



TC05615

Appeal number: TC/2012/11057

Customs duty – tariff classification – revocation of BTI – Traditional Kindle and Kindle Touch – CJEU decision giving guidance as to correct interpretation of tariff – application to strike out appeal on basis that no reasonable prospects of success in light of CJEU decision

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AMAZON EU SARL

Appellant

-and-

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

Respondents

TRIBUNAL: JUDGE KEVIN POOLE

Sitting in public in The Royal Courts of Justice, London on 30 August 2016

Amanda Brown of KPMG LLP for the Appellant

Sarabjit Singh, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

Decision

Introduction

1. This is a decision on an application by HMRC for this appeal to be struck out
5 on the basis that it has no reasonable prospect of succeeding, in the light of a decision
of the Court of Justice of the European Union (“the CJEU”) in proceedings involving
the German tax authorities in relation to the tariff classification of Kindle e-Readers,
which are also the subject of this appeal.

2. At the end of the hearing of the application, I gave an oral decision to the
10 parties indicating that I considered the application to be justified and the appeal would
therefore be struck out. Full findings of fact and reasons for that decision were
requested on behalf of the appellant. This document contains those full findings and
reasons. I also refused HMRC’s application for costs, and full findings and reasons in
relation to that decision are also included below.

15 The Facts

3. The facts relevant to this hearing are brief, and are fairly summarised as
follows in the appellant’s skeleton argument submitted in advance of this hearing:

“Background

1. The Appellant carries on a business as an online retailer. In the
20 course of its business, it imports certain products into the UK.

Traditional Kindle and Kindle Touch

2. Two of such products are the Traditional Kindle and the Kindle
Touch (“the Products”).

3. The Products fall into the category of products commonly
25 referred to as ‘e-Readers’.

4. The Products allow users to wirelessly download and read
books, newspapers and magazines. The products can hold up to 1,500
books.

5. The Products come with a built-in dictionary and a text-to-
30 speech function which translates written text into sound. The built-in
dictionary (for the UK – *the Oxford Dictionary of English*) has over
250,000 entries and definitions that allow the user to look up definitions
of English words. When a word is highlighted within the text of the
book the definition is displayed.

35 Tribunal Proceedings

6. On 16 October 2012, the Appellant submitted an application for
a Binding Tariff Information (“BTI”) to the Respondents requesting
that the Kindle Touch be classified under sub-heading 8543 70 10 of the

Combined Nomenclature ("CN") as an electrical machine with a translation or dictionary functions. [*sic*]

5 7. On 16 November 2012, the Respondents issued a BTI ruling classifying the Kindle Touch under sub-heading 8543 70 90, which covers "*other machines and apparatus – other*".

8. The Appellant appealed the Respondents' decision in relation to the Kindle Touch on 13 December 2012 (Tribunal reference TC/2012/11057).

10 9. By a letter dated 30 October 2012, the Respondents informed the Appellant that it intended to raise an assessment against the Appellant in relation to the imported Traditional Kindles as the Kindles should also have been accurately classified under sub- heading 8543 70 90.

15 10. An appeal against the decision to raise the assessment in respect of the Traditional Kindle was lodged by the Appellant with the Tribunal on 23 March 2013 (Tribunal reference TC/2013/02344).

11. On 1 July 2013, the Tribunal issued directions consolidating the two appeals under Tribunal reference TC/2012/11057.

20 12. A direction was issued by the First-tier Tribunal ("**the Tribunal**") for the appeals to be stayed behind a reference to the Court of Justice of the European Union ("**CJEU**"). The outcome of that reference ("*the German reference*") was released on 11 June 2015 (*Hauptzollamt Hannover v Amazon EU Sarl* (case C-58/14)).

25 13. The German reference concerned the classification of a Kindle e-Reader."

4. The CJEU decision included the following passages:

30 "11. Amazon is a company which imports inter alia reading devices for electronic books. In addition to the hardware and software necessary for reading books, a speech output option and a programme for the reproduction of audio formats, the devices have a dictionary function. The *Oxford American Dictionary* and the *Oxford Dictionary of English* are thus pre-installed in the apparatus, and additional dictionaries may be downloaded and installed.

...

35 [The CJEU goes on briefly to narrate the dispute between Amazon and the German tax office as to the correct tariff classification of the products, and the referral of that dispute to the German Tax Court]

40 15. It was in those circumstances that the Bundesfinanzhof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

‘(1) Is the description of goods in subheading 8543 70 10 of the [CN] to be understood as covering only apparatus which have exclusively translation or dictionary functions?’

5 (2) If the first question is to be answered in the negative, does subheading 8543 70 10 of the [CN] cover also apparatus the translation or dictionary function of which is insignificant by comparison with their principal function (in this case, a reading function)?’

Consideration of the questions referred

10 16. By its questions referred for a preliminary ruling, which it is appropriate to consider together, the referring court asks, in essence, whether the CN must be interpreted as meaning that a reading device for electronic books which has a translation or dictionary function must be classified under subheading 8543 70 10 as an electrical machine with translation or dictionary functions, or under subheading 8543 70 15 90 as other electrical apparatus.

20 17. As a preliminary point, it should be made clear that, when the Court is requested to give a preliminary ruling on a matter of classification for customs purposes, its task is to provide the national court with guidance on the criteria which will enable that court to classify the products at issue in the main proceedings correctly in the CN, rather than to effect that classification itself (judgement in *Rohm Semiconductor*, C-666/13, EU: C: 2014:2388, paragraph 23 and the case-law cited).

25 18. In a case such as that at issue in the main proceedings, it is for the national court to determine inter alia the principal and ancillary functions of the product which is to be classified for tariff purposes.

30 19. As is clear from the very wording of the second question referred for a preliminary ruling, set out in paragraph 15 above, the referring court considers that the principal function of the reading devices at issue in the main proceedings is a reading function.

35 20. It should be noted in that regard that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see, inter alia, judgement in *Digitalnet and others*, C-320/11, C-330/11, C-382/11 and C-383/11, EU: C: 2012:745, paragraph 27 and the case-law cited).

40 21. The referring court rightly states that the CN does not contain any subheading the wording of which expressly refers to an electrical apparatus whose principal function is that of reading.

22. However, it cannot be concluded that, in default of a subheading in the CN corresponding exactly to the principal function of such an apparatus, the apparatus must be classified under a specific subheading on the basis of one of its ancillary functions.

5 23. The tariff classification of a product must be made having regard to its principal function. Thus, Note 3 to Section XVI of Part Two of the CN provides that a machine which has a number of functions must be classified according to its principal function.

10 24. Similarly, the Court has previously pointed out that, for the purposes of classifying a product, it is necessary to take into account what consumers would consider to be ancillary or principal (see, to that effect, judgement in *British Sky Broadcasting Group*, C-288/09 and C-288/09, EU: C: 2011:248, paragraph 77).

15 25. A product is therefore classified having regard, not to one of its ancillary functions, but to its principal function, even in a situation such as that at issue in the main proceedings where there is no CN subheading corresponding specifically to that principal function.

20 26. It follows from the foregoing that, in the absence in the CN of a subheading corresponding to the principal function of a product, that product must be classified under a residual subheading of the CN, in the present case subheading 8543 70 90.

25 27. Therefore, the answer to the questions referred for a preliminary ruling is that the CN must be interpreted as meaning that a reading device for electronic books which has a translation or dictionary function must, where that function is not its principal function, that being a matter for the national court to ascertain, be classified under subheading 8543 70 90 and not under subheading 8543 70 10."

30 5. The parties are agreed (as was confirmed in the Appellant's skeleton argument and at the hearing of this application) that both the Kindle Touch and the Traditional Kindle have as their principal function that of e-Readers, the dictionary function therefore being secondary or ancillary to that principal function.

35 6. Following the issue of the CJEU decision, the appellant amended its grounds of appeal on 2 December 2015, to include an assertion that "the decision and reasoning of the CJEU in case C-58/14 reaches a conclusion that is difficult to reconcile with the preceding classification case law." The amended grounds went on as follows:

40 "39. However, it is possible to read the judgment consistently with other classification case law were one to interpret that case as concluding that "unless the circumstances otherwise require" the national court must classify a multi-functional product with reference to its principal function.

5 40. As stated by the CJEU in Case C-58/14, it is for the national court to determine which function is the principal function and which ones are ancillary. The Appellant contends that having determined which function predominates over the others, it is then for the national court to determine whether the circumstances require classification otherwise than with reference to that principal function.

41. The Appellant contends that such an interpretation is consistent with Note 3 of Section XVI of the CN and is also consistent with classification case law.

10 42. For the reasons set out in paragraphs 14-34 above, the Appellant contends that the circumstances in this case require the Product to be classified otherwise than by reference to its principal function.

15 43. Furthermore, the Appellant considers that the 1996 Information Technology Agreement (“the ITA”) (to which the European Union is a signatory) also supports this position.

44. the ITA requires a duty rate of zero to be applied to electronic products with translation and dictionary function.

20 45. The Appellant contends that it is necessary so far as possible to interpret the CN and Case C-58/14 in a way that supports the objectives of the ITA. The Appellant contends that to interpret it otherwise would result in a breach of the obligations of the European Union under the ITA.

25 46. This view was supported by the CJEU judgment in *British Sky Broadcasting Group (C-288/09) and Pace plc (C-289/09) v The Commissioners for Her Majesty’s Revenue and Customs* which provides:

30 *“even though the provisions of a treaty such as the ITA are not such as to create rights upon which individuals may rely directly before the courts under European Union law, where the European Union has legislated in the field in question, the primacy of international agreements concluded by the European Union over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.”*

35

40 47. The above statement is consistent with the approach required when interpreting EU legislation in order to achieve its intended purpose. In the case of *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) the CJEU held that domestic law must be interpreted consistently with the European legislation on which it is based, so far as it is possible to do so. This principle of consistent interpretation has been confirmed by subsequent cases.”

7. On 25 January 2016, HMRC served an amended consolidated statement of case, in which they submitted that as it appeared to be agreed that the principal function of both the Traditional Kindle and the Kindle Touch was as an e-Reader (the dictionary function being ancillary), the decision of the CJEU was determinative of this appeal; any attempt to circumvent that decision in effect amounted to an attempt to ignore its central tenet, to the effect that classification should be effected by reference to a product’s principal function, even where there was no specific heading or subheading in the CN which referred to that function but there was a specific heading or subheading that referred to some ancillary function. In the same document, HMRC warned that they considered the appellant’s continuation of the appeal in the light of the CJEU decision to be “hopeless”, and warned of their intention to apply for the appeal to be struck out.

8. In a Reply dated 15 March 2016 to the amended Statement of Case, the appellant indicated that it considered the Tribunal still to have a substantive decision to make in this case, notwithstanding the CJEU decision (which was by way of guidance only and specifically related to the questions put to it, leaving the national court to make the final decision). Essentially, the decision for the Tribunal revolved around two issues:

(1) that Note 3 to Section XVI of the CN contains the words “[u]nless the context otherwise requires”, and the Tribunal should adjudicate in detail on whether this Note applied in the present case so as to lead to a decision that the products in question should be classified differently from the way in which the CJEU had indicated to the German tax court that they should be classified; and

(2) that the CJEU had made an incomplete evaluation of the facts, failed fully to reflect the arguments before it or failed to provide sufficient guidance – here the case of *HMRC v Aimia Coalition Loyalty UK Ltd (formerly LMUK)* [2013] UKSC was referred to.

9. These arguments were further developed in the respective parties’ skeleton arguments and at the hearing – see below.

The law

The strike out application

10. The law applicable to this application derives from Rule 8(3) of the Tribunal Procedure (First-tier Tribunal) Tax Chamber Rules 2009, which provide (so far as relevant) as follows:

“(3) The Tribunal may strike out the whole or a part of the proceedings if—

...

(c) the Tribunal considers there is no reasonable prospect of the appellant’s case, or part of it, succeeding.”

11. Ms Brown referred us to the decision in *Revenue & Customs Commissioners v Fairford Group plc and another* [2014] UKUT 329 (TCC), in which the Upper Tribunal gave (at [41]) the following guidance for consideration of applications such as this:

5 “In our judgment an application to strike out in the FTT under Rule
8(3)(c) should be considered in a similar way to an application under
CPR 3.4 in civil proceedings (whilst recognising that there is no
equivalent jurisdiction in the First-tier Tribunal Rules to summary
10 judgment under Part 24). The Tribunal must consider whether there is a
realistic, as opposed to a fanciful (in the sense of it being entirely
without substance) prospect of succeeding on the issue at a full hearing,
see *Swain v Hillman* [2001] 2 All ER 91 and *Three Rivers* (see above)
Lord Hope at [95]. A ‘realistic’ prospect of success is one that carries
some degree of conviction and not one that is merely arguable, see *ED
& F Man Liquid Products v Patel* [2003] EWCA Civ 472. The tribunal
15 must avoid conducting a ‘mini-trial’. As Lord Hope observed in *Three
Rivers*, the strike out procedure is to deal with cases that are not fit for a
full hearing at all.”

12. This being HMRC’s application, the burden lies on them to establish that, in
20 accordance with the guidance given in *Fairford*, the appeal does not have a realistic
prospect of succeeding at a full hearing.

Costs

13. The Tribunal’s procedure rules contain the following relevant provisions:

25 10.— (1) The Tribunal may only make an order in respect of costs (or,
in Scotland, expenses)—

(a) ...

(b) if the Tribunal considers that a party or their representative
has acted unreasonably in bringing, defending or conducting
the proceedings;

30 ...

(3) A person making an application for an order under paragraph (1)
must—

35 (a) send or deliver a written application to the Tribunal and to
the person against whom it is proposed that the order be made;
and

(b) send or deliver with the application a schedule of the costs
or expenses claimed in sufficient detail to allow the Tribunal to
undertake a summary assessment of such costs or expenses if it
decides to do so.

40 ...”

14. Neither party cited any cases in support of their respective submissions on these provisions. Any decision on the question of costs depends on a general exercise of judicial judgment based on the perceived unreasonableness of the relevant conduct.

Tariff classification

5 15. There was no disagreement about the basic structure of the law applicable to the classification of the Products and the revocation of the BTI in respect of the Kindle Touch. The dispute between the parties revolved around the correct classification of the Products, and the appellant’s skeleton argument contained the following useful summary of the law in relation to classification, from which HMRC
10 did not materially dissent:¹

“General overview

Customs duty is payable on all goods imported into the United Kingdom from outside of the European Union (“EU”).

15 One of the factors that determines how much customs duty is payable is the classification of the goods being imported.

Article 12 of the Community Customs Code (Council Regulation 2913/92/EEC) (“**the Code**”) provides for the issue, by the customs authorities, of BTI rulings giving their opinion of the proper classification of the relevant goods.

20 The rules that Member States must apply in determining classification are set out in Council Regulation (EEC) No 2658/87 of 23 July 1987 in the tariff and statistical nomenclature and in the Common Customs Tariff (“**the Tariff**”) and the Combined Nomenclature that is Annex 1 to the Tariff (“**the CN**”).

25 The CN provides for the systematic classification of all goods and is amended each year with effect from the following 1 January.

30 In order to help achieve consistent classification across Europe, the CN is drafted with clear and unambiguous language, supported where necessary with supplemental explanations in the form of section and chapter notes.

35 The World Customs Organization (“**WCO**”) publishes Explanatory Notes to the Harmonized System (“**HSEs**”) and the European Commission publishes Explanatory Notes to the Combined Nomenclature (“**CNENs**”), both of which, where available, should be used when classifying goods.² There are no relevant HSEs and CNENs that are applicable in these appeals.

¹ Paragraph numbers have been removed to avoid confusion

² It would be more accurate to record (as touched on later) that both sets of notes are not legally binding but have been recognised in the case law as providing a useful aid to interpretation.

The CN applicable at the material time of the BTI application was set out in Commission Regulation (EC) No. 1001/2013 of 4 October 2013. This applied from 1 January 2014 to 31 December 2014. The structure of the relevant part of the CN has remained the same.

5 The CN is structured by reference to Sections, then Chapter numbers with Chapter titles, then Headings and Sub-headings. The first two numbers constitute the Chapter number, the next two numbers (together with the Chapter numbers) constitute the Heading and the final four numbers (where applicable) constitute the sub-heading. Each Section and Chapter within the CN has Notes which provide guidance in respect of the application of each Section and Chapter respectively. The Section Notes and Chapter Notes (unlike the HSEs) are legally binding.

Structure of the relevant provisions of the CN

15 The relevant CN sub-headings for these appeals are 8543 70 10 and 8543 70 90 (and both fall within Section XVI and Chapter 85 of the CN:

20 *“Chapter 85 Electrical machinery and equipment and parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.*

8543 Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter.

8543 70 Other machines and apparatus

25 *8543 70 10 Electrical machines with translation or dictionary functions*

8543 70 90 Other

30 Section XVI of the CN covers the classifications for machinery and mechanical appliances, electrical equipment, parts thereof, sound recorders and reproducers, television image and sound recorders and reproducers and parts and accessories thereof.

The notes to Section XVI are lengthy, however, relevant to this appeal is Note 3. Note 3 sets out the principal function test as follows:

35 *“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 purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that*

Situations have arisen however where the notes have been disregarded as being contrary to the underlying legal text.

component or as being that machine which performs the principal function”.

The General Interpretation Rules

5 The General Interpretation Rules (“GIRs”) provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code. The GIRs have legal force and must be used consecutively.

The GIRs are set out below:

Rule 1

10 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 2(a)

20 Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished (or failing to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

Rule 2(b)

25 Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combination of that material or substance with other materials or substances. Any references to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

Rule 3

35 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:

40 (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for

retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

5 (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;

10 (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 4

15 Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

Rule 5

20 Rule 5 is not relevant in this instance and applies to specific situations for packaging material, containers and cases.

Rule 6

25 For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those sub-headings and any related sub-heading notes and, mutatis mutandis, to the above rules, on the understanding that only sub-headings 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.”

HMRC’s argument

30 16. Mr Singh argued that, in the light of the CJEU judgment, the appeal was unsustainable. He submitted that as the principal function of the devices in question was clearly as an e-Reader, the CJEU had made it clear that their classification was to be determined by reference to that principal function, even though there was no CN subheading corresponding specifically to it; in the absence of such a subheading, the
35 residual subheading 8543 70 90 applied.

17. As to the appellant’s point about the words “unless the context otherwise requires” in Note 3 to Section XVI, he pointed out that the CJEU was well aware of the full content of that Note, as it was set out in full in the judgment. If the court had considered there to be any relevant context which could justify a classification of the
40 Kindle other than by reference to its principal function, it would have said so. There

could be no such “context” arising in the present appeal which would not also have arisen in the CJEU case, bearing in mind that the products involved had exactly the same principal function in both cases.

18. As to the application of *Aimia*, Mr Singh pointed out that “the Supreme Court merely decided that the particular questions that had been referred to the CJEU in the case before it did not fully reflect the central arguments or important factual matters. As a result, the CJEU’s own ruling in response to those questions was based on an incomplete evaluation of the arguments and the facts. In light of that, the Supreme Court had to take what guidance it could from the CJEU’s decision and apply it in the light of its own consideration of all the important facts and arguments.” He pointed out that there was no suggestion in the present case that there was any “serious deficiency” in the questions referred to the CJEU and therefore there was no basis for following the same approach as in *Aimia*.

19. He further argued that the appellant’s claim that the CJEU decision was “difficult to reconcile with preceding classification case law” was merely an expression of disagreement with the CJEU’s decision, but this did not impact on the binding effect of that decision.

20. Finally, Mr Singh repeated HMRC’s application for the costs of the strike-out application, based on what he characterised as the appellant’s “unreasonable conduct” in “persisting with what is now a hopeless appeal”.

Appellant’s argument

21. Ms Brown emphasised (as I accept) that it is not necessary for the Tribunal to decide that her arguments are correct, merely that the appellant “has an arguable case that is more than merely fanciful”.

22. In parallel with the finding in *Fairford* to the effect that HMRC’s strike out application could not be accepted without a detailed examination of the evidence (which was an exercise appropriate to a full hearing and not a strike out application), she sought to persuade me that the appellant’s arguments in this case should (and, indeed, could only properly) be expanded and explored in a full hearing. She pointed out that both parties were effectively ready for a full hearing, witness evidence already having been served.

23. She cited *Pärlitgu OÜ v Maksu- ja Tolliameti Põhja maksu- ja tollikeskus* (Case C-56/08) (“*Pärlitgu*”) at paragraph 24 (*emphasis added*):

“[W]hen the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria the implementation of which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori, since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so (*Joined Cases C-260/00 to C-263/00 Lohmann and Medi Bayreuth*)”

said that it was appropriate to examine first whether a product should come under a specific heading before classifying it under a residual heading. This approach could only be reconciled with the CJEU decision of December 2015 by taking account of the “context” of the sub-headings in the present case, which the Tribunal ought properly to do.

30. Finally, she referred us to paragraph [56] of the Supreme Court decision in *Aimia*:

“The Court of Justice’s analysis of the legal issues focused in the reference, on the basis of the facts as it understood them, is not open to question. This court is required by s 3(1) of the European Communities Act 1972 (as amended by s 3 of and the Schedule to the European Union (Amendment) Act 2008) to determine “any question... as to the validity, meaning or effect of any EU instrument” in accordance with “any relevant decision of the European Court”. Nevertheless, this court’s responsibility for the decision of the present case on the basis of all the relevant factual circumstances, and all the arguments presented, requires it to take into account all the facts found by the tribunal, including those elements left out of account by the Court of Justice, and to consider all those arguments, including those which were not reflected in the questions referred. That responsibility under domestic law is also recognised in EU law, as the Court of Justice explained at paras 17 and 18 of its *AC-ATEL* judgment. In the exceptional circumstances of this case, this court cannot therefore treat the ruling of the Court of Justice as dispositive of its decision, in so far as it was based upon an incomplete evaluation of the facts found by the tribunal or addressed questions which failed fully to reflect those arguments. This court must nevertheless reach its decision in the light of such guidance as to the law as can be derived from the judgment of the Court of Justice. In that regard, important aspects of the judgment include the statement that consideration of economic realities is a fundamental criterion for the application of the common system of VAT (para 39), and the statement that, where a transaction comprises a bundle of features and acts, regard must be had to all the circumstances in which the transaction in question takes place (para 60).”

31. In her submission, following *Aimia*, the Tribunal should ignore the CJEU decision, in effect because it failed to address the relevant arguments as she had outlined them.

32. In the appellant’s amended grounds of appeal delivered on 2 December 2015, it had also placed reliance on the 1996 “International Technology Agreement”, to which the EU is a signatory and which requires (it was said) a nil duty rate for all electronic products with translation and dictionary function. It was contended that the CN should be interpreted so as to be consistent with this agreement. This point was not pursued in the appellant’s skeleton argument or at the hearing but, in any event, appears to ignore the point that the CJEU decision clearly stated that a product’s principal function was the relevant consideration. Otherwise, as Mr Singh pointed

out, any electronic machine could be brought within the nil duty classification simply by adding a dictionary function to it.

Discussion and decision

Classification of the Products and the strike out application

5 33. However Ms Brown presents it, it seems to me that her essential argument is that the CJEU decision of December 2015 was wrong.

34. There was nothing complex about the issue that was referred to the CJEU. The argument was whether, in the context of products which are either the same as or (to all intents and purposes) indistinguishable from the Products involved in this appeal, classification should be by reference to (a) the principal function of the machine (even where the CN contains no specific heading or sub-heading describing a machine with that principal function) or (b) an ancillary function of the machine which does have a specific heading or sub-heading allocated to it. The CJEU clearly opted for the former.

15 35. Ms Brown's attempt to pray in aid the words "Unless the context otherwise requires" does not in my view assist her. The only relevant "context" could be the wording of the CN itself, and once the CJEU's central point (that "a product is ... classified having regard, not to one of its ancillary functions, but to its principal function, even in a situation such as that at issue in the main proceedings where there is no CN subheading corresponding specifically to that principal function") is accepted, her argument is bound to fail. The "context" was fully known to the CJEU in reaching its decision. It was very well aware of the existence of subheading 8543 70 10, and it gave a perfectly clear and cogent reason why 8543 70 90 (rather than 8543 70 10) was the correct sub-heading in the case of the Kindle.

25 36. The conclusion of the CJEU could hardly be clearer. In paragraph [27], it makes it quite clear once it is established that the "e-Reader" function is the principal function (and any translation or dictionary function is therefore ancillary), the correct classification is 8543 70 90. In the present case, it is agreed that the e-Reader function of the Kindle Touch and the Traditional Kindle is, in each case, the machine's principal function. As night follows day, the products the subject of the appeal must also, in conformity with the CJEU decision, be classified to sub-heading 8543 70 90.

37. I do not consider there to be any conflict with *Customs Support*. That case was concerned with an entirely different section of the CN, and no reference was made in it to any equivalent provision to that contained in Note 3 to Section XVI, which is the provision which specifically requires classification of composite machines by reference to their principal function.

38. Nor do I consider *Aimia* applies to the present case. No relevant facts have been missed from the reference to the CJEU. The only claim is that there might have been "relevant arguments" which were not presented to the CJEU before it reached its decision. I have no way of knowing in detail what arguments were put forward; but if

Ms Brown’s argument is right, paragraph [56] of *Aimia* would be an open invitation to the losing party on any CJEU reference to take a second bite at the cherry by seeking to persuade the UK courts that the CJEU’s ruling cannot be relied on because it failed to take account of some argument which had either been raised but ignored or not raised at all. This would in effect nullify any binding effect of CJEU rulings and that cannot be right. As the Supreme Court made clear, it is only in “exceptional circumstances” that a CJEU ruling should not be treated as “dispositive”. I do not consider this case to be in any way exceptional.

39. It follows that I do not consider the appeal to have any chance of success, still less a chance which is “more than fanciful”.

40. I can see no reason therefore why I should not exercise the discretion conferred by procedure rule 8(3)(c). The appeal is accordingly STRUCK OUT.

Costs

41. Costs are not routinely awarded in relation to proceedings before the Tribunal, unless an appeal is categorised as complex – though even then an appellant can “opt out” from the costs regime. In cases such as the present, the only basis for an award of costs (apart from the extreme sanction of “wasted costs” orders) is that set out in procedure rule 10(1)(b).

42. To make an award of costs, I would need to be satisfied that (a) the appellant had acted unreasonably in bringing or conducting the proceedings, and (b) it was an appropriate case for the exercise of the judicial discretion to award costs.

43. Mr Singh argued that the unreasonable conduct in this case was the persistence with the appeal in circumstances which were, in his submission, “hopeless”. He did not go so far as to say that any strike out under rule 8(3)(c) of the Procedure Rules ought to entitle the successful party to an award of costs. I agree with him on that. He submitted that in a situation where the appellant’s evidence (Mr Hatch) had been that “the issue is [*sic*] the German case is in all material respects identical to the issue looked at in these appeals”, it was clearly unreasonable for the appellant to continue with the appeal once that case had been finally decided against the appellant by the CJEU.

44. Ms Brown argued that the appellant had a genuine belief that the CJEU decision was wrongly decided and/or ought not to be decisive of this appeal and wished to pursue it. In doing so, it had conducted the litigation diligently and co-operatively and ought not to be penalised in costs simply because I considered its belief to be ill-founded.

45. I find the matter finely balanced, but in the event I do not consider the appellant to have acted unreasonably in persisting with the litigation in the face of the CJEU decision. They did so with reasonable efficiency and expedition and I do not consider they should be penalised in costs for their actions. In any event, even if their conduct of the litigation were considered to be unreasonable, I would on balance choose not to exercise such discretion as I may have in favour of HMRC; the Tribunal

is essentially a non-costs jurisdiction and in the round, I do not consider that the way the appellant has conducted the litigation justifies a departure from that general starting point.

46. HMRC's application for costs is therefore REFUSED.

5 47. 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
10 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.

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KEVIN POOLE
TRIBUNAL JUDGE
Release Date: