

# Head of the Class

**T**he past year, broadly equating to the school year, has seen our valiant VAT & Duties Tribunal Chairmen charged with classifying a plethora of exciting goods, ranging from beautician's plastic nail tips to physicist's spectrometers. I often wonder whether our Chairmen look forward to getting their teeth stuck into thrilling arguments such as whether compression hosiery can be considered a fashion item or whether a patchwork quilt can be described as bedding. On the upside, Chairmen no doubt delight in being requested to inspect the likes of a 1964 Bentley S3 Continental Flying Spur. Such joys are not restricted to members of the judiciary, however. The arrival of a box load of portable CD players at Bedford Square must surely be more exciting by comparison with the regular deluge of reams of dull and dreary accounts.

Let me share the delight of customs duty classification cases with you all. Those of you who are still on holiday as you read this can sit back in your deckchairs whilst I reflect on what we can take away from the decisions that have been promulgated by the Tribunal over the past twelve months. Several such decisions do not involve any points concerning the various rules for interpreting categories, or the order in which those rules should be applied. Those decisions are not considered in this article.

Statistically, it has been a good year for HMRC: five victories from nine appeals. It has similarly been a good year for Messrs Owain Thomas and Andrew O'Connor of Counsel, who have seemingly secured the lion's share of this work acting on behalf of HMRC. Interestingly, many of the taxpayers represented themselves.

Still, the taxpayer was victorious in the world of customs duty's only flirtation with the High Court this year. As expected, this decision, *GE Ion Track Ltd v HMRC* (6 July 2006, as yet unreported)

*Sam Davies, Solicitor, McGrigors, gives us a round-up of the year's customs duty classification cases and asks, what have we learned?*

will stand to be the most helpful of all in providing the customs practitioner with much needed guidance. This is as good a place as any to start.

In the Tribunal (CO 00204), the taxpayer sought to argue that products designed for the detection of explosives by analysing air using an Ion Mobility Spectrometer, for example at airports, ought to be classified under the heading of 'instruments and apparatus for physical or chemical analysis' (90 27), such heading including spectrometers as an example of a type of good capable of falling within that heading. HMRC, however, contended that because the products use beta radiation they ought to fall under the heading 'apparatus based on the use of X-rays or alpha, beta or gamma radiation' (90 22). The rate of duty under 90 22 is higher.

Before we continue with our analysis it is worthwhile at this juncture briefly to remind ourselves of the tenets of customs duty classification.

## The tenets of classification

The level of customs duties on goods imported from outside the EU was determined at EU level on the basis of the Combined Nomenclature (CN). The CN is comprised of the Harmonised System (HS) nomenclature with further EU specific subdivisions. The HS is governed by the World Customs Organisation (WCO). The General Rules for the Interpretation of the CN (GIRs) include (as most commonly cited and insofar as they are relevant for the purposes of this article):

- Rule 1, which directs that the titles of sections, chapters and sub-chapters are provided for ease of reference only;

classification is to be determined according to the terms of the headings and any relevant section or chapter notes;

- Rule 3(a), which provides that where goods are classifiable under two or more headings the heading providing the most specific description is to be preferred to a heading providing a more generalised description;

- Rule 6, which provides that 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 (see the Council Regulation (EEC) 2658/87, Annex 1, Part 1, s 1A).

The GIRs of the CN have the force of law under EU law. There are also Harmonised System Explanatory Notes (HSEs) and Combined Nomenclature Explanatory Notes (CNENs) which, although they are an important aid to interpretation, do not have legally binding force (*Holz Geenn GmbH Case C-309/98*, at paragraph 14).

## The hierarchy of the rules of interpretation

In *GE Ion Track* HMRC sought to rely *inter alia* upon the HSEN to 90 27 (instruments for physical or chemical analysis). The HSEN excludes apparatus falling within 90 22 (X-rays etc) from 90 27. The taxpayer argued, however, that the HSEN was not legally binding and accordingly could not exclude items contrary to the wording of the headings. The Tribunal was of the view that both 90 22 and 90 27 were possible headings for the categorisation of the products but considered that HSEs could not be used in a manner so as to contradict headings. Applying GIR 3(a) the more specific

heading was considered to be 90 27, particularly as spectrometers are specifically included in the list of examples therein. The Tribunal served to illustrate the basic tenet that the heading is paramount.

The High Court (Briggs J) upheld the Tribunal's decision. The Court held that the Tribunal was correct to find that the products were properly classified under both CN 90 22 and CN 90 27. The Tribunal's decision to apply GIR 3 was also considered correct both as a matter of law and fact. The Court pointed out that the unanimous conclusion of the jurisprudence was that the HSEs did not have legal force but provided a guide to the headings, the chapter notes and the GIRs, and were aids to interpretation rather than legally binding rules. It could not be right to choose exclusions in the HSEs independently and before any reference to GIR 3, so that GIR 3 was excluded where a HSE exclusion broke the tie. HSEs were not to be applied where the effect would be to alter the meaning of the heading at issue.

The hierarchy of the rules of interpretation was further illustrated in *Hughes DVT Cushions Ltd v HMRC* (CO 00199). The Tribunal was asked to determine whether the proper classification of socks designed to prevent deep vein thrombosis was 'Pantyhose, tights, stockings, socks and other hosiery, including stockings for varicose veins and footwear without applied soles, knitted or crocheted' (61 15) (the appellant's case) or 'Orthopaedic appliances, including crutches, surgical belts and trusses; splints and other fracture appliances; artificial parts of the body; hearing aids and other appliances which are worn or carried or implanted in the body, to compensate for a defect or disability' (90 21) (HMRC's case). In finding that the socks in question fell within the latter category, the Tribunal noted that even if it was wrong about that, pursuant to Rule 1 of the GIR the Chapter Note to Chapter 90 would have excluded the socks from that Chapter upon the ground that they were 'support articles of textile material whose intended effect on the organ to be supported or held derives solely from their elasticity'. Accordingly, the Tribunal confirmed that exceptions contained in Chapter Notes could be used in a manner so as to contradict headings.

This year has also seen persuasive sources being used by the Tribunal as an aid to interpretation. In *Beamfeature Ltd v HMRC* (CO 00215) the Tribunal referred to a ruling by the WCO. The particular product *Beamfeature* was



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concerned with was a thin, patchwork quilt designed for decorative rather than utilitarian purposes. The issue was essentially whether the product was 'stuffed'. The relevance of the WCO ruling is that it related to a quilted pillowcase apparently known in the trade as a pillow 'sham', which contained a middle layer of 'wadding'. The WCO reasoned that the wadding was relatively thin and that consequently the sham was neither stuffed nor internally fitted with any material. The point was also made that the sham could not be used on its own as an article of bedding. The Tribunal viewed the WCO ruling as analogous and decided accordingly that the product ought to be excluded from the heading covering 'internally fitted quilts' (94 04).

#### In a class of their own

The final decisions worthy of mention will stir the hearts of classic car lovers. Every year many enthusiasts importing classic cars seek to do so free of duty by asserting that the vehicle is a collector's item (97 05) as opposed to a regular means of transport (87 03). Those who have done so will testify that 'collector's item' is a high standard to meet. Certainly Messrs Burford and Paul will agree (*Andrew Burford v HMRC* (CO 00205), *Julien Sibree Paul v HMRC* (CO 00210)). These motoring enthusiasts imported a Ford Fairlane 500 Galaxie Skyliner Retractable and a Bentley S3 Continental Flying Spur, respectively. Some might say that these cars give the impression of being collectors' items by name alone! HMRC disagreed. The relevant CNEN to 97 05 is based on a European Court of Justice decision in *Erika Daiber v*

*Hauptzollamt Reutlingen* Case 200/84 (Judgment 10 October 1985) and sets out the relevant criteria to consider in determining whether a motor vehicle can be considered a collector's item. These requirements include, but are not limited to:

- possessing a certain scarcity value;
- not normally used for their original purpose;
- the subject of special transactions outside the normal trade in similar utility articles;
- of high value; and
- illustrate a significant step in the evolution of human achievements or a period of that evolution.

Both Mr Burford and Mr Paul managed to persuade the Tribunal on many of these factors. Photos, plans, original promotional material and expert evidence were provided. However, neither appellant managed to convince the Tribunal that his vehicle was of sufficiently high value. In *Burford* the Tribunal noted that the Advocate-General in *Daiber* commented that one would expect a truly collectable car to fetch a higher price than a new car; indeed several times the price of a new car. Mr Burford's car cost him £22,000. In *Paul* the Tribunal similarly cited *Daiber* but instead focused on the present-day value of the original cost. The original cost was £7,681 which, according to the Tribunal, if adjusted for inflation would amount to about £105,000 today, considerably more than the present-day value. Mr Paul's car cost him £41,802. Following these radically different decisions it seems that uncertainty looms for classic car importers, and many more classic cars can be expected to be spotted heading for the vicinity of Bedford Square, WC1 (for information, there is a secure underground car park conveniently situated a short distance away in Bloomsbury Square Gardens). One thing that is certain, however, is that in deciding that neither car met this standard, the Tribunal confirmed that the tests are strictly applied.

No doubt as our Tribunal Chairmen relax in the late summer sun, taxpayers, advisers and HMRC are already preparing for future battles in the customs duty classification arena in readiness for the start of the new 'school term' when everyone goes back to work. The mind boggles as to what exciting items may fall to be classified in the coming year. Certainly there will be more appeals in relation to the importation of classic cars. Just as to what else may arise, however, we shall have to wait and see.