TC01294

Appeal number: TC/2010/05433

Customs Duty – classification – whether devices used in medical sciences and within heading 9018 – nature of use – relevance of explanatory notes in determining question – on criteria in heading and notes, held not within heading – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

OUTSIDE IN (CAMBRIDGE) LTD trading as LUMIE **Appellant**

- and -

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

TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
SHAHWAR SADEQUE

Sitting in public at 45 Bedford Square, London WC1 on 11 May 2011

Jonathan Cridland, CEO of the Appellant for the Appellant

Jonathan Davey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal relates to two tariff classification decisions made by the Respondents ("HMRC") in respect of products manufactured for the Appellant in China. The first of these classifications was for a product known as Lumie Arabica. The second was for a product known as Lumie Clear. Under binding tariff information ("BTI") reference GB 118971545 Lumie Arabica was classified by HMRC as falling within tariff code number 9495403590 (relating to lamps and light fittings not specified elsewhere). Under BTI reference GB 119372566 Lumie Clear was classified by HMRC as falling within tariff code number 8543709099 (relating to electrical machines and apparatus not specified elsewhere).

The legal framework

2. We are grateful to Mr Davey for his description of the legal framework, which with minor modifications we adopt.

3. The EU's customs tariff ("the Tariff") applies to the import of goods across the external borders of the EU. Classification of goods for the purposes of the Tariff takes place in accordance with the Combined Nomenclature ("CN"). The CN is set out in Annex 1 to Council Regulation 2658/87 ("the CN Regulation") and is updated annually by way of Regulation. The CN is based on the worldwide harmonised commodity description and coding system ("HS") drawn up by the Customs Co-operation Council (now the World Customs Organisation) (see further *Intermodal Transports BV v Staatssecretaris van Financien* (Case C-495-03) [2006] 1 CMLR 32 at paragraph 4). Having been effected by way of Regulation, the CN is directly applicable in the UK. The CN provides a systematic classification for all goods. The aim of the CN is to ensure that any particular product falls to be classified in only place within the nomenclature. This aim is aided by the general rules for the interpretation of the CN ("GIRs").

4. The GIRs, like the CN, are set out within the CN Regulation. The GIRs provide (among other things):

> "Classification of goods in the Combined Nomenclature shall be governed by the following principles:
>
> 1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
>
> 2. . . .
>
> 3. . . .
>
> 4. . . .
>
> 5. . . .

> 6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and mutatis mutandis to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires."

5. In addition to the GIRs, the explanatory notes to the CN ("CNENs") and the explanatory notes to the HS ("HSENs") also provide interpretative assistance (see for instance *BAS Trucks BV v Staatssecretaris van Financien* [2007] (Case C-400/05) at paragraph 28). Unlike the GIRs, neither the CNENs nor the HSENs are legally binding (*Intermodal* at paragraph 48).

6. Determinations as to the classification of particular goods under the CN are made in accordance with the EC customs code established by way of Regulation 2913/92 ("the EC Customs Code Regulation"). Such determinations are made by way of BTIs by customs authorities (Article 12 of the EC Customs Code Regulation). As regards the proper approach to such classification, in *Intermodal* the ECJ stated the position in the following terms (at paragraph 47):

> "According to settled case law, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters."

The facts

7. The evidence consisted of a bundle of documents provided to the Appellant on the day of the hearing and to the Tribunal either on the same day or the day before; we comment below on the timing of its provision. In addition the Appellant provided certain further documentation at the hearing, and following the grant of an application made subsequently, the Appellant provided other documentation which it considered should have been included in the bundle. For HMRC, a witness statement was provided by Perry Young, a Review Officer; Mr Young also gave oral evidence. Various items of information were provided by Mr Cridland and Douglas Fernie, the Technical Manager of the Appellant; these did not take the form of formal evidence, but where appropriate we have taken this information into account. We deal with the evidence in the order corresponding to the respective dates of the Appellant's BTI applications for the two products. The Appellant demonstrated samples of each product at the hearing. From the evidence, we find the following facts: where appropriate, we consider disputed evidence later in this decision.

Lumie Arabica

8. Lumie Arabica is described by the Appellant as a light therapy medical device for the treatment of Seasonal Affective Disorder ("SAD"). It is classified as a Class 2a medical device. It is a white rectangular panel which emits bright white light, with a minimal UV content. It is mains-powered, and manufactured in China to a British

design. The instructions do not state the dimensions, but we would estimate the height at approximately 40-50 cm and the width at approximately 25 cm. It is placed 50 cm away from the user, or further away if the user is not comfortable with the light level. When used at 50 cm, the suggested daily exposure is between one and two hours, but this should be increased if the distance is greater.

9. On 30 September 2009 the Appellant applied to HMRC for a BTI in respect of Lumie Arabica. The description of the product in the application was:

> "A light therapy product, classified as a Class IIa medical device, for the treatment of Seasonal Affective Disorder and Subsyndromal Seasonal Affective Disorder. Seasonal Affective Disorder is classified by the World Health Organisation as a recurrent depressive disorder. This product uses visible light generated by two compact fluorescent lamps and derives its therapeutic effect through a medically documented visual stimulus. The product is powered directly from the mains supply and is controlled by a button switch which switches on and off the light source. The product is manufactured from plastics with a bright aluminium reflector."

10. The Appellant specified the "Classification Envisaged" at question 7 on the form as "Nomenclature Code 9018", ie "Instruments and appliances used in medical, surgical, dental or veterinary sciences, including scintigraphic apparatus, other electro-medical apparatus and sight testing instruments".

11. On 16 October 2009 HMRC wrote to the Appellant enclosing the BTI. This classified the Lumie Arabica under heading 9405403590; it was excluded from heading 9018 because it was not considered to be a medical device. On 19 October 2009 Mr Cridland sent a fax to HMRC to express disagreement with this decision. He pointed out that the product was legally required to be certified as a Class IIa medical device and that it was in the course of certification. He enclosed a document detailing the requirements and also a copy of the Appellant's EC Certificate for Production Quality Assurance under Directive 92/42/EEC for Medical Devices, Annex V and an attached schedule for currently certified products.

12. On 22 October 2009 HMRC responded. Their conclusion was that the product was correctly classified under heading 940503590. In a letter showing the date as 22 October 2009, but which we find must have been written subsequently, HMRC wrote again, referring to Mr Cridland's letter dated 26 October, with which he had enclosed information from various medical sources relating to SAD. HMRC indicated that their continuing view was that for tariff classification purposes Lumie Arabica was not a medical instrument or apparatus.

13. On 6 January 2010 Mr Cridland responded to HMRC's incorrectly dated letter. He referred to the officer's statement suggesting that Lumie Arabica could be used for household lighting and that it did have the appearance of a general purpose light source. Mr Cridland referred to the information given in his letter dated 26 October, indicating that Lumie Arabica was considerably brighter than a general lighting product, and also that the appearance of the unit was such that it would be unlikely to be used for general household lighting, this not being the intended use of the product

or how it was marketed. He maintained his request for classification under heading 9018.

14. Following an email from HMRC, Mr Cridland wrote to HMRC on 26 January 2010 with a sample of Lumie Arabica for further consideration of the tariff code.

15. On 16 February 2010 HMRC wrote to Mr Cridland stating the officer's conclusion that Lumie Arabica was not a medical device within heading 9018. The officer quoted the HSEN to heading 9018; this is considered below. The officer stated that a product which provided lighting at a much higher level than normal household lighting was not the type of product which he considered would be used only in professional practice. Consequently, Lumie Arabica was classified as a lamp under heading 9405.

16. On 6 April 2010 Mr Cridland wrote to HMRC requesting a review of the BTI for Lumie Clear. He questioned HMRC's interpretation of the guidance notes for heading 9018.

17. On 26 May 2010 Mr Young wrote to Mr Cridland setting out the results of HMRC's departmental review. This covered both products. In respect of Lumie Arabica, Mr Young's view was that he agreed with the original decision. He stated:

> "The Lumie Arabica is a lamp which provides additional light. There is no rule for Tariff heading 9405 that requires a maximum or minimum brightness and I have concluded that the Lumie Arabica has been classified correctly on BTI GB118971545 and that the product is classified as follows. . . 940540 35 90 Other."

Lumie Clear

18. Lumie Clear is described by the Appellant as a light-based medical device for the treatment of Acne Vulgaris. It is classified as a Class 2a medical device. It emits blue and red light generated by an array of LEDs. It is powered by a mains-to-DC power adaptor. It can be used either hand-held for close-up use, or on its own stand to treat a wider area. The recommended treatment time varies depending on the distance between the Lumie Clear and the skin of the person being treated. For use in contact with the skin, the time is 15 minutes per day. For use at 10 cm distance, it is 30 minutes per day. At 20 cm, it is 60 minutes per day, and at 30 cm, 120 minutes per day. Daily use is recommended. Results of using the Lumie Clear should be expected in about 8 to 12 weeks. Even at minimum distance, the Lumie Clear is designed to treat a specific area rather than a single spot.

19. On 5 November 2009 the Appellant applied to HMRC for a BTI in respect of Lumie Clear. The description of the product was as follows:

> "A light therapy product, classified as a Class IIa medical device, for the treatment of mild to moderate Acne Vulgaris. This product emits blue and red light generated by an array of LEDs and derives its therapeutic affect [*sic*] through medically-documented mechanisms. The product is powered by its own DC power adaptor and is controlled

> by a button switch which switches on the light source for a duration of 15 minutes. The product can be hand-held or placed in its own base unit."

20. The Appellant specified the "Classification Envisaged" at question 7 on the form as "Nomenclature Code 9018" (ie as at paragraph 10 above).

21. On 23 November 2009 HMRC issued a BTI classifying Lumie Clear under heading 9405, ie "Lamps and lighting fittings including searchlights and spotlights and parts thereof, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like, having a permanently fixed light source, and parts thereof not elsewhere specified or included". The full classification was 940503990. In the covering letter HMRC stated:

> This product has been excluded from heading 9018 as it is not considered to be apparatus specifically used in medical applications."

22. By his letter dated 7 January 2010, Mr Cridland requested a reconsideration of this decision. HMRC responded on 11 January 2010, indicating that the classification under heading 940503990 was considered to be correct. In addition to heading 9018, the officer had also considered heading 8543 ("Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter") and the description of another product referred to in Commission Regulation (EC) No 119/2008, but had concluded that the specified product differed from Lumie Clear in that it incorporated an electric motor and pulses, whereas the Lumie Clear only emitted red and blue light.

23. By his fax dated 26 January 2010 Mr Cridland requested a further reconsideration of HMRC's decision. Following a request from HMRC, he sent a sample of the Lumie Clear to the relevant officer. HMRC responded on 16 February 2010; the officer's conclusion after reconsideration was that the product had been incorrectly classified under the heading 940503990, as the product was not used for illumination. In relation to heading 9018 the officer stated:

> "Whilst I recognise that the Lumie Clear can be used to ease the effects of mild to moderate acne vulgaris condition it is designed to work in conjunction with a patients existing acne treatment. And is therefore not considered to be a medical device to **treat or cure** an **illness** but is used purely for cosmetic purposes. The regulation below was introduced in 2008 to classify a similar product.
>
> Commission Regulation (EC) No 119/2008 relates to a product designed for hair removal and for skin treatment ranging from purely cosmetic to rejuvenation to removing age spots, uneven pigmentation and threat [ie thread] veins, used in beauty parlours. This apparatus works by means of intense pulsed light (IPL). The product was classified under 85437090 by the Commission and member states. Classification under 9018 as a medical device or appliance was excluded as the product did not provide medical treatment and was not used in professional practice.

> The product of this regulation incorporates an electric motor and pulses. The Lumie Clear emits red and blue lights of certain frequencies and is therefore considered to be a similar device to the one mentioned in this regulation."

24. On 18 February 2010 the officer issued a replacement BTI, the classification being 8543709099. Heading 8543 covers: "Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this Chapter".

25. By letter dated 15 March 2010, the Appellant requested a reconsideration of this decision. HMRC's letter dated 6 April 2010 set out the result of this reconsideration; in the officer's opinion the product had been correctly classified.

26. On 13 April 2010 Mr Cridland wrote to HMRC on behalf of the Appellant to request a formal departmental review, as the Appellant believed that the appropriate classification was under heading 9018. Mr Cridland enclosed a copy of the Clinical Evaluation for Lumie Clear prepared by Dr Rakesh Patalay, a clinical research dermatologist at Hammersmith Hospital, and a copy of the certification of Lumie Clear as a Class 2a medical device. He also referred to the classification of acne vulgaris as a disease.

27. In his letter dated 26 May 2010 to Mr Cridland, Mr Young set out the results of HMRC's departmental review in respect of Lumie Clear. He referred to the information which Mr Cridland had provided, indicating that using a combination of both red and blue light therapy was an effective and safe treatment for acne. He stated:

> "I have no reason to question the effectiveness of this treatment but I can find no evidence of its use by health professionals.
>
> . . .
>
> Having considered all the arguments, I do not consider the Lumie Clear to be used for medical, surgical dental or veterinary sciences. It is a product for the treatment of mild to moderate acne vulgaris using light and is available to purchase by the public for use without medical supervision and for these reasons, it is excluded from Tariff heading 9018."

He concluded that the decision to classify the Lumie Clear to Tariff heading 8543709099 was correct.

28. Notice of Appeal to the Tribunal in respect of both decisions on review was given on 17 June 2010.

Arguments for the Appellant

29. Mr Cridland put his arguments relating to the products in the order used in his skeleton argument.

Lumie Clear

30. This was a medical device. He submitted that heading 9018 was therefore the correct one, despite the various contradictory views from HMRC. Lumie Clear was for the treatment of mild to moderate acne vulgaris. It was required under the Medical Directive to be classified as a medical device, and had been so certified. He referred to the Clinical Evaluation prepared by Dr Rakesh Patalay.

31. Heading 9018 seemed fairly explicit. One of the arguments put by HMRC had been that the HSEN referred to use only in medical practice. HMRC had referred to the wording of the HSEN (considered below). However, the GIRs set out above (see paragraph 4) indicated that classifications were to be determined from the headings. These were legally binding, whereas the HSEN was not, being merely a guide. He submitted that the emphasis should be placed on the heading and not the HSEN. The HSEN was not stating as a requirement that the appliance should be used only in professional practice, but was merely making the observation that in the vast majority of cases alliances falling under this heading were so used.

32. Lumie Clear was a device for the consumer to use at home, but it could be used in professional practice. The Medical Devices Directive required that a device should treat a recognised medical condition. Both Lumie Clear and Lumie Arabica came within this description. The Clinical Evaluation had been part of the process of registration under the Directive.

33. The argument went back to use in professional practice. There were three points:

(1) Heading 9018 did not specify this;

(2) The HSEN was only an observation;

(3) He submitted that Lumie Clear could be used in professional practice, although he accepted that this was less likely, unless a more powerful version of the device were to be produced.

34. He referred to the exchanges in the course of correspondence. Acne vulgaris had been certified by the World Health Organisation as a disease, and therefore it amounted to a medical condition. He referred to the increasing trend for medical devices to be designed for home use. HMRC had selected a product to compare; this had been different from Lumie Clear as that product was not for treating a medical condition. He submitted that Lumie Clear was for treating a medical condition, and that therefore it was not appropriate for the other product to be used as the basis for a comparison.

35. In summary, Lumie Clear was for treating a medical condition; it was absolutely within heading 9018, being designed specifically for the treatment of mild to moderate acne vulgaris, which was the key argument for it to be classified under that heading.

Lumie Arabica

36. This was also a Class 2a medical device, for the treatment of SAD. SAD was recognised by the World Health Organisation as a disease. A recognised treatment was the use of very bright light. This could be in particular parts of the spectrum, or in very large quantities. Mr Cridland referred to the Clinical Evaluation Report, which described the effects.

37. The arguments for classification of Lumie Clear under heading 9018 also applied to Lumie Arabica. The primary purpose of Lumie Arabica was the treatment of SAD. HMRC had not made any comparison of Lumie Arabica with other products. He accepted that this product was perhaps unusual and did not fall into the particular "buttonhole".

Points put in reply

38. In relation to both products, he emphasised that the Directive related to the safety and efficacy of apparatus used for medical purposes. He submitted that this was relevant in relation to heading 9018.

39. He submitted that the appropriate classification for Lumie Clear was 90189085, ie "Other" under the sub-heading "Other instruments and appliances". In relation to Lumie Clear, this took precedence over heading 8543, as the HSEN relating to 8543 specified that it covered "all instruments and appliances and apparatus, not falling in any other heading of this Chapter, nor covered more specifically by a heading of any other Chapter of the Nomenclature." The HSEN referred to "certain instruments and apparatus of Chapter 90".

40. He referred to the comparison of Lumie Clear with the device referred to in EC Regulation 119/2008 (as mentioned at paragraph 23 above). He submitted that products under 8543 were of a different nature, as the heading did not refer to medical products. He referred to the objective purpose of Lumie Clear.

41. In relation to Lumie Arabica, the description of SAD on the NHS Direct website showed that professional practices were involved in advising on light therapy; in particular, it stated under the heading "How do I get light therapy?":

> "Before undertaking light therapy, it is best to visit your GP to discuss what type of therapy would be best for you. Your GP will be able to give you advice on how you should be using this type of treatment, and will also be able to advise you on what to do should you suffer from any kind of side effects."

42. Thus Lumie Arabica, as well as Lumie Clear, should be classified under heading 9018.

Arguments for HMRC

43. Mr Davey referred to his description of the legal framework (see paragraphs 3-6 above). The dispute related to the validity or otherwise of two classifications by

HMRC; at its centre was the CN. This essentially comprised a series of descriptions. Ideally there should be one place per item. The descriptions did not sit in a vacuum. The starting point was the sections, as shown in the "Integrated Tariff of the United Kingdom"; the chapter titles were subdivisions of the sections. The GIRs assisted interpretation. The Explanatory Notes (CNENs and HSENs) did not technically have the force of law, but were highly persuasive. An important factor was that any similarities should be taken into account.

44. The way of linking a product to a particular classification had been described in *Intermodal* (see paragraph 6 above). It was not appropriate to look at the subjective intention; the objective characteristics of the product should be examined. The headings were legally binding.

45. These proceedings concerned the validity of HMRC's classification of the two products. Under s 16(6) of the Finance Act 1994, the burden of proof was on the Appellant to satisfy the tribunal that the classifications were wrong, rather than on the Respondents to prove that they were correct.

46. The Appellant specialised in light therapy products, which suggested that light was a significant element in the decision as to classification.

Lumie Arabica

47. This product could be bought by anyone. Mr Davey referred to the heading of 9405, and to Mr Young's analysis in his review letter (summarised at paragraph 17 above). The HSENs described the items covered by heading 9405.

48. The Appellant had argued that heading 9018 should be looked at. Examination of Section XVIII (comprising Chapters 90, 91 and 92) contained no mention of any lamps. Thus, at the very least, it was not obvious that Lumie Arabica fell within that Section. Examination of the sub-headings of 9018 showed that on the face of things, the items being described were very different from what was under consideration here. Mr Davey referred to the HSEN (considered below) and to its construction, and questioned whether it applied.

49. There had been no formal evidence relating to the professional medical use of the product; the NHS Direct website information mentioned that light boxes were not currently available on the NHS. The real question was, what was the most appropriate description of the item? One of the choices was professional medical practice, but HMRC said that the other heading under 9405 was the appropriate one.

50. The Appellant relied on the Directive. Ultimately this was a health and safety Directive, which made no reference to the CN, nor did the CN refer to the Directive. The fact that the product fell within the Directive did not answer the question under appeal, ie the position under the CN.

51. The Appellant had referred to the primary purpose of the product. There was no concept of primary purpose; reference had to be made to the objective characteristics.

HMRC did not deny that the intended use of a product could potentially constitute an objective criterion for classification purposes, but for this to be the case, the intended use must be "inherent to the product" (*Olicom A/S v Skatteministeriet* (Case C-142-06) [2007] All ER (D) 268 (Jul) at paragraph 18). HMRC did not accept that this was so here. The Appellant's marketing material referred to its light boxes (of which Lumie Arabica was one) as constituting "a great way of improving your work environment". HMRC contended that even on the premise that Lumie Arabica could be used to treat SAD, it was not obvious that such use was inherent to the product or in some way as of primary status as contrasted with other uses.

52. Mr Davey submitted that the classification of Lumie Arabica as a lamp under heading 9405 should stand.

Lumie Clear

53. Mr Davey referred to the characteristics of Lumie Clear. It could be bought over the internet. He submitted that it had been proper for HMRC to take the view on classification that the product fell within heading 8543. Looking at the comparison with the device referred to in EC Regulation 119/2008, this was an example which worked by light; it dealt with a skin condition, and did not involve contact with the skin. Thus there were similarities. Further, the Annex to the Regulation specifically mentioned that the other device specified "does not provide any medical treatment and is not used in professional practice (see the HS Explanatory Notes to heading 9018)".

54. Looking at Section XVIII, and Chapter 90, it was not obvious that Lumie Clear fell within that Section or Chapter. Nothing listed under heading 9018 was similar. These were items used by doctors, surgeons, vets and so on. The HSEN described the context. There had been no witness statement or expert's report for the Appellant which was specific to this legislation. There was no evidence to show that Lumie Clear was used in professional practice. Thus its classification should stand.

Summary of HMRC's submissions

55. The classification decisions were perfectly proper, based on the wording of the CN, the HSENs and case law. It was not the task of HMRC to interpret the CN, but to classify. It was accepted that there would be difficulties. HMRC had taken a "safe" approach by classifying Lumie Arabica as a lamp, and Lumie Clear as a light-emitting electrical appliance. This was by reference to their objective characteristics. The products were freely available over the internet. There had been no real evidence that they were used in professional practice. Given the lack of such evidence, it would be inappropriate to allow the appeal, which would involve classifying these products alongside products used by doctors. The classifications should stand and the appeal should be dismissed.

Discussion and conclusions

56. As Mr Davey submitted, the burden of proving that the classifications were not correct falls on the Appellant. To satisfy us that the classifications should be changed, the Appellant needs to show that heading 9018 is the most appropriate for both Lumie Arabica and Lumie Clear.

57. Leaving aside for the present Mr Cridland's submission that the HSEN was only an observation, we need to consider whether the two products are, within the terms of heading 9018, "appliances used in medical . . . sciences". Apart from the question of how much factual evidence there is to support this contention, there is a question of construction.

58. Without any supplementary explanation, heading 9018 does not specify the extent to which an appliance is required to be used in medical sciences in order to fall within the heading. However, an item which can be expected to be used only occasionally for such purposes does not appear to justify inclusion under heading 9018. We interpret this heading as applying to items whose objective characteristics show that they are predominantly medical in nature, and that, on the basis of the approach in *Olicom*, their intended use for medical science (and not merely for medical *purposes*) is inherent to the product. We consider that this approach is particularly relevant in a case where, as here, the heading under which the Appellant seeks to classify the appliances specifically refers to the use of the items covered by the heading.

59. We accept Mr Cridland's submission that the HSENs are not legally binding. However, as Mr Davey indicated, they are highly persuasive. The HSEN relating to heading 9018 includes the following comment:

> "This heading covers a very wide range of instruments and appliances which, in the vast majority of cases, are used only in professional practice (eg, by doctors, surgeons, dentists, veterinary surgeons, midwives), either to make a diagnosis, to prevent or treat an illness or to operate, etc."

60. There is an element of possible ambiguity in the language used. Does the phrase "which, in the vast majority of cases, are used only in professional practice" qualify each such instrument or appliance, or can the note be read as accepting that there may be some appliances which might be more generally used outside professional practice, but occasionally used within it?

61. As the purpose of the CN is to find the most appropriate classification for each individual item, we consider the better interpretation of the HSEN to be that the phrase qualifies each instrument or appliance. Accepting the other interpretation could result in an appliance being classified under this heading despite its objective characteristics being predominantly of a different nature and thus justifying its classification under a quite different heading. We therefore agree with Mr Young's understanding as expressed in his witness statement, although we have some reservations as to the final part of his comment:

> "It is not my understanding that it is an exception which would include products which are used solely outside professional practice. That would render the specific references in the heading itself a nullity – as all of the sciences listed under Chapter heading 9018 relate to some form of professional practice."

62. We are not persuaded by Mr Cridland's argument that the HSEN to heading 9018 is merely an observation. We find the note consistent with our interpretation of the heading itself. It confirms that the nature of an appliance must be that it is to be almost exclusively used in medical sciences, ie (where appropriate) in professional practice, in order to fall under the heading. In relation to Mr Young's final comment as set out above, we do not think that the heading is necessarily confined to professional practice as that term is generally understood; for example, it appears that the heading would be appropriate for appliances used for research in the course of medical science.

63. Mr Young also acknowledged in his statement that the HSEN allows for classification under this heading of instruments and appliances which are not used only in professional practice. His understanding was that the heading is designed to cover also those products which, in limited circumstances, are used both in and outside professional practice. We agree with this view. It would be inappropriate for an appliance to be excluded from this heading merely because there were a few isolated examples of its use outside medical practice. However, this does not extend to cases where an appliance is used to a significant extent outside medical practice. Such use must be unusual or exceptional in nature for the appliance to remain within the heading.

64. Thus the questions to be asked in respect of both Lumie Arabica and Lumie Clear are:

(1) Do the characteristics of the appliance show that it is predominantly medical in nature?

(2) Is the intended use for medical science inherent to the product?

(3) In the vast majority of cases, is the product used only in professional practice?

65. We are entirely satisfied, on the basis of the documentary evidence provided, that both devices are predominantly medical in nature. Lumie Arabica is a specialised form of light. Although (as mentioned in the Appellant's marketing literature) it can be used for enhancement of the general working environment, the brightness and spectral content of the light relates specifically to the treatment of SAD. It does not appear to us that an appliance of this nature would normally be used for general lighting purposes. The recommended proximity of the appliance, 50 cm, does not greatly resemble the distance at which general forms of lighting are used. Having seen it demonstrated, we consider that Lumie Arabica is not obviously to be considered as a general lighting device. In the case of Lumie Clear, acne vulgaris is acknowledged to be a recognised medical condition, and the characteristics of the appliance are specifically related to the treatment of that condition. Thus, if this first test were the

only one to be satisfied, the Appellant would have satisfied us that its desired classification was appropriate. However, it is necessary to satisfy the other two tests.

66. In relation to the second test, the basis on which the appliances are marketed and the format of the instruction manuals do not appear to us to be consistent with any suggestion that they are inherently for use for medical science. They are freely available on the internet to any purchaser, whether an ordinary consumer or a medical practitioner. The instruction manuals appear to be aimed at ordinary consumers rather than medical professionals. The Lumie Arabica manual, under the heading "Precautions", states

> "However, please check with your doctor first if any of the following apply . . ." Additionally – "IMPORTANT: The guidelines in this leaflet are not medical directions for treating any condition. If your doctor has suggested using light therapy, follow their instructions and discuss any effects with them".

Above the Lumie Arabica questionnaire in the manual, designed to monitor progress, the following comment appears:

> "You might like to talk it over with your doctor or another person in your household."

67. In the Frequently Asked Questions section of the Lumie Clear manual, one question is: "Can I use my normal creams/lotions/cleansers? The last part of the answer states:

> "As your acne improves with Lumie Clear, other acne treatments could be gradually reduced or stopped. This should be under the direction of your doctor if they have been prescribed."

68. Our conclusion is that these appliances are not inherently for use for medical science, but are instead appliances for general consumer use. We do not ignore the possibility that they may be used by doctors or other professional medical practitioners, but this is a question of evidence, dealt with below, and does not in any event affect our conclusion on this test.

69. To fulfil the third test, it would be necessary for the Appellant to satisfy us both that the appliances were used in professional practice, and that in the vast majority of cases this was the only use to which they would be put. For the reasons we have given in relation to the second test, we do not consider that the use of either Lumie Arabica or Lumie Clear by persons not involved in professional medical practice is minor or miniscule as compared with their use by those involved in such practice. We arrive at this view without need to consider whether there is any evidence of use by medical professionals, although for the reasons set out below we accept Mr Davey's submission that the Appellant had not produced any such evidence, even though Mr Cridland did satisfy us as to the medical nature of both appliances.

70. Mr Young explained in his witness statement that having reviewed the material with which he had been provided when he had been asked to conduct his review, he had been given no supporting evidence that the products in question were used in

professional practice. In oral evidence he indicated that his view had not been altered by seeing the Clinical Evaluation Report or the other material relating to the definition of medical sciences and disease classifications included in the bundle. To change his view, he would need some evidence of contracts or sales involving the NHS. There was no evidence that the appliances were prescribed either by the NHS or even by private clinics. We accept his evidence, and agree that such other material would be necessary in order to demonstrate that the appliances were used in professional practice.

71. The NHS Direct website indicates that "Light boxes are not currently available on the NHS". Apart from this specific comment, there is no evidence of light boxes being prescribed by NHS doctors on a private basis, or of prescriptions being provided by private medical practitioners. Further, there is no evidence of light boxes being used by medical practitioners themselves either in NHS practice or private practice. Correspondingly, there is no evidence that Lumie Clear is available on NHS prescription or through private prescription, and no evidence of its use in medical practice. Although Mr Cridland referred to the possibility that Lumie Clear might be used in medical practice, he did acknowledge that this was unlikely, as more powerful apparatus would be needed than for use in the home environment.

72. In citing the Medical Devices Directive, Mr Cridland referred to the treatment of a recognised medical condition. Although we have made similar references above, we should point out that in the definition of 'medical device' at Article 2(a), reference is made to ". . . treatment or alleviation of disease", rather than to a recognised medical condition. However, we have concluded that the principal criteria to be satisfied in the context of heading 9018 relate to the use of the product, and therefore the medical nature of the devices is less significant. Further, we do accept Mr Davey's submission that a definition in a Directive of a 'health and safety' nature is not in itself a strongly persuasive indication when looking in the different context of classification of devices for tariff purposes.

73. As both products do not meet the second and third tests set out above, we hold that the requirements of heading 9018 are not fulfilled. Accordingly, the Appellant has not succeeded in establishing that the respective BTIs should be changed. Thus we have to dismiss the Appellant's appeal, despite our acceptance that both devices are medical in nature.

Late submission of documentation

74. A preliminary hearing for the purpose of giving directions in this appeal was arranged for 7 February, but HMRC's Solicitor's Office wrote to the Tribunal on 4 February 2011 with directions agreed between the parties. The agreed directions were approved and the preliminary hearing was vacated. The directions required HMRC to serve their skeleton argument seven days in advance of the hearing date, and to file and serve the agreed bundle three days in advance of the hearing date. The skeleton argument was not provided on time to the Appellant, as HMRC's Solicitor's Office emailed it to the Appellant on 9 May. The despatch time was 16.54. The message was also copied to the generic Tribunal address for London Tax Appeals. The attached

covering letter indicated that the Solicitor's Office was in the process of finalising the trial bundle, and that owing to the time constraints, the Solicitor's Office would have to deliver a copy of the bundle to the Appellant on the morning of the hearing.

75. We consider it unacceptable for the skeleton argument and bundle to have been delivered late, in contravention of the directions agreed between the parties. Because of the delay in supplying the bundle, the Appellant's skeleton argument could not be amended to put in the correct page references to the bundle. The Appellant may have been familiar with a large proportion of the documents, but the late delivery may well have caused difficulty for the Appellant, possibly putting it at a disadvantage in presenting its case. In future appeals, we expect HMRC to comply with directions, whether made following a preliminary hearing or agreed between the parties.

Right to apply for permission to appeal

76. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK

TRIBUNAL JUDGE
RELEASE DATE: 5 July 2011