



TC04843

Appeal number: TC/2014/06691

*CUSTOMS DUTY – whether product a digital camera or a watch –
“principal function” and “essential character” – relevance of marketing
materials – appeal allowed*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

VTECH ELECTRONICS EUROPE PLC

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JONATHAN RICHARDS
DUNCAN McBRIDE**

**Sitting in public at The Royal Courts of Justice, Strand, London on 11 and 14
December 2015 and having reviewed further written submissions submitted on 4
January and 6 January 2016**

Amanda Brown of KPMG LLP for the Appellant

**Isabel McArdle, instructed by the General Counsel and Solicitor to HM Revenue
and Customs, for the Respondents**

DECISION

1. This appeal concerns the classification of the “Kidizoom smart watch” (the “Product”) for customs duty purposes. The appellant, Vtech Electronics Europe plc (the “Company”) considers that the Product should be classified as a camera under commodity code 8525 8030 under the following Headings and Subheadings of Chapter 85 of the Combined Nomenclature annexed to the Common Customs Tariff:

8525 ... television cameras, digital cameras and video camera recorders

8525 8030 digital cameras

2. However, on 13 October 2014, HMRC issued a Binding Tariff Information Ruling (“BTI”) which classified the Product under commodity code 9102 1200 under the following Headings and Subheadings of the Combined Nomenclature:

9102 wristwatches, pocket-watches and other watches, including stopwatches other than those of heading 9101

-wristwatches, electronically operated, whether or not including a stopwatch facility

9102 1200 with opto-electronic display only.

3. HMRC reviewed this decision and on 19 November 2014, they wrote to the Company to confirm that their view remained unchanged. The Company now appeals to this Tribunal against this decision.

4. HMRC and the Company are agreed that the only two potentially relevant commodity codes are 8525 8030 and 9102 1200.

Evidence

5. Clive Richardson, the Marketing Director of the Company, prepared a witness statement, gave oral evidence at the hearing and was cross-examined. Part of Mr Richardson’s evidence involved a demonstration of the Product. We found Mr Richardson to be an honest and reliable witness.

6. We had no witness evidence on behalf of HMRC.

Findings of fact

The business of the Company

7. As part of its business, the Company develops and sells high-quality, innovative electronic products that, in the words of Mr Richardson, “enrich children’s development through fun and smart play”.

8. Since the Company's manufacturing takes place outside the UK, it imports the Product into the UK prior to selling it to customers in the UK. These imports give rise to the customs duty at issue in this appeal.

The external appearance of the Product

5 9. The main housing of the Product has dimensions of 5cm x 5cm and a thickness of 1 cm. That is attached to a strap and buckle which enables it to be worn around the wrist. The main housing of the Product is both larger and considerably thicker than most conventional wrist watches (whether of a child or an adult) would be.

10 10. The upward facing part of the main housing of the Product is taken up by a 3cm x 3cm touch sensitive screen which can be used to navigate through the various functions of the Product.

15 11. On the left hand and right hand sides of the main housing of the Product are two buttons: a "home" button and a "camera" button. The camera button is used to take digital photos and video footage and to select the Product's camera function described in more detail below. The home button is used to access various menus from which items can be selected on the touch screen. The home button can also be used to go back to a previous sub-menu on the touch screen. Pressing and holding the home button turns off the touch screen. On the right hand side of the Product there is also a USB port which enables the Product to be connected to a computer, both to recharge
20 its battery and to enable digital content stored on the Product to be transferred to a computer.

12. On the top side of the Product there is a lens for a digital camera. On the reverse of the main body is a master power switch.

Overview of functions of the Product

25 13. In very broad summary, and without at this stage making any findings as to the respective importance of these functions, the Product has the following main functions:

30 (1) It operates as a digital camera and can take both still photos and video footage (including sound). It also allows digital effects to be added to both photos and videos.

35 (2) Up to 10 borders can be added to a photo that has been taken (for example the photo can be included in a snow-like frame including cartoon polar bears and penguins). Up to three colour effects can be added (for example giving photos a reddish or greenish tinge). There are also two effects that distort the photograph (in the same way as someone's reflection in a curved mirror might be distorted).

(3) Up to four borders can be added to video footage (for example, the footage can be made to appear as if taken through binoculars) or a frame consisting of stage curtains can be added.

5 (4) The Product also has a time-telling function. The user can choose for the time to be displayed on one of 25 analogue-style watch faces, or one of 24 digital watch faces which appear on the touch screen. Some of the watch faces permit the user to change the colour of the chosen face as well. So, for example, the user could choose to have the time displayed in the form of a cartoon chimpanzee holding up a placard showing the time in digital format. Alternatively, the time could be displayed in analogue format surrounded by a brightly coloured Christmas scene.

10 (5) The Product has three games that can be accessed through the touch screen menu. The first game, "Super Detective", tests reactions and recognition by showing the player a particular face. The player then has to tap the face each time the face appears on the screen. The second game, "Rotating Puzzle", uses photos that are stored in the memory of the Product. That photo is divided into sections and one or more sections rotated. The player has to rotate those pieces to make up the original photo. The third game, "Finger Dance", tests the player's co-ordination and timing by asking the player to tap music notes shown on the touch screen once a white circle starts to close on it, which takes place in time with the music.

20 (6) The Product also contains alarm clock, timer and stopwatch functions. When setting the alarm, the user can specify the alarm sound to be played as well as an image that is to be shown on screen when the alarm goes off (for example a smiling clapping cartoon chimpanzee). There is no ability to select sounds to be played when accessing the timer or stopwatch functions. However, the user can select the background image to be displayed when the timer or stopwatch are being operated from various different options (for example a smiling cartoon hula-hooping pig).

30 (7) The Product also has a voice recorder function. The user can record a voice clip by selecting an icon on the touch screen. Having recorded the voice clip, one of five effects can be added: for example, the clip can be made to sound very high in tone or very low in tone, or a robot or echo effect can be added.

Aspects of the Product's functions considered in more detail

35 14. The Product's digital camera takes digital images with a resolution of 0.3 megapixels. Mr Richardson accepted in cross-examination that digital cameras marketed for sale to adults would have a resolution of 15 to 20 mega pixels and that therefore the image quality of a picture taken on the Product would be lower than the quality of a photograph taken on a typical adult digital camera. However, he said that, while 0.3 megapixels would not be enough to produce a high quality image if photos were printed out, it would display a perfectly acceptable image on the Product's touch screen or on a computer screen if photos were transferred, via a USB cable, to a computer. Mr Richardson showed us an example of a photo that had been taken with the Product and uploaded onto his own iPad. Since we could not ourselves discern a noticeable lack of quality in comparison with our own experience of photos displayed on tablet computers we have accepted his evidence to this effect.

15. The Product does not have different exposure modes, a slot for a memory card or optical or digital zoom features, all of which would typically be found in digital cameras.

5 16. The Product's watch function is the first that a purchaser of the Product will experience as, when the Product is removed from its packaging and switched on, the purchaser is required to enter the date and time.

10 17. The Product contains a rechargeable battery which is charged by connecting the Product to a computer via a USB port. The Product's default setting is that, when it has been idle for a period of 10 seconds, its screen is switched off in order to preserve battery life. The screen of the Product can be re-activated by pressing the home button. This will cause the watch face to be displayed on the Product's screen.

15 18. A user could shorten, or extend, the 10 second period referred to at [17] above via the touch screen menu. In fact, the feature could be completely disabled (with the result that the screen of the Product is not switched off when idle). If a user selects this option, a warning will be displayed on the Product's screen to the effect that battery life will be significantly shortened and requiring the user to confirm that he or she wishes to proceed. If this option is selected then, once the Product has been idle for a period, the screen will revert to showing the watch face and the screen will switch off only if the user holds the home button continuously for two seconds. By
20 selecting this option, therefore, a user could ensure that the watch face is displayed continuously (at least while other of the Product's functions are not being used). However, if the watch face were displayed continuously, the battery would run down in less than a day and would therefore need to be recharged daily whereas with low usage and if the screen were switched off completely while the Product is idle, the
25 battery could last for up to two weeks before needing to be recharged.

30 19. Mr Richardson accepted in cross-examination that the Product looks like, and was intended to look like, a watch. He also accepted that it would have been possible for the Product to be designed differently so that, for example, the camera function (rather than the watch function) is the first that a user would see when the Product is switched on and the function to which the Product reverts when it has been idle for a period.

The components of the Product

35 20. Mr Richardson gave evidence as to the nature, and function, of various components of the Product. Mr Richardson's expertise is in the marketing arena and he himself acknowledged that he is not an expert on the precise technical specification and operation of the Product. However, since his evidence on the Product's components summarised at [21] to [22] below was of a general kind, and since Ms McArdle did not suggest that his evidence on these issues was wrong, we have accepted his evidence on these points.

40 21. Mr Richardson's witness statement included photographs of the various components of the Product. He also produced a dis-assembled version of the Product

at the hearing and explained to the Tribunal what the various components were, what their function was and whether any components related only to the “watch function” or “camera function” respectively. We have accepted this evidence and have concluded that the Product consists of the following components:

- 5 (1) a microchip which contains the software for all of the Product’s functions and also serves as the memory on which pictures, videos and sounds are stored;
- (2) an LCD, full colour, touch sensitive screen which is used for all of the Product’s functions;
- 10 (3) a speaker which is used for playing sounds on video recordings and voice recordings and also more generally for the Product’s functions (for example, it plays sounds when menu items are selected via the touch screen and the alarm sound when the Product’s alarm clock or timer functions are used);
- (4) a rechargeable battery which provides power to the Product generally;
- 15 (5) an audio integrated chip that drives the amplifier for the speaker through which sounds are played as described at [21(3)];
- (6) a printed circuit board that transfers electrical current for use in the entirety of the Product;
- (7) a camera device that converts light into digital information that is used to create and store digital photos and videos;
- 20 (8) a microphone that is used to record sounds captured on the video or voice recording functions;
- (9) a charger used to charge the battery which is used for the entire Product; and
- (10) an integrated power chip that regulates voltage for the Product as a whole.

25 22. Mr Richardson said in his witness statement that, while he did not have a detailed cost breakdown, he believed that the camera and the LCD screen were the most expensive components of the Product and the plastic housing and software would be the cheapest components. He also said that, while the LCD screen was used
30 both for the camera and the watch functions of the Product, without the camera and games functions, it would be possible for the Product to have a much cheaper and more basic screen. He also stated that, without those functions, the Product would not need a rechargeable battery, the same level of memory or a USB port. As we have noted, we have accepted that evidence.

The packaging and name of the Product

35 23. At [52] and [53] we set out our reasons for concluding that much of Mr Richardson’s evidence relating to the marketing of the Product is not relevant to the question of classification. However, for reasons set out in those paragraphs, we think it is appropriate to make some limited findings as to the name of the Product and the packaging in which it is sold.

24. As has been discussed, the Product is known as the “Kidizoom smart watch”. We accepted Mr Richardson’s evidence that the term “smart watch”, refers to a multifunctional device, like the Apple Watch, which does a variety of things, just as the term “smart phone” refers to a device which, as well as working as a mobile
5 phone, enables the user to take photos and access the internet. Mr Richardson accepted in cross-examination that considerable thought had gone into the naming of the product and that it was by no means pure accident that the product had been called a “smart watch” rather than, for example, a “wrist cam”.

25. The box in which the Product is sold refers to it as:

10 8-in-1
 More than just a watch!

Mr Richardson accepted in cross-examination that the wording used on the Product’s box would have been considered carefully and that a conscious choice would have been made to refer to it in these terms (rather than, for example, describing it as “more
15 than just a camera”).

26. Finally, we note that the back of the box is divided into two distinct halves. The left hand side is taken up by what Mr Richardson termed a “lifestyle shot” of a child using the Product to take a picture of two friends with a speech bubble containing the words “take your photos and videos with ease”. The right hand side is an explanation,
20 in both words and pictures of the Product’s various features.

EU law on classification of goods for customs duty purposes

27. The parties were in agreement on the broad summary of EU law set out at [28] to [35] below.

28. Customs duty is payable on goods imported into the UK from outside the EU.
25 The EU operates a harmonised system of customs duty. This means that Member States must apply the same set of rules to determine how goods are to be classified for customs purposes which in turn determines how much duty should be paid in respect of those goods.

29. The legislative basis for the Combined Nomenclature is Council Regulation
30 (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff.

30. The Combined Nomenclature provides for the systematic classification of all goods and is amended each year to take into account changes in technology, the invention of new products or variations to existing products or simply to provide
35 clarification. The Combined Nomenclature is designed to be applied consistently by all Member States so as to enable effective operation of the EU’s internal market and to achieve fiscal neutrality between traders in different Member States.

31. The Combined Nomenclature is structured by reference to Sections, then Chapter numbers with Chapter titles, then Headings and Subheadings. Sections and

Chapter headings often have Notes associated with them. A product is given a classification code with the first two numbers referring to the relevant Chapter number, the next two numbers referring to the relevant Heading and the final four numbers (where applicable) referring to the relevant Subheading.

5 32. The General Interpretation Rules (“GIRs”) provide a set of rules for interpretation of the Combined Nomenclature in order to ensure that all products are classified under the correct code. The GIRs are set out in the Combined Nomenclature and have legal force.

10 33. The relevant GIRs (which are required to be applied in numerical order) are as follows:

Rule 1

15 The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

...

Rule 3

20 When by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description...

25 (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a) shall be classified as if they consisted of the material or component which gives them their essential character in so far as this criterion is applicable;

30 (c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

Rule 6

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

40 34. In addition, the World Customs Organisation publishes Explanatory Notes to the Harmonized System (“HSENs”) and the EU publishes Explanatory Notes to the Combined Nomenclature (“CNENs”) which are used as an aid to the interpretation of the scope of the various headings.

35. The CJEU has consistently held that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is, in general, to be found in their objective characteristics and properties as defined in the wording of the relevant Headings or Subheadings and of the notes to Sections and Chapters (see for example *Kip Europe SA* (Case C-362/07)). It is then for the national court to determine the relevant “objective characteristics and properties”.

Applying the relevant provisions in a particular case

36. We were referred to the decision of the Upper Tribunal in *E.P. Barrus Ltd and another v Revenue and Customs Commissioners* [2013] UKUT 449 (TCC) which, at [41], set out a summary of the principles to be followed from various decisions of the CJEU on the approach to the classification of goods for customs purposes.

41 In our view the following principles can be derived from the authorities we have reviewed:

(1) 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 (*DFDS* and *BAS Trucks*);

(2) The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities (*Farfalla Fleming*);

(3) By the examination of the external characteristics the main purpose of the product must be inferred. It does not matter if there are other purposes for the product (*Neckermann*);

(4) The CNENs and HSEs should be used as an aid to interpretation as can specific classification regulations, but the latter only in relation to products identical to those specifically classified (*Kamino*);

(5) Marketing materials and a product’s targeted use are not to be taken into account (*Kamino, Honda*);

37. The parties were in broad agreement with this approach. They also agreed that:

(1) GIR 2 was not relevant in the circumstances of this appeal.

(2) GIR 3(a) was not relevant in the circumstances of this appeal since that provision is dealing with a situation where a product is potentially classifiable under two or more different Headings (or Subheadings) of the same Chapter. Here the dispute centres on which Chapter the Product falls under.

38. The parties were not, however, agreed on the following aspects of the approach to be followed:

(1) The Company considered that Notes 3 to 5 on Section XVI of the Combined Nomenclature require an examination of the “principal function” of

the Product. HMRC did not agree that “principal function” is a relevant consideration in this case.

5 (2) HMRC considered that the decision in *Barrus* was authority binding on this Tribunal to the effect that “marketing material” and “targeted use” are matters that we cannot take into account at all when classifying the Product. The Company considered that the position was more nuanced than this and that Note 4 to Section XVI of the Combined Nomenclature envisaged that marketing materials relating to the Product could be taken into account.

10 (3) The Company argued that the Notes 1(g) to Chapter 91 suggested that Chapter 85 had some degree of supremacy over Chapter 91. HMRC disputed this.

15 (4) The Company suggested that, when the Tribunal was applying tests related to “principal function” and “essential character”, some assistance could be derived from jurisprudence of the CJEU on the question of whether a supply is a single or multiple supply for VAT purposes. HMRC considered case law in the VAT arena to be of no assistance.

(5) The Company and HMRC had different perspectives on how the test of “essential character” should be applied.

20 (6) The Company and HMRC were not agreed as to the relevance or otherwise of other BTIs that had been issued in relation to similar products.

39. We will therefore make determinations on these areas of disagreement and, having done so, will set our conclusions as to the approach to be followed.

Relevance or otherwise of “principal function”

25 40. Ms Brown founded her argument on this issue on Note 3 to Section XVI of the Combined Nomenclature which (together with Notes 4 and 5 on which Ms McArdle placed emphasis) read as follows:

30 3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purposes of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being the machine which performs the principal function.

35 4. Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings of Chapter 84 or 85, then the whole falls to be classified in the heading appropriate to that function.

40 5. For the purposes of these notes, the expression ‘machine’ means any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85.

41. Ms Brown argued that the Product is clearly designed to perform “two or more complementary or alternative functions”. Moreover, since there was no dispute that classification as a digital camera is one possible classification of the Product, the Product is a “machine” as defined in Note 5 by virtue of being “cited” in Chapter 84 or Chapter 85 even it is ultimately not classified under those chapters. In those circumstances, she submitted that Note 3 required an examination of the Product’s “principal function”.

42. Ms McArdle disagreed. She submitted that Note 3 is a note on the interpretation of Section XVI. Section XVI contains only Chapters 84 and 85; it does not contain Chapter 91 which falls within Section XVIII and Section XVIII is not accompanied by any Section notes. Therefore, she submitted that Note 3 to Section XVI can only be an aid to determining the Heading or Subheading of Chapter 84 or 85 into which a product falls. It cannot help to determine the question of whether a particular product falls within Section XVI, or a different Section. She submitted that the precise definition of “machine”, which applies only to products falling with Chapter 84 or 85 made this clear.

43. Both parties referred to the decision of the CJEU in *Kip Europe SA* (Case C-362/07 and C-363/07) which refers to, and applies, Note 3. That case concerned an apparatus comprising, in a single housing, a laser printer module and a scanner module, having the functional capabilities of printing, digitalisation and copying. Those machines were connectable to computers and received and processed signal code used in a data processing environment. The issue was that units of “automatic data-processing machines” fall within Chapter 84, whereas photocopying machines fell within Chapter 90.

44. We find the reasoning of *Kip Europe SA* to be less than clear. However, we prefer Ms McArdle’s submission to the effect that the CJEU did not apply the “principal function” test in Note 3 for the purposes of deciding whether to classify the product in Chapter 84 or in Chapter 90. Rather, we consider that the CJEU considered that GIR 3(b) should be applied to determine the “essential character” of the product and, accordingly, to determine whether it falls within Chapter 84 or Chapter 90. Note 3 would then be relevant if the product had been classified in Chapter 84 in which case the “principal function” of the product would determine which Heading or Subheading within Chapter 84 was applicable.

45. We also consider Ms McArdle was correct to submit that, read together, Notes 3 to 5 demonstrate an intention to adjudicate between competing Headings and Subheadings within Section XVI rather than to adjudicate between Section XVI and Section XVIII. We consider that it is significant that, in Note 5, referred to at [40] above, a specific definition of “machine” is adopted, being a “machine” that is “cited in the headings of Chapter 84 or 85”. That definition indicates that, the Notes are intended as an aid to the classification of items that fall within Chapter 84 and 85 and not as an aid to determining whether items fall within Chapter 84 or 85. Ms Brown submitted that we should read the definition of “machine” as embracing something that is merely capable of falling within Chapter 84 or 85 but, if that is the correct

construction, it would be difficult to see what purpose there is in having a definition of “machine” at all.

46. We have concluded that the “principal function” test contained in Note 3 to Section XVI is not relevant to this appeal.

5 *Relevance or otherwise of “marketing material”: “targeted use” and “intended use”*

47. As noted above, both parties were agreed that the Product should be classified by reference to its objective characteristics and properties. They were, therefore, agreed that a taxpayer could not alter the classification of a product by producing marketing material that was inconsistent with its objective characteristics and
10 properties. However, Ms Brown submitted that what she described as “realistic” marketing material could be relevant to the Product’s classification, whereas Ms McArdle submitted that *Barrus* is binding authority to the effect that no marketing material (whether “realistic” or not) can be taken into account.

48. Ms Brown relied on Additional Note 2 in the Notes to Section XVI of the
15 Combined Nomenclature which reads as follows:

Should the customs so require, the declarant shall produce in support of his declaration, an illustrated document (for example, instructions, prospectus, a page from a catalogue, a photograph) giving the normal description of the machine, its uses and essential characteristics and, in
20 respect of an unassembled or disassembled machine, an assembly plan and a list of the contents of the various packages.

She noted that the Company wished to rely on material set out in Mr Richardson’s witness statement in the form of extracts from Argos catalogues, trade presentations and other documents that the Company produced as part of its “build-up” to making
25 sales of the Product. All of these documents, she submitted, fall within the scope of Additional Note 2. Since the Company could be required to produce these documents to HMRC, she submitted that they had to be relevant to the question of classification even if they might be described as “marketing material”. Therefore, she submitted that the broad statement in *Barrus* could be distinguished on the basis that there was no
30 provision comparable to Additional Note 2 that applied for the purposes of the classification exercise the Upper Tribunal was undertaking in that case.

49. The essence of Ms Brown’s argument is that, since HMRC are entitled to require copies of particular documents, it must follow that they are obliged to take those documents into account when classifying the Product. We do not accept this
35 argument. The function of Additional Note 2 is clearly to enable HMRC, should they so require, to obtain information that will enable a product to be classified. We do not consider that it goes further than that by prescribing how information that is so obtained (or which could have been so obtained) is to be treated for classification purposes. That remains to be determined in accordance with the general principles of
40 classification already outlined. This conclusion is emphasised by the fact that Additional Note 2 applies only if HMRC “so require”. If Ms Brown’s argument were correct the correct classification of identical products in different Member States

would depend on the information that different taxing authorities requested pursuant to Additional Note 2. We therefore considered that Additional Note 2 is a provision that deals with the provision of information and that Ms Brown’s submissions overstated its relevance to the question of classification. It follows that we do not agree that the presence of Additional Note 2 is a reason for us to distinguish the broad statement regarding “marketing materials” set out in *Barrus*.

50. We therefore agree with Ms McArdle, that *Barrus* sets out an authority which is binding on us to the effect that “marketing materials” and a product’s “targeted use” are not to be taken into account. However, it still needs to be considered what “marketing materials” and “targeted use” *Barrus* is referring to in order to apply that restriction. We consider that it is clear from the discussion of the various authorities that the Upper Tribunal performed in *Barrus* (set out in paragraphs [23] to [40] of their decision) that they were making a point based on the need to take into account objective characteristics and properties. Therefore, the Upper Tribunal were not excluding information from being relevant by reason only that it might be described in loose general terms as “marketing material” but were intending to exclude specifically, that kind of marketing material that does not deal with objective characteristics and properties. So for example, suppose that an advertising brochure contained a detailed circuit diagram of an electronic device. Of course that would be an unlikely situation but, if it did, even though it is contained in an advertising brochure, the circuit diagram would clearly set out objective characteristics of the device in question and so would be relevant to the question of classification. That can be contrasted with aspects of Mr Richardson’s evidence which dealt with the Company’s (subjective) reasons for offering the Product for sale.

51. *Barrus* does not explain in detail what “targeted use” means. While that phrase appears in the Advocate General’s opinion in *Kamino*, it is not explained in the CJEU’s decision. We consider that “targeted use” has to be understood as distinct from “intended use” which the CJEU have determined can be relevant to a product’s classification. For example, in paragraph 76 of *British Sky Broadcasting Group plc and another v Revenue & Customs Commissioners* (Cases C-288/09 and C-289/09), the CJEU said:

It should be realised that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties.

52. We therefore consider that “targeted use” is a reference to purported evidence of use which is not supported by the Product’s objective characteristics and properties. We have, therefore, in line with *Barrus*, excluded “marketing material” and “targeted use” from our consideration. For that reason, we have not taken into account a number of aspects of Mr Richardson’s evidence. In particular:

- (1) We have not taken into account evidence that he gave as to why the Product was developed and the marketing process that led to its development. We considered that this evidence dealt with subjective matters relevant to the

Company and not objective characteristics and properties inherent in the Product itself.

5 (2) We have not taken into account Mr Richardson’s evidence on the way in which the Product is marketed to trade buyers and how it fits into the Company’s range of “Kidizoom” products generally as we considered that evidence fell within the scope of the prohibition on considering “marketing materials” set out in *Barrus*. Moreover, even though it was not disputed that the Company distributes the “Kidizoom” digital camera range, we did not consider
10 that the fact that the Company distributes other digital cameras has any bearing on whether the Product is itself a digital camera or not.

53. However, we considered that it was at least arguable that the name of the Product, and the packaging in which it is sold, are objective characteristics of the Product. For that reason, we have made the relatively limited findings of fact set out at [24] to [26] above.

15 *Whether Chapter 85 has primacy over Chapter 91*

54. Ms Brown referred us to Note 1(g) of the Chapter Notes to Chapter 91 which provides as follows:

1. This chapter does not cover:

...

20 (g) articles of Chapter 85 not yet assembled together or with other components into watch or clock movements or into articles suitable for use solely or principally as parts of such movements (Chapter 85).

25 She submitted that, at least as regards items that are not themselves watches or clocks, Chapter 85 has some measure of supremacy over Chapter 91 as, for example, a digital display of a watch is to fall within Chapter 85 for so long as it is a separate component and only falls within Chapter 91 when it actually becomes part of a watch. Therefore, she submitted that a product needs to be of the character of a watch or clock before it can fall within Chapter 91 and, if it does not have that character and is capable of falling within Chapter 85, the Chapter 85 classification should prevail.

30 55. We did not consider that Note 1(g) gave rise to any general implication that Chapter 85 is to prevail over Chapter 91. Rather, we agreed with Ms McArdle’s submissions to the effect that Chapter 91 is dealing specifically with the classification of components that have not yet been assembled into watches or clocks. No question of the classification of such components arises in this appeal and, accordingly, we do
35 not consider that Note 1(g) is relevant to this appeal.

Relevance of case law in the VAT arena

56. Ms Brown did not cite any authority in which jurisprudence of the CJEU on the question of how a particular supply for VAT purposes is to be characterised has been followed in a customs classification case. In the absence of any such authority, we

accepted Ms McArdle’s submission to the effect that this case law is not relevant to this appeal.

Approach to ascertaining “essential character”

57. Ms Brown took us to a number of decisions of the ECJ and CJEU on the determination of “essential character” for the purposes of GIR 3(b) for example *Sportex* (Case C-253/87), *Turbon International GmbH* (Case C-250/05), *Roeckl Sporthandschuhe GmbH & Co. KG* (Case C-123/09) and *SIA Kurcums Metal* (Case C-558/11). Some of those cases approached the question by considering whether the product in question would retain its characteristic properties if one or other of its constituents were removed from it.

58. Ms McArdle submitted that this approach was not particularly useful in the context of a product that has a number of different functions. However, this aspect of disagreement was more apparent than real since Ms Brown did not submit that the only test of “essential character” was that outlined at [57] above. On the contrary, Ms Brown submitted that Explanatory Note VIII accompanying GIR 3 made it clear that the test of “essential character” was wide-ranging as follows:

(VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

59. Therefore, the true disagreement between the parties related to the kinds of factors that could be taken into account in determining “essential character”. Ms Brown submitted that it would be necessary to move beyond purely objective factors (and consider, for example, the way in which the Product is marketed) since “essential character” (and GIR 3 generally) are relevant only in circumstances where GIR 1 has not enabled the classification of the Product to be determined. Therefore, in Ms Brown’s submission if only objective characteristics and properties were relevant, no question of classification could proceed beyond GIR 1.

60. We do not agree with Ms Brown’s general submission that GIR 3(b), when read together with Note VIII invites an examination of factors other than objective characteristics and properties not least since all of the decisions of the CJEU on the question of “essential character” to which we were referred placed great emphasis on the need to examine objective characteristics and properties. For example, at [16] of its decision in *Turbon International GmbH*, in which the CJEU considered Explanatory Note VIII, the CJEU said:

It is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties...

61. Nor do we agree that an examination of purely objective factors would prevent any question of classification from proceeding beyond an application of GIR 1. It

seems to us that GIR 1 is focusing on the precise terms of the Combined Nomenclature and, applying GIR 1, it is perfectly possible that a product might appear to be both a digital camera and a watch. GIR 3(b) takes matters a stage further and asks what the “essential character” of such a product is. That test is not incompatible with an examination of purely objective factors: it is simply a different test from that set out in GIR 1.

62. However, we do agree with Ms Brown that Explanatory Note VIII invites a potentially wide-ranging examination of “essential character” and we accepted, in particular, her submission that the cost of components used in the Product’s watch functions and camera functions respectively were relevant to the determination of “essential character”. Ms McArdle had sought to argue that the cost of components could not be an “objective characteristic” since commodity costs might change over time and would not be readily apparent to customs authorities when a product is imported. However, Explanatory Note VIII specifically mentions the value of a product’s components as being something that may be relevant to the determination of its “essential character”. Moreover, the mere fact that a particular factor may not be readily apparent at the time of import does not seem to us to prevent it being an objective characteristic. That factor may take some time and effort to ascertain, but just because it is not apparent from a cursory examination of the Product, it is not unascertainable. We therefore consider that the value of components can be relevant to the determination of “essential character”.

63. We have therefore concluded that the “essential character” of the Product should be determined under GIR 3(b) having regard to Explanatory Note VIII. A consideration of what properties the Product would have if one or more of its constituent functions were removed may be relevant to determining its “essential character”, but is not the only way of approaching the issue. Moreover, the value of various components making up the “watch function” and the “camera function” of the Product respectively can be relevant to the determination of “essential character”.

Relevance or otherwise of other BTIs

64. Ms Brown referred us to summaries of other BTIs that had been issued including those for other “smart watch” products. She submitted that, because the Combined Nomenclature was intended to achieve legal certainty and equality of treatment of different products imported throughout the EU, it was appropriate for us to consider these BTIs as an aid to the classification question at issue in this appeal.

65. However, we agree with Ms McArdle that we should not consider these BTIs. While we agreed that the Combined Nomenclature must be applied consistently to similar products, we considered that Ms Brown would need to satisfy us of the objective characteristics of these other products before we could be satisfied that they are indeed similar to the Product. No such evidence was before us and it followed that we should not consider BTIs relating to other products whose properties could not be demonstrated to us.

Relevance or otherwise of a child's perspective

66. It was common ground that the Product is, viewed objectively, intended to be used by children. Both parties made submissions that invited us to draw particular inferences from particular features of the Product. For example, Ms McArdle referred to what she submitted was the low quality of the photos that the Product takes (as demonstrated by its 0.3 megapixel specification) in support of her submissions that the Product is a watch. Ms Brown referred us to the fact that, if the Product was set so that its screen was permanently on, and so displayed the time continuously, battery life would be considerably shortened and submitted that this was an indication that the Product is not a watch.

67. At our invitation, the parties made further written submissions on whether questions such as this should be determined by reference to the perspective of a child (who might not care about the Product's megapixel specification, or who might not care if the battery had to be continually recharged if his or her parents did that for him), or by reference to the perspective of an adult. Both parties were agreed that relevant characteristics and properties of the Product have to be determined objectively. Therefore, the fact that particular children, or particular adults, might have particular subjective opinions about the Product cannot be relevant to classification. However, they had different views as to the relevance of a hypothetical "reasonable child's" perspective on particular aspects of the Product or its use. Ms Brown thought that, since an objective characteristic of the Product is that its "intended use" is by children, the use that a "reasonable child" might be expected to make of the Product is potentially relevant. However, Ms McArdle submitted that the fact that the Product is intended to be used by children can make no difference to the classification exercise since, broadly, neither of the competing customs classifications of the Product makes any reference to children at all.

68. We incline to Ms Brown's view, although we do not consider that this issue makes any material difference to our conclusion. It seems to us that, given that an objective characteristic of the Product is that it is intended to be used by children, questions of the "use" to which the Product is put, or its "essential character" should at very least take that factor into account.

Approach we will follow in this appeal

69. We will therefore apply the following approach to the question of classification at issue in this appeal:

(1) We will ascertain the objective characteristics and properties of the Product in accordance with the approach set out in *Barrus*. That is not limited to a consideration of the Product's external appearance: we will consider all relevant objective characteristics including how the Product works when used. We will not pay regard to "marketing material" or the Product's "targeted use" taking into account the discussion at [52] for the purposes of identifying evidence that falls within the scope of that restriction. Given the conclusions we express at [46] above, we do not consider that the "principal function" of the

Product for the purposes of Note 3 to Section XVI is relevant to the question of classification.

5 (2) We will then consider whether, having regard to those objective characteristics and properties, an application of GIR 1 enables the Product to be classified.

10 (3) If GIR 1 does not answer the question, given the agreement of the parties referred to at [37], we will next apply GIR 3(b) to the objective characteristics and properties of the Product and consider whether the Product has an “essential character” and, if so, what it is. We will consider a wide range of factors when considering that question that will include, but will not be limited to, a consideration of what properties the Product would have if various of its constituent functions were removed. We will take into account the respective value of components used in the Product’s camera function and watch function respectively given the statements referred to in Explanatory Note (VIII) referred to at [62] to [63].

15 (4) In applying the approach set out above, we will not assume that Chapter 85 is to take precedence over Chapter 91 (or vice versa).

20 (5) If GIR 3(b) does not answer the question of classification, we will apply GIR 3(c). Since the Heading for which HMRC contend comes after that for which the Company is arguing, an application of GIR 3(c) would result in HMRC’s classification being determined to be correct.

Discussion

Application of GIR 1

25 70. We have set out our findings on the relevant objective characteristics and properties of the Product at [9] to [26] above.

30 71. GIR 1 focuses attention on the terms of Headings and related notes to sections and chapters of the Combined Nomenclature. Ms Brown submitted that an application of GIR 1 compelled the conclusion that the Product is a digital camera because its “principal function” was as a digital camera. If the competing classifications of the Product were all to be found in Section XVI of the Combined Nomenclature, the question of “principal function” would be relevant to the application of GIR 1 since the question of “principal function” appears in Note 3 to Section XVI and is thus an aid to the interpretation of Section XVI. However, we have concluded at [46] that Note 3 to Section XVI cannot serve as an aid to interpretation when the question is, as

35 here, whether the Product should be classified in Section XVI or in Section XVIII.

40 72. The Product clearly has features of a digital camera as it takes photographs and stores them digitally. It clearly has features of a watch as it tells the time (albeit not continuously) and can be worn around the wrist. Since we have concluded at [46] that the question of “principal function” is not relevant in these circumstances, GIR 1 does not enable us to decide between classification as a digital camera and classification as a watch. The relevant Headings and Subheadings do not themselves contain any

indication which determines whether the Product should be treated as a digital camera or a watch and GIR 3(b) must be applied.

Application of GIR 3(b)

5 73. As we have noted above, GIR 3(b) requires us to decide whether the Product has an “essential character” and, if it does, what that “essential character” is.

74. There was no dispute that the Product is, objectively viewed, intended to be used by children. To that we would add that the Product is, objectively viewed, intended to be fun and amusing. The features of being able to distort photographs, videos and voices, and of being able to add brightly coloured effects and amusing effects to photographs and videos emphasise this. So too do the 50 types of brightly coloured and amusing watch faces, and the inclusion of games within the Product. The essence of the Product is that it is fun and amusing, and not merely utilitarian.

75. Ms McArdle submitted that the “essential character” test could be determined by asking what the product is, more than anything else, from the perspective of a consumer. Having formulated the test in those terms, she submitted that more than anything else it is a watch since it looks like a watch, the clock face is the first item that is seen when the Product is switched on and the display to which the Product reverts when it has been left idle for a period. She emphasised that the time telling function on the Product is not inferior to that on a typical watch; on the contrary, in many ways it is superior as the time can be displayed, on a range of faces, in both analogue and digital form and it has a stopwatch and alarm which might not be found on all watches. She contrasted the superiority of the time-telling function with what she submitted was the inferiority of the camera function (in terms of its low megapixel specification and absence of the features referred to at [15]). She submitted, therefore, that the Product should be regarded as a “watch with benefits”.

76. We consider that this approach does not give sufficient weight to the objective “fun” characteristics of the Product nor to the fact that, viewed objectively, the Product is intended to be played with, and interacted with, and not merely to be looked at or used as a tool. We agree that the camera function of the watch is basic when compared with that of digital cameras generally. However, we consider that the essence of the video and camera function of the Product is that it enables children to take photos and videos of family and friends, add amusing effects to those and have fun both while taking that footage and looking at it together afterwards. While the specification of the camera would be highly relevant if it the essential purpose of the camera function was to take photographs and print them out, it is considerably less relevant to the activities just referred to. We have also found at [14] that, when photos are displayed on the Product’s screen, or even on the screen of an iPad onto which they have been uploaded, it is not readily apparent that those photos are of lower quality than they would be if taken on a normal digital camera.

77. As we have noted at [63], one approach to the determination of “essential character” is to ask what features the Product would have if one or more functions were removed. We consider that, if the camera function were removed, the Product

would be much less fun for children to play with and much less interactive. While we consider that children would find the different watch faces amusing and would continue to enjoy the games and voice recording functions, much of that enjoyment would be solitary and removal of the camera function would remove a key part of the Product's sociable appeal. In addition, the digital camera function enables a child to use the Product in a number of different ways over a short period of time, by taking different photos and adding one of 10 borders, one of two distortion effects and one of three colour effects. There is thus considerable variety in the way that a child can use the digital camera function, part of which comes from the variety of photos and videos that can be taken and part of which comes from the effects that can be added. If the digital camera function were removed, much of this variety of use would disappear. While a child could select up to 50 watch faces, having selected a watch face, there would then only be the option of replacing it with another. The voice recording and games function would still offer some options for use and interaction with the Product, but they would be many fewer than the options offered by the digital camera: there would be a choice of just four games or five voice effects. Therefore, we consider that removing the digital camera function would remove a large part of the Product's interactive and sociable appeal whereas, if the watch function were removed most of that appeal would remain.

78. For reasons set out at [62], we consider that an analysis of the value of the components is relevant to the question of "essential character". Mr Richardson's evidence, referred to at [22] suggests that, if the Product had only the "watch" functions, it would not need its most expensive components. That points away from the conclusion that the essential character of the Product is of a watch.

79. As we have noted, we agree with Ms McArdle that "marketing material" that does not relate to objective characteristics or qualities of the Product is not relevant to the question of its categorisation for customs duty purposes. The name of the Product is, in our view, an objective characteristic and points towards the conclusion that its essential character is of a watch. However, we do not consider that any additional inference can be drawn from Mr Richardson's acceptance in cross-examination that the decision to call the Product a watch was considered carefully from a marketing perspective. At most that demonstrates that the Company had a subjective reason for wishing to refer to the Product as a "watch". Moreover, the Product is described not just as a watch, but specifically as a "smart watch" and, as noted at [24], we have accepted Mr Richardson's evidence that this expression describes a multifunctional device that can do a variety of things as well as function as a watch. Since a "smart watch" can do many things, describing the Product as a "smart watch" is not inconsistent with the conclusion that, while it has the function of a watch, its essential character is that of one of its other functions.

80. In support of her submissions that the "essential character" is of a camera, Ms Brown submitted that the Product is essentially useless as a watch since, if it displayed the time continuously its battery would need to be charged every day. We consider that to be an overstatement. Even if the screen does not show the time continuously, the Product can be made to display the time at the touch of a button. It is not of the essence of a watch that it displays the time continuously on a brightly lit

screen: a device worn on the wrist that can be prompted to display the time by pressing a button seems to us capable of having the essential character of a watch.

81. We have also considered Ms McArdle's submission that the Product has no essential character and that it simply contains a collection of functions with none of those functions predominating. However, we do not accept that submission. We consider that the camera function predominates over other functions as it is the function that makes the Product the most fun and engaging. Therefore, while we have not accepted all of Ms Brown's submissions, and we acknowledge that there are aspects of the Product that suggest it could be classified as a watch, our overall conclusion is that the cumulative effect of the points made at [74] to [80] is that the essential character of the Product is of a camera.

Conclusion

82. The Product should be classified as a camera under commodity code 8525 8030. The appeal is allowed.

83. 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.

JONATHAN RICHARDS

TRIBUNAL JUDGE

RELEASE DATE: 26 JANUARY 2016