[2017] UKFTT 209 (TC)

TC05700

Appeal number: TC/2016/01143

CUSTOMS DUTY – classification - Combined Nomenclature – Apple Watch wristband –classified as other articles of plastics under code 3926. 9097. 90 or as part of telephone apparatus within code 8517.7090 – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

APPLE DISTRIBUTION INTERNATIONAL **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
REBECCA NEWNS

Sitting in public at The Royal Courts of Justice, Strand, London on 30 November 2016

Stephen Cock, The Customs Consultancy Ltd, for the Appellant

Simon Pritchard, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant ("Apple") appeals against HMRC's decision to issue a Binding Tariff Information ("BTI") (ref: GB 502749946) on 26 January 2016, classifying a wristband("the band") for an Apple Smart Watch, imported by Apple, under Combined Nomenclature ("CN") code 3926.9097.

2. The BTI classifies the band under the commodity code 3926.9097.90 as:

> "Other articles of plastics and articles of other materials of headings 3901 to 3914: Other: Other: Other".

3. Apple, however, contends that the band should be classified within CN code 8517.7090, as:

> "Telephone sets, including telephones for cellular networks or for other wireless networks; other apparatus for the transmission or reception of voice, images or other data, including apparatus for communication in a wired or wireless network (such as a local or wide area network), other than transmission or reception apparatus heading 8443, 8525, 8527 or 8528: Parts: Other"

4. This appeal involves, we were informed, the importation of the band as a separate item. It does not involve the importation of Apple Watches with the bands attached.

5. In this decision, for simplicity, references to the Court of Justice of the European Union ("CJEU") include references to the European Court of Justice.

The Combined Nomenclature

6. A basic feature of the European Union is that it has established a customs union, involving the prohibition of customs duties on imports and exports between Member States and the adoption of a common customs tariff as regards imports from countries outside the EU. The legal basis for this common customs tariff is provided by Council Regulation (EEC) 2658/87 of 23 July 1987 on the Tariff and Statistical Nomenclature and on the Common Customs Tariff (the Tariff Regulation). Each year the Commission adopts a regulation reproducing a complete version of the Combined Nomenclature and Common Customs Tariff duty rates, taking all amendments since the last version into account. Tariffs are fixed by reference to a very extensive list of goods categories, with a code of up to eight digits and a description.

7. Explanatory notes to the Combined Nomenclature ("CNENs") are published by the European Commission which have consistently been held by the CJEU to be highly persuasive and an important aid to the interpretation of the scope of the various headings, albeit that they do not have legally binding force.

8. The same is true of the Explanatory Notes to the Global Harmonised System for classifying goods, organised by the World Customs Organisation ("HSENs"). The EU Combined Nomenclature and the Global Harmonised System are very similar, although the latter uses six-digit codes as opposed to eight-digit codes.

9. The relationship between these two systems was succinctly explained by Arden LJ in *Amoena (UK) Ltd v HMRC* [2015] EWCA Civ 25 at [7]:

> "In the EU, customs classification is carried out under a system known as the Combined Nomenclature ("CN"). It is based on the customs classification scheme agreed and used internationally by a large number of countries, called the Convention on the Harmonised Commodity Description and Coding System ("HS"). The EU is a party to this Convention. The HS consists of some 5,000 groups of goods with 6-digit codes. The CN integrates the HS but in addition contains further subdivisions with 8-digit codes, specifically adapted for the EU. Both the HS and the CN have explanatory notes (HSEN and CNEN respectively), which are prepared by experts. Courts generally give weight to these notes even though they are not legally binding."

10. We should add, however, that the content of the CNENs must be compatible with the provisions of the CN and cannot alter the meaning of those provisions: see C-376/07 *Kamino*, at paragraphs 47-49.

11. The CN contains general rules of interpretation ("GIRs") for the nomenclature. These general rules are mandatory and hierarchical. GIR 1 provides:

> "The title 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".

12. Thus, reference to the headings of the CN and any relevant section or chapter notes is the primary method of determining classification. The other general rules of interpretation apply only if the application of GIR 1 does not enable classification to be made and only in so far as they are not inconsistent with the headings (Case C-379/02 *Imexpo Trading* [2004] ECR I-9273 at paragraph 16).

13. GIR 3 sets out three sub-rules which are to be applied sequentially where goods are *prima facie* classifiable under two or more headings:

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

14. GIR6 provides that the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the preceding GIRs, on the understanding that only sub-headings at the same level are comparable.

The principles of classification

15. It was common ground that it is well-established in CJEU jurisprudence that the decisive criterion for the tariff classification of goods must be sought 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 of the CN.

16. The CJEU has made clear that, in the interests of legal certainty and ease of verification, the product must be assessed on the basis of the objective characteristics present at the time of its presentation for customs clearance: see Case 175/82 *Hans Dinter* at [10] and Case C-395/93 *Neckermann* at [8]. Those objective characteristics must be capable of being ascertained and assessed at the time of customs clearance: Joined Cases C-208/06 and C-209/06 *Medion* and *Canon*.

17. The Court has also consistently emphasised that subjective factors, in particular "factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities", may not be used as criteria for classification of goods for customs purposes: see Case C-228/89 *Farfalla Flemming* [1990] ECR I-3387, at paragraph 22. Similarly the manufacturing process is not relevant save where expressly referred to in the heading: Case C 40/88 *Paul F. Weber.*

18. In *Van Landeghem* [2007] EUECJ C-486/06 (06 December 2007) at [23]-[25] the CJEU summarised the principles to be applied in resolving CN classification issues, including the relevance of goods' intended use:

> "23. First, 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 as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-0000, paragraph 27).

> 24. Second, 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 (see C-400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-0000, paragraph 18).
>
> 25. Lastly, according to the Court's case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*BAS Trucks*, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *KawasakiMotors Europe*, paragraph 36)."

The facts

19. The band with which this appeal is concerned is made predominantly of plastic, with metal lugs used to secure the band to the watch. The intended use of the band is plainly to allow an Apple Watch to be attached to the user's wrist by attaching the band to the Apple Watch.

20. The band has no electronic parts or function, although it does, as we shall see, enable certain functions to be performed by the Apple Watch by attaching the Apple Watch to the user's wrist.

21. The band comes in two parts and the base material for the band is a plastic called floroelastomer. We were informed that Apple supplies other types of bands (not involved in this appeal) for the Apple Watch which are made out of e.g. woven synthetic material or leather.

22. The band is attached to the Apple Watch by means of a patented combination of lugs and grooves. The band is designed only to fit the Apple Watch and, similarly, due to the design of the band and the Apple Watch it is not possible to substitute an alternative type of watch strap for the band.

23. One part of the band contains a stainless steel pin. The other has a series of holes that are designed to receive the pin. When the two parts are connected, the band secures the Apple Watch to the wearer's wrist.

24. The Apple Watch is intended to be worn on the user's wrist and the sole function of the band is to secure the Apple Watch to the user's wrist.

25. Furthermore, the Apple Watch is designed for exclusive use with the Apple iPhone. The Apple Watch is equipped with a customised design chip that integrates the sub-systems of the device. The design chip contains the capacity of an entire

computer system including processing, graphics, memory, Bluetooth and Wi-Fi capability, miniaturised into a single module.

26. The principal function of an Apple Watch is the transmission and reception of information through the device and its host device (i.e. the iPhone), as it is through this host device that all the capabilities of the device may be fully realised.

27. The following description of the relationship between the band and the Apple Watch, which we understood to be uncontroversial, is taken from Apple's application for a BTI dated 8 October 2015:

> "The principle [sic] functions of the Apple Watch, are "Smart Security", "Power Saving", "Taptic Alert", "Apple Pay". In addition, notifications are disabled when the Apple Watch is not secured to the user's wrist. Indeed other functions such as Heart Rate Monitoring and Health and Fitness Tracker, become limited (these functions become less accurate or require manual input when no longer connected to the wrist).
>
> …
>
> Apple Watch enables you to send messages, read emails, and in some cases answer calls to your iPhone right from your wrist. The Taptic Engine alerts you with a gentle tap so you won't miss important notifications such as text message and calendar alerts etc. This drives the "Apple Watch" function as a wireless communication device.
>
> With Digital Touch, Apple Watch allows you to communicate in new ways by sending a sketch, a tap or even the rhythm of your own heartbeat via the paired iPhone's wireless connectivity….
>
> The Apple Watch interface is normally protected by a four-digit pass code. The pass code is requested when you first set up the Apple Watch through the iPhone, and the Apple Watch remains unlocked while it is secured to the user's wrist by the "Apple Watch Band". The sensors on the back of the Apple Watch detect when it is being worn, and it uses this as a cue to request a pass code, or allow the user to continue as normal. Once the user has removed the watch, the pass code is requested the next time it wakes up. This "Smart Security" is integral to the intimate customer experience that the "Apple Watch" is aiming to achieve. Customers need to have the confidence that their confidential material will be maintained but not be overburdened with security controls.
>
> Apple Pay is another essential function of the "Apple Watch". Using sensors beneath sapphire crystal on the back of the device, the Watch knows when it is being worn on a user's wrist and doesn't require the owner to input the device's security code while the Watch is being worn. This also allows users to make payments with Apple Pay without the need to verify them by inputting a PIN. These sensors can also detect when the Watch has been removed from a person's wrist. Once that detection has been made, PIN code security is re-enabled.

Functionality of the Apple Watch is critically limited if not secured to the wrist if not secured to the wrist by the "Apple Watch Band" with direct contact to the skin, as the integrated sensors, gyroscope and accelerometer all need specific positioning to work correctly:

• Heart rate sensor: the back of the Apple Watch case has a ceramic cover with sapphire lenses protecting four rings (one of the most defining characteristics of the Apple Watch design). These are specifically designed sensors that use infra-red and visible-light LEDs and photodiodes to detect the user's heart rate.

This technology works on the principle that blood is red, because it reflects red light and absorbs green light. Apple Watch uses green LED lights paired with light-sensitive photodiodes to detect the amount of blood flowing through the user's wrist at any given moment. When your heart beats, the blood flow in your wrist – and the green light absorption – is greater. Between beats, it's less. By flashing its LED lights hundreds of times per second, Apple Watch can calculate the number of times the heart beats each minute. The data collected from the pulse monitor can be shared with other devices such as another Apple Watch through haptic feedback, to enable a user to share their heartbeat for medical or other reasons. Haptic feedback is a form of tactile feedback technology that recreates the sense of touch by applying forces, vibration or motion to the user via a lineal actuator.

• Accelerometer: The Apple Watch accelerometer measures your total body movement and steps to calculate the calories you burn throughout the day. It counts all kinds of physical movement, from simply standing up to walking around the office to running to catch your bus.

• Gyroscope: The gyroscope, working with the accelerometer, enables the device to sense the wrist movement of the user in order to activate the display when the user lifts their wrist in order to view the device….

A detailed breakdown of the functionality of the Apple Watch (when on and off the wrist) is detailed below.

Apple Watch Feature	**W/O Pairing with iPhone**	**After pairing with iPhone with Apple Watch Band**	**After Pairing with iPhone without Apple Watch Band**
Receive Notifications (email, Msg, Alert, etc)	X	√	∗Limited
Send Communication(email,	X	√	√

Msg, etc)			
Timekeeping	X	√	√
Heart Rate Monitoring (PPG Sensor)	X	√	∗Limited to manual reading
Digital Touch Communication	X	√	X
Voice Calls	X	√	X
Calendars & Reminders	X	√	X
Health & Fitness Tracker	X	√	∗Accuracy impacted
Apple Pay	X	√	X
Maps & Directions	X	√	√
Remote Control (Camera, Apple TV, Mac)	X	√	√
Play Music	X	√	√
View Photos	X	√	√
Stocks	X	√	√
Weather	X	√	√
Apple Watch Feature	X	√	√

28. Thus, there are a number of functions of the Apple Watch which will only work fully (or at all) if the Apple Watch is in contact with the user's wrist. There are also other functions of the Apple Watch which will work regardless of whether it is worn on the user's wrist.

29. The 20th classification of the 55th session of the World Customs Organisation ("WCO")'s HS Committee specified the Apple Watch as follows:

> "Wrist wearable device ("smart watch"): a battery-operated device (available in two sizes) in the form of a wrist-watch, incorporating a display, a central processing unit (CPU), an electronic watch module, microphone, speaker, vibration motor, accelerometer, gyroscope,…."

Apple's submissions

30. Mr Cock submitted that the band had the objective characteristics of part of the Apple Watch because it was essential to the mechanical function of the Apple Watch. The band did not have the objective characteristics of an "other" article of plastic as

suggested by HMRC. It did not comply with the conditions set out in the HSEN for CN code 3926. 9097.

31. Furthermore, a number of the functions of the Apple Watch did not operate (or did not operate effectively) unless the Apple Watch was held against the user's wrist by the band. The band was, therefore, necessary for the complete functioning of the Apple Watch.

32. The band, Mr Cock argued, had a unique patented design for use solely and exclusively with the Apple Watch. The Apple Watch was classified, as a result of an Opinion issued by the WCO and a BTI issued by the customs authorities in the Republic of Ireland, in CN heading 85.17.

33. The WCO ruling described the Apple Watch as a "Wrist wearable device ("smart watch")…." Therefore, Mr Cock said, without the band the Apple watch could not be worn on the user's wrist and was unable to function as designed.

34. By analogy, the classification of an ordinary watch strap within the CN under heading 91.13 as part of a wristwatch, confirmed that the band should be classified as part of the Apple Watch in heading 85.17. Mr Cock accepted, however, that the band did not fall within CN chapter 91.

35. The band is not a complete product in its own right and, therefore, Mr Cock argued that it was classifiable as part of an item within code 85.17.

36. Furthermore, the band complied with the conditions set out in the HSEN for CN heading 85.17.

37. Finally, Mr Cock submitted that in so far as other Member States may have classified products similar to the band in a different code from that contended for by Apple, those BTI's were not binding on the Tribunal.

HMRC's submissions

38. Mr Pritchard confirmed that HMRC were not arguing that the band was an "accessory". He also confirmed that if we decided that the band was a "part" of the Apple Watch then the correct heading would be CN code 85.17.

39. Mr Pritchard referred to a number of decisions of the CJEU in relation to the term "part", which was relevant because of Apple's submission that the band was "part" of the Apple Watch. In particular, he referred to *Turbon International* [2002] EUECJ C-276/00 (07 February 2002) ("Turbon") where the question was whether ink cartridges were part of a computer printer. The CJEU held at [30]-[31]:

> "30. In that connection, it should be observed that the word part, within the meaning of CN heading 8473, implies a whole for the operation of which the part is essential (see Peacock, cited above, paragraph 21) and this is not so in the case of the cartridge at issue in the main proceedings. While it is true that, without an ink-cartridge, a printer is

> not able to carry out its intended functions, the fact remains that the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge. The inability of the printer, in the absence of an ink-cartridge, to transcribe on to paper the work produced with the aid of a computer is caused by lack of ink rather than a malfunctioning of the printer.
>
> 31. For those reasons an ink-cartridge such as that at issue in the main proceedings, which, in view of its characteristics as described by Turbon International in its written observations, plays no particular role in the actual mechanical functioning of the printer, cannot be regarded as part of a printer within the meaning of CN heading 8473."

40. Mr Pritchard also referred to *Unomedical* (C- 250/05) ("*Unomedical*") in which the CJEU held that a drainage bag attached to a dialyser was not part of the dialyser, even though the dialyser would not function unless the drainage bag was connected. In that case, the CJEU at [36] considered it material that the process of cleansing blood was complete at the time when the bag was used and that the bag served only to collect the liquid drained.

41. Next, Mr Pritchard referred to *Administration des douanes et droits indirects v Rohm & Haas Electronic Materials CMP Europe GmbH* (C-336/11) [2012] EUECJ C-336/11 (19 July 2012) ("*Rohm & Haas*") where the Court emphasised at [34] that the notion of "parts" implied a whole for the operation of which the part was essential. In that case the question was whether polishing pads were part of a polishing machine. The Court held [35] that the mechanical and electrical functioning of those machines was not dependent on there being polishing pads even though the polishing machine could not function properly without the polishing pads. Furthermore, the court held at [39] that the fact that the polishing pad was intended exclusively to be used with a particular kind of machine was not a relevant consideration for the purposes of classifying the good in question as a "part".

42. The Court followed the above authorities in *HARK GmbH & Co KG Kamin und Kachelofenbau v Hauptzollamt Duisburg* (Case C-450/12) ("*HARK*") and held at [36] that it was not sufficient to show that without the article, the machine or apparatus was not able to carry out its intended functions: "It must be established that the mechanical or electrical functioning of the machine or apparatus in question is dependent on that article."

43. Mr Pritchard submitted that the objective characteristics of the band meant that it fell to be classified under heading 3926 – it was plastic with any small amount of metal. It was not "electrical machinery and equipment" for the purposes of heading 8517 nor was it a "part" thereof because the band was not "essential" to the operation of the Apple Watch.

44. Mr Pritchard argued that the Apple Watch could function albeit that some functions, e.g. the heart rate sensor, would not detect a heartbeat unless held against the user's wrist. Similarly, it could not be said that a user's arm was "part" of the Apple Watch any more than the band.

Discussion and decision

45. In this appeal, the Tribunal's jurisdiction is that set out in section 16(5) Finance Act 1994:

> "…the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

46. In other words, we have full appellate jurisdiction in relation to this appeal.

47. The crux of this case, in our view, is whether the band is "part" of the goods specified in CN code 8517 7090 00, viz: "Electrical machinery and equipment and parts thereof; sound recorders and reproduces, television image and sound recorders and reproducers, and parts and accessories of such articles." If it is, then HMRC accepted in argument that the band was correctly classified under CN code 8517.

48. In Case C-339/98 *Peacock* [2000] ECR I-8947, the CJEU established the test at [25] in relation to whether an item was a "part", as follows:

> "The word 'part', on the other hand, implies a 'whole' for the operation of which the part is essential and this is not so in the case of network cards."

49. The *Peacock* test was followed in *Turbon*, as mentioned above. In holding that ink cartridges were not part of a printer, the Court [at 30]-[31] held:

> "30. In that connection, it should be observed that the word part, within the meaning of CN heading 8473, implies a whole for the operation of which the part is essential (see *Peacock*, cited above, paragraph 21) and this is not so in the case of the cartridge at issue in the main proceedings. While it is true that, without an ink-cartridge, a printer is not able to carry out its intended functions, *the fact remains that the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge.* The inability of the printer, in the absence of an ink-cartridge, to transcribe on to paper the work produced with the aid of a computer is caused by lack of ink rather than a malfunctioning of the printer.
>
> 31. For those reasons an ink-cartridge such as that at issue in the main proceedings, which, in view of its characteristics as described by Turbon International in its written observations, *plays no particular role in the actual mechanical functioning of the printer, cannot be regarded as part of a printer* within the meaning of CN heading 8473." (Emphasis added)

50. In the light of further facts found by the national court, demonstrating that the ink cartridge was necessary for the functioning of the printer, the CJEU, in a second reference, (*Turbon International GmbH v Oberfinanzdirektion Koblenz* (Case C-250/05)) held at [18]-[19]:

> "18. In the present case, the circumstances of the case communicated by the referring court reveal that the cartridge itself is necessary for the

printer to function. It is therefore capable of being regarded as a part and, accordingly, classified in subheading 8473 30 90 of the CN.

19. However, as the Advocate General observes in points 72 to 74 of her Opinion, the ink contained in the cartridge cannot be regarded as part of a printer. An ink cartridge, such as that at issue in the main proceedings, is thus made up of two elements which, when considered separately, may each be classified under one heading, namely subheadings 3215 90 80 or 8473 30 90 of the CN, but neither of those headings covers the goods as a whole."

51. In *Unomedical* (above) the question was whether a drainage bag attached to a catheter and dialyser was part of the catheter and dialyser. The CJEU held that it was not, even though the dialyser would not function unless the drainage bag was connected. The Court held [36]-[37]:

"36 Neither the urine drainage bag for catheters nor the drainage bag for dialysers *is indispensable for the functioning* of those instruments or apparatus. It is apparent that catheters do not depend on the presence of a urine drainage bag in order to function and, similarly, that dialysers do not depend on the presence of a drainage bag in order to carry out dialysis, *since the process of cleansing blood is complete at the time when the bag is used*, that bag serving only to collect the liquid drained (see, by analogy, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21, and *Turbon International*, paragraph 30).

37 *The latter finding cannot be called into question by the fact that dialysers work only when a bag is attached*. In that regard, suffice it to state, as the European Commission points out, that, were it not for the security mechanism with which that apparatus is fitted, the dialysis process could be carried out without a bag, that security mechanism being the sole link between the apparatus and the bag (see, by analogy, Case C-250/05 *Turbon International* [2006] ECR I-10531, paragraph 23)."(Emphasis added)

52. Thus, the test, according to *Unomedical*, is whether the item in question is indispensable to the functioning of the apparatus (i.e. "the whole"), but that test is not determined by whether the machine or apparatus only works when the item in question is attached.

53. In *Rohm & Haas* (above) the question before the Court was whether polishing pads intended for semiconductor wafer-polishing machines were part of those machines. The CJEU held at [33]-[39]:

"33. In that regard, it must be noted that, in accordance with note 2(b) to Section XVI of the CN, parts of machines are classified, 'if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading', with the machines of that kind or, as appropriate, in other headings in Section XVI of the CN, such as heading 8466 which covers 'parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465 ...'.

> 34 However, the CN, in the versions applicable to the main proceedings, does not define the notions of 'parts' and 'accessories' within the meaning of Chapter 84 thereof. Nonetheless, it is clear from the case-law that the notion of 'parts' implies a whole for the operation of which the part is essential and that the notion of 'accessories' implies an interchangeable part designed to adapt a machine for a particular operation, or to increase its range of operations, or to perform a particular service relative to the main function of the machine (see, to that effect, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21; Case C-267/00 *Turbon International* [2002] ECR I-1389, paragraphs 30 and 32; and *Unomedical*, paragraph 29).
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> 35 However, in the present case, firstly, and as Rohm & Haas claim, while a semiconductor wafer-polishing machine is not able to function properly without polishing pads, *it is nevertheless established that the mechanical and electrical functioning of those machines is not dependent on there being polishing pads. Consequently, polishing pads are not essential for the operation of wafer-polishing machines*.
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> 36 *That finding is supported by the fact that, as Rohm & Haas submitted at the hearing, several different types of polishing pad may be fitted on a semiconductor wafer-polishing machine.*
>
> 37 Second, it is common ground that polishing pads do not enable those machines to perform operations other than that for which they are designed. Therefore, the polishing pads in question do not enable those machines to be adapted for a particular operation, nor do they increase their range of operations, or enable them to perform a particular service connected with their main function.
>
> 38 It follows that polishing pads such as those at issue in the main proceedings cannot be considered to be 'parts' or 'accessories' suitable for use with semiconductor wafer-polishing machines and cannot therefore be classified under heading 8466 of the CN (or heading 8486 of the CN since Regulation No 1549/2006 entered into force).
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> 39 The arguments of Rohm & Haas that the polishing pads at issue in the main proceedings are exclusively intended to be fitted on certain types of polishing machines for such wafers and that those machines are already fitted with a polishing pad are not sufficient to question the finding in paragraph 38 of this judgment. *Neither the fact that a good is intended exclusively to be used with a particular kind of machine nor the fact that it is possible that the machine may already be fitted with that good are, in the light of the case-law cited in paragraph 34, relevant considerations for the purposes of classifying the good in question as a 'part' or 'accessory'."* (Emphasis added)

54. Thus, the Court considered it important that the polishing pads were not essential for the mechanical and electrical functioning of the machines. Secondly, the Court considered that their conclusion was supported by the fact that several different types of polishing pads could be fitted to the polishing machine. Thirdly, the fact that the polishing pads were intended to be used with a particular kind of machine or the fact that the machine may already be fitted with the polishing pads were not relevant considerations.

55. In *HARK* (above), the question before the CJEU was whether a stove pipe set which comprised a right-angled elbow in steel, covered in heat-resistant paint and had a closing flap to allow internal cleaning, a chimney connection and an appropriate surround, fell under CN heading 7321 as a part, in steel, of a stove, or CN heading 7307 as a tube or pipe fitting. The Court held:

> 36 The CN does not define 'parts' within the meaning of CN heading 7321. Nonetheless, it is clear from the Court's case-law, developed in the context of Chapters 84 and 85 of Section XVI and of Chapter 90 of Section XVIII of the CN, that the notion of 'parts' implies a whole for the operation of which the part is essential (see, inter alia, Case C-183/06 *RUMA* [2007] ECR I-1559, paragraph 31; Case C-152/10 *Unomedical* [2011] ECR I-5433, paragraph 29; and *Rohm & Haas Electronic Materials CMP Europe and Others*, paragraph 34). *It follows from that case-law that, in order to classify an article as 'parts' within the meaning of those chapters, it is not sufficient to show that, without that article, the machine or apparatus is not able to carry out its intended functions. It must be established that the mechanical or electric functioning of the machine or apparatus in question is dependent on that article* (see, to that effect, Case C-276/00 *Turbon International* [2002] ECR I-1389, paragraph 30, and *Rohm & Haas Electronic Materials CMP Europe and Others*, paragraph 35). Furthermore, account should be taken of note 2(a) to Section XV of the CN, which specifies that references to 'parts of goods', inter alia in CN heading 7321, do not include references to 'parts of general use.'
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> 37 In the interests of a consistent and uniform application of the Common Customs Tariff, *the notion of 'parts', within the meaning of CN heading 7321, must be given the same definition as that established by the case-law on other chapters of the CN, such as that referred to a paragraph 36 above.*
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> 38 In this case, it is apparent from the factual findings of the referring court that the tubular elbow component at issue in the main proceedings, as well as the chimney connection and the surround, are intended exclusively for use with stoves. Furthermore, that component serves to connect the stove to the chimney flue. In the absence of such a connection, the stove could not be operated because flue gases would escape.
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> 39 Therefore, it must be concluded that the tubular elbow component is essential for the operation of the stove. In the light of the case-law referred to at paragraph 36 above, such a component may therefore be regarded as 'part' of a stove and, therefore, classified under CN heading 7321. (Emphasis added)

56. Once again, the Court has emphasised that for a component to be "a part" of a machine or apparatus, the mechanical or electric functioning of the machine or apparatus must be dependent on that component. It is not sufficient to show that, without the component, the machine/apparatus will not carry out its intended function.

57. In this case, it seems to us that the mechanical or electrical functioning of the Apple Watch is not dependent on the band. It is true that a number of functions of the Apple Watch can only occur whilst it is held against the skin on the user's wrist. There was nothing in the evidence to indicate that any of these functions would be disabled if the Apple Watch were to be held, for example, manually against the wrist or by some other form of attachment, however unsatisfactory that may be. That, of itself, suggests to us that the band is not essential to the electrical and mechanical operation of the Apple Watch. The Apple Watch is a self-contained, fully functioning electrical machine and the band is not part of that machine. We note that, in his opening submissions, Mr Cock conceded that the band was not essential to the actual electronic functioning of the Apple Watch. We consider that this concession was correctly made and reinforces our conclusion.

58. Mr Cock maintained, however, that the band was essential to the mechanical functioning of the Apple Watch. We do not think that this is correct, for the reasons that we have just given. It is true that that without the band the Apple Watch will not carry out some of its intended functions, but as the decision in *HARK* demonstrates this is not sufficient to establish the band as a part of the Apple Watch.

59. By analogy with the Court's reasoning at [36] in *Rohm & Haas*, we also note that there are a number of types of wristbands in different materials supplied by Apple and that the Apple Watch will function with any of these wristbands in the same way that the polishing machine would work with different polishing pads. This supports the conclusion that the band is not part of the Apple Watch.

60. As regards CN heading 39.26, Mr Cock acknowledged that floroelastomer was a plastic and accepted that suitable articles of floroelastomer would stand to be classified under heading 39.26. However, Mr Cock submitted that, when plastics were combined with materials other than textiles, it was clear from the HSEN that CN Chapter 39 only encompassed those items which remained essentially plastics.

61. In our view, considering the objective characteristics of the band, it seemed to us that the essential characteristic of the band was that it was a piece of plastic. It is true that there are small amounts of metal (e.g. the lugs and the pin) but it would be, in our view, a nonsense to seek to classify the band as a piece of metal. It was fundamentally a piece of plastic. In any event, even if the band was regarded as being both plastic and metal GIR 3(b) would require the band to be classified as if it consisted of the material which gives it its essential character which, in our view, would be plastic.

62. Finally, HMRC referred to a BTI issue by the Netherlands in relation to a strap for a smart watch. The reasoning behind the decision appeared to be that the strap could not be regarded as an "accessory" because it did not add any function to the device. That BTI did not appear to address the question whether the strap was "part" of the smart watch and seem to us of limited relevance.

63. It follows, therefore, that the band was correctly classified by the BTI issued on 26 January 2016 under the CN code 3926.9097. Accordingly, we dismiss this appeal.

64. 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.

GUY BRANNAN
TRIBUNAL JUDGE

RELEASE DATE: 21 FEBRUARY 2017