60. Mr Lyons KC submits that, in the present case, the FtT considered the 2009 Regulation, and it was as a result of the close attention paid to it that the FtT found that it was neither necessary nor possible to apply the 2009 Regulation by analogy. This was because the FtT, quite permissibly it is submitted, referred to the decision of the CJEU in *Invamed CJEU* regarding the classification of mobility scooters, and in light of the answer provided thereby, concluded that it was neither necessary nor possible to apply the Regulation by analogy.

61. We find that the FtT erred in deciding that it was neither necessary nor possible to have regard to the 2009 Regulation for the reasons it gave at paragraphs [55] to [57] of the Decision. In *Stryker*, the CJEU was concerned with the classification of medical implant screws that could only be inserted into the body by means of specific medical tools rather than ordinary tools. The request for a preliminary ruling asked: "(i) Should heading 9021 of the CN be interpreted as meaning that implant screws [such as those at issue in the main proceedings] which are solely intended to be inserted in the human body for the treatment of bone fractures or the stabilisation of prostheses may be classified thereunder? ; and (ii) Is Implementing Regulation No 1212/2014 … valid?". The CJEU said, at [57], that the answer to the first question is that the CN must be interpreted as meaning that medical implant screws such as those at issue in the main proceedings fall under CN heading 9021. The CJEU went on to address the second question concerning the validity of the relevant regulation. In doing so it said, at [62], that "…an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading.". Put another way, the CJEU had, in answering the first of the two questions referred, provided the answer and thus an application by analogy was neither necessary nor possible. In those circumstances the Court did not need to address the second question regarding the validity of the classification regulation.

62. In *Medtronic GmbH* at [32], the CJEU considered whether spinal fixation systems which are implanted in the body, assembled according to the needs of each patient and intended to treat degenerative disc diseases, spinal stenoses and spinal dislocations or failures in earlier spinal fusions, tumours, scolioses or bone fractures are covered by CN subheading 9021 90 90. The CJEU, at [33], confirmed, as a preliminary point, that, when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the CJEU does not necessarily have available to it all the information which is essential in that regard and, in any event the national court is in a better position to effect the classification in question.

63. The CJEU considered Implementing Regulation (EU) No 1214/2014, and the reasons set out in the Annex to the Regulation that the goods corresponding to the description in the Regulation are covered by CN code 9021 10 90. The Court confirmed that the principal function of the fixation systems is decisive for classification purposes: If they are orthopaedic appliances (i.e. for preventing or correcting bodily deformities, or for supporting or holding body parts following an illness, operation or injury), then they are classified under CN code 9021 10 10. The CJEU said, at [46], that appliances for the treatment of degenerative disc diseases, spinal stenoses and spinal dislocations or failures in earlier spinal fusions, tumours or scolioses could come within CN subheading 9021 10 10, subject, however, to verification by the referring court. They can only be classified under CN code 9021 10 90 if intended principally for treatment of fractures.

64. Unlike in *Stryker*, there was no challenge to the validity of the relevant Regulation. The CJEU however referred to the decision in *Stryker* at paragraph [59]. It went on, at [60], to say that if the referring court were to conclude that the spinal fixation systems in issue, having

regard to their objective characteristics and properties as well as their intended and actual use were not intended principally for the treatment of fractures, then Implementing Regulation No 1214/2014 should not be taken into account for the purposes of their classification. It was therefore, as Mr Pritchard submits, for the national court to determine whether the products were sufficiently similar that the classification Regulation applied by analogy. That is not to say that it was neither necessary nor possible to apply the relevant Regulation by analogy.

65. Finally, our attention was drawn to the decision of the CJEU in *PR Pet BV v Inspecteur van de Belastingdienst/Douane, Kantoor Eindhoven* (Case C-24/22). This case involved a request for a preliminary ruling concerning the classification of 'cat scratching posts' under the CN and the validity of Commission Implementing Regulation (EU) No 1229/2013 of 28 November 2013. At [46], the CJEU said it was a matter for the national court to verify, but that the answer to the first question was that the CN required to be interpreted as meaning that an article consisting of a structure, covered with different materials depending on the case, intended to give cats a place of their own which they can occupy, play in or scratch, referred to as a 'cat scratching post', does not fall under heading 9403 of the CN. Such an article must be classified under the CN heading corresponding to the material present to the greatest degree among those covering it, which it is for the referring court to determine. If those materials are present in equal proportions, that article should be classified under the last heading in numerical order among those which equally merited consideration. As far as the classification regulations were concerned, the CJEU said, at [70], that although the articles referred to in the relevant implementing regulation did not appear to be identical in all respects to the goods at issue, they were nonetheless similar to them, such that application by analogy of those regulations could not be excluded from the outset. The CJEU went on to say, at [71], that the application of the implementing regulations by analogy was neither necessary nor possible where the CJEU, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading.

66. The approach adopted by the CJEU in the decisions we have referred to is that an application by analogy is neither necessary nor possible where the CJEU, by its answer to a question referred for a preliminary ruling, has provided the referring court with **all** the information necessary to classify a product under the appropriate CN heading (our emphasis). The FtT relied upon the decision of the CJEU in *Invamed CJEU.* It said that "… if the CJEU has spoken about how to go about classifying mobility scooters (and it clearly has), it is unnecessary to go through the (painstaking) process of applying a classification by *analogy."*

67. However, in *Invamed CJEU* (at [16]) the CJEU emphasised that its task on a reference was merely to give the national court guidance on the criteria which should be applied rather than to make the classification itself albeit that it acknowledged that it may, as it put it, in a spirit of co-operation, give the national court all the guidance that it needs. The CJEU was not asked how the national court should answer the ultimate question of classification. The CJEU did not, in *Invamed CJEU*, give any guidance or information about how, if at all, the 2009 Regulation impacts the classification of mobility scooters. The focus was upon the meaning of the words "for disabled persons" in respect of which there was, arguably, inconsistency at CJEU level, cf. *Lecson Elekromobile*, (C-12/10, EU:C2020:823) ("*Lecson Elekromobile*"), and the consideration thereof in *BG Technik* at [23] and [43] (see paragraphs 88 and 89 below). Further, the decision in *Invamed CJEU* concerned not the 2009 Regulation, but the earlier Commission Regulation (EC) No 1789/2003 of 11 September 2003. In short, we do not consider that *Invamed CJEU* can be taken to provide the answer to the classification question in the way that the FtT considered that it could.

68. It follows that, in our judgment, the FtT also erred in deciding that it was neither necessary nor possible to have regard to the 2009 Regulation.

THE CROSS APPEAL BY EME AND SM

69. EME and SM claim the FtT erred in two materials respects in its findings. First, at paragraph [31], in concluding that the distinctions relied upon by EME and SM between the mobility scooters described in the 2009 Regulation and the imported mobility scooters did not amount to "material differences". Second, at paragraph [47], when it said that if it were considering only the left hand of the extract from the 2009 Regulation referred to in paragraph 42 above, it would have concluded that the imported mobility scooters were similar to those referred to therein.

70. We take both of the grounds together since they concern findings made by the FtT. The classification of goods for customs purposes is in general to be sought in their objective characteristics. At paragraph [30] of the decision, the FtT clearly set out the core design features of the 29 different models of mobility scooter that it was concerned with. The FtT articulated those core design features. The FtT acknowledged at [31], that it had been presented with a good deal of evidence about the variants that could be seen within the core design amongst the various models. The FtT referred to the 2009 Regulation and found that if it looked only at the left hand column of the extract from the 2009 Regulation, it would have concluded that the imported mobility scooters were similar to those referred to therein. It said: "the regulation vehicles bear the core design features of 'mobility scooters', as we have found them." The FtT said it did not find it helpful, as EME and SM had invited it to do, to find distinctions in the fine details, or specifications, of the regulation vehicles, as they are not in the FtT's view, material differences.

71. The FtT was provided with a schedule with an analysis of the differences between the imported mobility scooters and the scooters referred to in the 2009 Regulations.

72. It was in our judgment open to the FtT to consider the variants within the core design amongst the various models were immaterial to the legal issues to be decided by the FtT. The variants referred to by the FtT at paragraph [31] regarding, for example, variations to width, length, wheels, speed, additional features and ease of transportation do not impact on the core design and fundamental characteristics. At paragraph [47] of the decision, the FtT returned to the core design of the imported mobility scooters when considering whether the 2009 Regulation affects the classification.

73. Mr Lyons KC submits the 2009 Regulation refers to measurements such as width, length and weight. He submits that in this context, measurements matter. He referred to the decision of the CJEU in *Stryker* in which the CJEU was concerned with screws with a diameter of between 6.5mm and 4mm. The smallest of differences can be material. The difficulty with that submission is that 'implant screws' intended for insertion in the human body, where tolerances are very much finer, are very different to 'mobility scooters'. Furthermore, the 2009 Regulation, in its description of the goods in the left hand column of the extract, makes repeated reference to "approximate" measurements. The vehicle is described as "approximately 48 cm wide, 99cm long and 58cm high". The Regulation refers to an "approximate weight" without batteries and an "approximate maximum load". The use of the word "approximate" in the extract from the 2009 Regulation is important since it avoids traders circumventing the classification by making marginal modifications to the core design and characteristics for the purpose of escaping the consequences of an economically unfavourable classification as envisaged in the Opinion of Advocate General Mischo in *Hewlett Packard BV* at [23].

74. It was therefore open to the FtT to say that it was not helpful to find distinctions in the fine details, or specifications, as they are not material differences. The fact that the imported scooters may be a few centimetres wider or longer for example, does not affect whether they are 'carriages for disabled persons' or the application of the 2009 Regulation.

75. Appellate courts have been warned repeatedly, not to interfere with findings of fact by trial Judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. We are satisfied that the findings made by the FtT in relation to these issues are based on the evidence before the Tribunal and there is no demonstrable misunderstanding of the evidence. As Mr Lyons KC himself submits, the decision here is one of a specialist Tribunal and the FtT. The FtT did not misunderstand the evidence and in reaching its decision, it cannot be said that the FtT arrived at a conclusion which the evidence could not on any view support. The two grounds relied upon by EME and SM are nothing more than a disagreement with the findings made by the FtT.

THE VALIDITY OF THE 2009 REGULATION

76. In view of its finding that the mobility scooters in question were classified under heading 8713 of the CN (*"carriages for disabled persons"*), the FtT did not need to, and did not consider EME's and SM's alternative argument that the 2009 Regulation is invalid. However, given what would otherwise be our conclusion in respect of the appeal and cross-appeal, it is necessary for us to do so.

77. Post Brexit, the Upper Tribunal has jurisdiction under the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019/673 ("the Exit Regulations") to determine that an EU instrument such as the 2009 Regulation is, in some respect, invalid, and to declare it, to that extent, void. However, pursuant to reg. 5 of the Exit Regulations, no court or tribunal may make such a declaration unless the appropriate notice has been given to *"the relevant UK authorities"* (i.e. a Minister of the Crown). It is common ground that no such notice has been given in the present case. It would not therefore be appropriate for us to make any such declaration until such notice has been given. However, it was also common ground between the parties that that unless the Upper Tribunal could be satisfied that there were prima facie grounds for concluding that the 2009 Regulation was, in some material respect, invalid, there would be no point in deferring the question until notice had been given pursuant to reg. 5 of the Exit Regulations.

78. EME and SM rely upon the following arguments in support of their contention that the 2009 Regulation is invalid:

i) First, they argue that the Commission, in purporting to classify mobility scooters of the kind that is the subject matter of the present appeal as falling under heading 8703 of the CN rather than under the more specific heading 8713 of the CN, lacked competence to do so as this involved impermissibly altering a CN heading, something which it is common ground that it is not open to the Commission to do.

ii) Second, they argue that in making the 2009 Regulation, the Commission infringed essential procedural requirements, in particular by providing insufficient and illogical reasons for classifying mobility scooters of the present kind under heading 8703 of the CN rather than under heading 8713 of the CN.

iii) Third, they argue that the 2009 Regulation infringes the UN Enable Convention promoting independence and full participation by disabled persons, which (like all international treaties entered into by the EU) is an integral part of EU law. The particular complaint is that imposing the rate of VAT applicable to heading 8703 of the CN was inconsistent with the requirement to provide appropriate facilitation for disabled persons at a reasonable cost.

79. We consider each of these arguments in turn.

80. With regard to the competency issue, EME and SM rely upon a number of CJEU cases in which it had been held that the Commission had invalidly classified goods as falling within a particular heading of the CN on the basis that it was not open to the Commission to alter the CN heading. In particular, reference was made to *Holz Geenen GmbH v. Oberfinananzdirektion Munchen* (C-309/98) [2000] ECR I-1975, at [34], a case in relation to an earlier regulation where the latter was held to be invalid in so far as it purported to classify rectangular wooden blocks under a particular sub-heading. The CJEU held that the items in question could not validly be classified under this sub-heading because they were not intended to be used in the structure of buildings, and nor were their objective characteristics and properties in any way those of goods covered by the designation of builders' carpentry, which was the description of the classification.

81. EME and SM argue that altering the CN heading in this sort of way is exactly what the Commission has purported to do by providing, either expressly or by analogy, for mobility scooters of the kind under consideration in the present appeal, to fall under heading 8703 of the CN rather than heading 8713 thereof. In the course of submissions, we suggested to Mr Freund, who argued the validity issue on behalf of EME and SM, that what he was seeking to say was that the Commission could not call something an apple if it was, in fact, a pear. He clarified that what he was saying was that if heading 8703 was taken to apply to fruit, then heading 8713 represented a pear. Consequently, if one has a pear, i.e. a mobility scooter of the present kind, then it properly falls within heading 8713, and not the more generic 8703.

82. Mr Freund then developed this submission by saying that it had been determined by *Invamed CJEU*, as applied in *Invamed CA* and by the FtT in the present case, that mobility scooters the subject matter of the present appeal were *"carriages for disabled persons"*, and so it was simply not open to (or competent for) the Commission to seek to classify them differently. Consequently, any attempt to do so should be treated as void.

83. There are, as we see it, a number of fundamental difficulties with this line of argument:

i) First, Mr Pritchard, on behalf of HMRC, relied on Mr Lyons KC having conceded in submissions (see paragraph 40 above) that although the FtT found that the present mobility scooters were carriages for disabled persons, it would have been open to another tribunal to have found that they were not. He submitted that if this was the case, and Mr Lyons KC did not seek to correct Mr Pritchard at the hearing with regard the concession that Mr Pritchard had identified, then it is difficult to see that the Commission could properly be accused of altering the CN heading. As we have identified, Mr Lyons KC has, since the hearing, sought to clarify any concession that he made[4]. Nevertheless, in the light of the case law referred to in paragraph 67 above, and as illustrated by the facts of and decision in *BG Technik,* we consider it difficult to say that another tribunal, in this jurisdiction or any other relevant EU jurisdiction, could not properly have come to a different conclusion on the same facts. If it is open to different tribunals or different courts, to reach different conclusions on the issue, then what the Commission can be seen to have done is not, we consider, to have altered the CN heading. Rather, in those circumstances, what we consider that it is properly to be regarded as having done is to specify or determine which of the various approaches that might otherwise have been available to a domestic court in deciding upon the correct classification, it should adopt. In the present case, the

[4] See footnote 3 above.

direction provided by the 2009 Regulation was that mobility scooters of the present kind should be treated by domestic courts as falling within heading 8703 and not 8713. As already touched upon above, we consider that this is the very purpose of the regime that provides for the Commission to make regulations classifying goods and other items for the purposes of their CN heading, namely, to resolve uncertainties and to prevent inconsistent decisions by domestic courts.

ii) Second, as Mr Pritchard pointed out, there is CJEU case law to the effect that the mere fact that a domestic court might have held that goods fall under a particular CN heading did not mean that the Commission could not subsequently provide by regulation that the goods in question fell under another heading. Thus, in *Kubota UT*, the Upper Tribunal had decided that the vehicle in question was a dumper and was to be classified accordingly. A regulation subsequently provided that it was not, and that it fell under a different CN heading. However, in *Kubota and EP Barrus Limited v HMRC*, (C-545/16), the CJEU, in a preliminary ruling, found no difficulty in this, commenting at [38] that: *"the commission has a broad discretion to define the* subject *matter of tariff headings."* Similarly, in *Amoena Ltd*, (C-677/18, EU:C:2019:1142), the UK Supreme Court ([2016] UKSC 41) had decided that a particular accessory was an accessory for a medical appliance. A regulation brought in subsequently said that it was not. The decision of the UK Supreme Court was held not to invalidate the regulation.

84. We are not therefore persuaded that the Commission has, by the 2009 Regulation, altered any relevant CN heading, and we do not therefore consider that the latter is in any way rendered invalid in consequence thereof.

85. The second way in which it is argued that the 2009 Regulation is invalid is that it is submitted that, in implementing the latter in respect of CN heading 8713, the Commission infringed essential procedural requirements. As submissions were developed, the only procedural requirements that were alleged not to have been followed were those in respect of the reasoning required to be provided by the Commission. It was submitted that, in implementing the 2009 Regulation, insufficient reasoning was provided in relation to why mobility scooters of the present kind were excluded from being *"carriages for disabled persons"*, and that such reasons that were provided were illogical. In essence, it was submitted that the *"Reasons"* provided in the right-hand column of the extract from the 2009 Regulation referred to in paragraph 42 above, provided a conclusion, but failed to state how that conclusion was reached. Thus, for example, it is said that the reasons do not explain why the products described therein have no special features to alleviate disability. Further, it is said that the reasons that were provided failed to consider that some of the design features of the relevant mobility scooters were of benefit only to persons suffering from disability, and so failed to recognise that these features were special features designed to alleviate disability.

86. However, the *"Reasons"* in the right hand column expressly refer to the Harmonised System Explanatory Notes ("HSENs") and the Combined Nomenclature Explanatory Notes ("CNENs"), which should be taken to form part of the reasoning behind this particular heading 8713 of the CN. The CNENs provided the following explanation in respect of CN heading 8713 10 18, "other", i.e. that relating to the mobility scooters referred to in the extract from the 2009 Regulation referred to in paragraph 42 above:

> "Motorised vehicles specifically designed for disabled persons are distinguishable from vehicles of heading 8703, mainly because they have:
>
> - a maximum speed of 10 Km per hour, i.e. a fast walking pace;
> - a maximum width of 80 cm;

- two sets of wheels touching the ground;
- special features to alleviate the disability (for example, footrests for stabilising the legs).

Such vehicles may have:

- an additional set of wheels (anti-tips);
- that are easy to manipulate; such controls are usually attached to one of the armrests; they are never in the form of a separate, adjustable steering column.

This subheading includes electrically-driven vehicles similar to wheelchairs which are only for the transport of disabled people. They can have the following appearance:

However, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this subheading. They can have the following appearance and are classified in heading 8703:

”

87. Mr Freund sought to make a point about footrests, making the point that they would hardly assist somebody with no legs, thus undermining the reasoning behind the classification. However, as Mr Prichard pointed out, the CNENs are not saying that the relevant vehicle, to qualify under CN heading 8713, required to have footrests, simply that there required to be some special feature to alleviate disability.

88. Further, Mr Pritchard identified that the explanation provided in the CNENs is consistent with the reasoning that the CJEU has itself adopted in considering the classification of mobility scooters. Thus, in *Lecson Elekromobile*, in concluding that the mobility scooters then under consideration fell within CN heading 8703 under Regulation (EC) No 1810/2004, the CJEU made specific reference to the CNENs at [20] stating that mobility scooters fitted with a separate adjustable steering column were excluded under CN heading 8713, and that they come under heading 8703 thereof, going on to observe at [21] that all the mobility scooters on which the CJEU was required to rule had a separate, adjustable steering column, to which the steering and other controls for driving and breaking were connected. At paragraph [22], the Court went on to observe that the mobility scooters in question were equipped with a platform on which

the driver could place his feet, but observed that this did not constitute a support to stabilise the legs. It was further observed that the anti-tipping system also contributed to user comfort, but that the mobility scooters did not include any specific feature which was aimed at aiding disabled persons' use thereof. These various characteristics led to the conclusion that the mobility scooters at issue were to be considered to be means of transport for persons falling within CN heading 8703, and not vehicles for disabled persons for the purposes of heading 8713.

89. We were also, on this point, referred to *BG Technik,* where the CJEU at [43] observed that:

> "… the Court has found that it is clear from the Explanatory Note to the CN relating to heading 8713 that the decisive criterion for classification under that heading is the special design of the vehicle for disabled persons and that, accordingly, vehicles specifically designed for the transport of disabled persons come under that heading. That explanatory note states in the last paragraph that, conversely, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from that heading and come under heading 8703 of the CN (see, to that effect, judgment of 22 December 2010, *Lecson Elektromobile*, C-12/10, EU:C:2010:823, paragraphs 19 et 20)."

90. The CJEU having in this way analysed and considered the parts of the CNENs providing further explanation behind the *"Reasons"* provided within the CN heading 8713, we do not consider that there is any proper basis for contending that absence of sufficient reasons, or the provision of illogical reasons provides a proper basis for challenging the validity of the 2009 Regulation.

91. The third reason advanced on behalf of EMA and SM for challenging the validity of the 2009 Regulation is that it is said that the 2009 Regulation infringes the UN Enable Convention promoting independence and full participation by disabled persons which is to be regarded as an integral part of EU law. The point made is that a VAT regime that imposes a charge in respect of mobility scooters undermines independence and full participation by disabled persons, by imposing an additional cost upon the provision of mobility scooters. However, we consider the short answer to this to be that there is nothing within the UN Enable Convention that requires mobility scooters to be classified in a certain way for customs purposes, or for mobility scooters to be a subject to specific customs tariff, such as being exempt from customs duty. It must be a matter for individual UN member states as to how they seek to promote independence and full participation by disabled persons. This conclusion is consistent with the approach of the CJEU in *BG Technik* at [56], where the effect of the UN Enable Convention was considered.

92. In conclusion, therefore, on the validity issue, we do not consider there to be any prima facie basis for challenging the validity of the 2009 Regulation in so far as it relates to CN heading 8713, and the application thereof to mobility scooters. We are fortified in our conclusions by the analysis of the position by the CJEU in *BG Technik*. Had there been any proper basis for a challenge of the kind made in the present case in relation to the 2009 Regulation, then we would have expected such a challenge to have been made and to have succeeded in that case.

CONCLUSION

93. For the reasons we have set out, we find that the FtT erred in its conclusion that the 2009 Regulation does not affect the classification of the imported mobility scooters to heading 8713 because it was based upon a material error of law and we set aside the decision of the FtT.

REMAKING THE DECISION

94. Having found that the Decision involved the making of an error on a point of law, we have set it aside pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 ("the Act"). Together with the FtT's findings of fact, we have before us the evidence which was before the FtT on which we can re-make the decision in relation to the appeals by EME and SM pursuant to section 12(2)(b)(ii) of the Act. By virtue of section 12(4) of the Act, we may make any decision which the FtT could make if it were re-making the decision and may make such findings of fact as we consider appropriate.

95. The FtT found, that, at [30], that all 29 models of the imported mobility scooters bore the core design features of a 'mobility scooter', as articulated. The FtT found that the variations within the core design features are not material. The FtT found that if it looked to the left hand column of the extract from the 2009 Regulation referred to in paragraph 42 above, it would have concluded that the imported mobility scooters were similar to those referred to therein. They are, for the reasons we have already given, findings and conclusions that were open to the FtT and do not interfere therewith. For the reasons we have given the 2009 Regulations apply by analogy to the mobility scooters imported by EME and SM and it follows that we dismiss their cross appeals.

DISPOSITION

96. For these reasons we allow HMRC's appeal to the Upper Tribunal, set aside the decision of the FtT, and dismiss the underlying cross appeals by EME and SM against HMRC's decisions.

COSTS

97. Any application for costs in relation to this appeal must be made in writing and served on the Tribunal and the person against whom it is made within one month after the date of release of this decision as required by rule 10(5)(a) and (6) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MR JUSTICE CAWSON
JUDGE VINESH MANDALIA
Release Date 28 January 2026