



[2019] UKFTT 693 (TC)

TC07466

Appeal number: TC/2018/8263

CUSTOMS DUTY – Classification under the CN – portable gas measurers – whether alarms under 8531 or analysers under 9027. Held 9027

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

MSA BRITAIN LTD

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE CHARLES HELLIER

Sitting in public at Taylor House EC1N on 24 and 25 September 2019

Stephen Cock of The Customs Consultancy Ltd for the Appellant

**Brendan McGurk, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents**

DECISION

1. The Appellant appeals against five Binding Tariff Information rulings (“BTIs”) issued by HMRC on 12 October 2018. These rulings classified certain portable gas detectors under heading 9027 10 10 00 (“9027”) of the Combined Nomenclature (the “CN”) of the European Union’s Common Customs Tariff (which, so far as pertinent, relates to electronic gas or smoke analysis apparatus). The Appellant, to whom the rulings were addressed, argues that the correct classification is under 8531 80 70 00 (“8531”).

Customs classification: law and interpretation.

(A) The Combined Nomenclature.

2. The EU is a party to the International Convention on the Harmonised Commodity Description and Coding System 1983. This Convention lays out the World Customs Organisation's (the “WCO”) system of commodity description (the “HS”). This consists of a harmonised system of commodity nomenclature (description) under sections, chapters, headings, subheadings, associated notes and general rules for interpretation. By article 3 of the Convention the EU agrees to apply the nomenclature and the general rules.

3. The EU fulfils its obligations under this convention in Regulation 2658/1987 which contains, in Annex 1, a combined nomenclature (the “CN”) which comprises (i) the WTO's harmonised nomenclature, (ii) further community subdivisions of the subheadings in the WTO's nomenclature, and (iii) additional notes. The CN in Annex 1 is amended by the EU annually by regulation.

4. The CN uses an eight digit identification system. The first two digits represent the chapter heading; the next two represent headings in the chapter; the fifth and sixth digits represent further World Customs Organisation subheadings. The final two digits represent the EU’s further subdivisions.

5. In this appeal three classification provisions in the CN are relevant. The dispute related to the first four digits of the classification heading and no argument was made that the remaining six digits were wrong if the heading was correct.

(i) 8531

"Section XVI - machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.

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.

8531 - Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530.

8531 80 - Other apparatus.

8531 95 – Other."

Two of the Notes in section XVI is relevant in this case. They provides:

"1. This section does not cover:

...

(m) articles of Chapter 90;

...

3. Unless the context otherwise requires, ... machines designed for the purpose of performing two or more complementary or alternative functions are to be classified ... as being of that machine which performs the principal function."

(ii) 9026

"Section XVIII - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof.

Chapter 90 - Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; parts and accessories thereof.

9026 - Instruments and apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases (for example, flow meters, level gauges, manometers, heat meters), excluding instruments and apparatus of heading 9014, 9015, 9028 or 9032.

9026 80 – Other instruments or apparatus.

9026 80 20 - Electronic."

(iii) 9027

"9027- Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity, porosity, expansion, surface tension or the like; instruments and apparatus for measuring or checking quantities of heat, sound, or light (including exposure meters); microtomes.

9027 10 - Gas or smoke analysis apparatus

9027 10 10 - Electronic."

(B) The GIRs.

6. The WTO's general rules for interpretation of the nomenclature (the GIRs) are set out in section 1 of annex 1. There are six GIRs. GIR 1 provides that classification shall be determined according to the terms of the headings and any related section or chapter notes and, provided those headings and notes do not otherwise provide, according to the following GIRs.

7. GIR 2 deals with incomplete articles or mixtures. It requires that an unfinished article be classified as the finished article provided that it has "the essential character" of the complete article.

8. GIR 3 provides:

3. 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 which occurs last in numerical order among those which equally merit consideration.

9. GIR 4 provides a sweep up rule: 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.

10. GIR 6 provides for a hierarchy of comparative classification under the subheadings so that only subheadings at the same level are to be compared.

(C) HSEN's

11. The Harmonised System Committee produces Explanatory Notes (HSEs) in relation to the headings in the HS. There are HSE's for 8531, 9026 and 9027.

12. The CJEU has consistently held that the explanatory notes "may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force" (see e.g. [48] *Metherma GmbH*). They must be consistent with the provisions of the CN and cannot alter their scope ([48] *Intermodal*; [20] *Possehl Erzkontor*)

(D) EU classification Regulations.

13. From time to time the EU Commission promulgate, on the advice of the EU Customs Code Committee, regulations on the classification of particular goods for the purposes of the CN. They do so where the classification of a particular product under the CN is difficult or disputed. These regulations provide reasons for specifically described goods to be classified under a particular heading and prescribe that classification.

14. In *Hewlett-Packard C-119/99*, the CJEU accepted the possibility of declaring a classification regulation invalid (although it held that the particular regulation at issue in that case was not in doubt). In so finding it stated that:

(a) "20. In the interpretation of a classification regulation, in order to determine its scope, account must be taken inter alia of the reasons given ...".

15. Taking account of the reasons given in that Regulation the Court found that the regulation did not apply to the goods at issue which accordingly did not fall to be classified under it.

16. Mr Cock notes the warning of the Advocate General at [24] of his opinion that the approach adopted by a classification regulation should not unhesitatingly and automatically be adopted for a similar product.

17. In *Anagram International Inc C-14/05* the CJEU said that the application of a Regulation classification to similar products by analogy would be desirable.

(E) BTIs

18. A person may apply to the customs authority of a State for a Binding Tariff Information (BTI) classifying particular goods. Once issued the BTI binds the customs authorities of the member states to use the specified classification in relation to goods imported by the holder of the BTI, but it does not confer rights upon any other person.

19. Under articles 33 and 34 of the Union Customs Code, a BTI becomes invalid where: a contrary regulation is adopted, the CN is amended, a conflicting HSE, CNE

or HS Committee Opinion is adopted, there is a contrary judgement of the CJEU or where, there being an error in its reasoning, it is revoked.

The Background to the Appeal

20. The Appellant imported portable gas detectors of the Altair range. It was common ground that for relevant classification purposes that these were similar to the Gas Alert Micro 5, which was distributed by Honeywell and had been the subject of an appeal to the FTT (in 2015) in relation to its CN classification and onward appeals to the Upper Tribunal (in 2016) and to the Court of Appeal (in 2018). I shall come later to the arguments and conclusions in that litigation, but at this stage I merely note that it was there argued that the Gas Alert Micro 5 detector fell within 9026 80 20 ("9026") as an instrument for measuring gases. Neither party in this appeal argued that this classification should have been adopted in the BTIs applied to the Altair range.

21. The Appellant applied for the BTIs in dispute in April 2017. There were applications in relation to five detectors, which differed materially only in relation to the number of different gases they dealt with, and those five applications resulted in the five BTIs which are the subject of this appeal. In its applications the Appellant described the detectors in terms such as the following (which was for the 6 gas detector):

Portable Multi-gas detector. The device detects and measures the level of up to 6 gases in ambient air and in the workplace. It provides no analysis of the gas level measurement that it takes. It is available with a maximum of five sensors, which can display readings for six separate gases (one two-gas sensor can detect two toxic gases with a single sensor). Gas concentration is displayed on an integrated LCD which incorporates a backlight. Audio, visual and vibrating alarms alert the user when dangerous gas concentrations are detected. Bluetooth enables the detector to be paired with a suitable android device to allow a note monitoring or configurations. [My underlining]

And in correspondence with HMRC said that the units were “the same in form and function to Honeywell’s Gas Alert range” of detectors.

22. The descriptions for the other four devices differed only in the specification of the number of gases and the omission or inclusion of the Bluetooth facility. The application was accompanied by a brochure with pictures.

23. The BTIs issued by HMRC on 12 October 2018 described the goods in the same terms as in the applications but with the omission of the words which I have underlined.

24. In a letter enclosing the BTIs, HMRC explained their reasons for classification under 9027. These were the following:

(a) on 30 August 2018 a Commission Implementing Regulation was published which described the classification of an oxygen analyser under 9027. Whilst the products in the BTIs were not the same as such oxygen analysers, they were sufficiently similar to the Regulation for it to be applied by analogy;

- (b) heading 9027 included "instruments and apparatus for physical and chemical analysis (for example ... gas or smoke analysis apparatus ...);
- (c) the HSEN to 9027 referred to electrical or gas or smoke analysis apparatus ... (used to analyse combustible or burnt gases in coke ovens, gas producers, blast furnaces etc).

25. I have noted that the Appellant's descriptions of the products in its applications contained the phrase "it provides no analysis of the gas level measurement" and that this phrase was omitted from the BTI description: that omission is reflected in the reasons for HMRC's classification - for each of them is reliant to some extent upon the device "analysing". If a detector did not analyse it would be difficult to conclude that it fell within 9027. Whether there was such analysis as 9027 contemplates, is therefore an issue in this appeal.

The Honeywell litigation.

Honeywell Analytics Ltd v HMRC [2015] UKFT 586 TC; [2017] UKUT 0061 (TCC); [2018] EWCA Civ 579

26. Honeywell appealed against BTIs which classified its Gas Alert Micro 5 under heading 8531 (alarms). It argued that they should be classified under 9026 (gas measuring devices).

27. The FTT received evidence of the features of the device and made findings as to the contents of the device and how it worked [35-37] and also [38-42] as to its functions and use. As [38] it said:

“in answer to the question: "What is the device for?" We find that it is to do [the alerting of its wearer to the presence of noxious levels of gas]. And we find that alerting is the only thing the device is intended to be used for."

28. It found that the device measured the concentration of a gas but that such measurement was a means to an end; measurement was not its intended use.

29. It held that 8531 (alarms) accurately described the essential characteristics and the only intended use of the device. It then considered 9026 (instruments ... for measuring ... gases) and held [80] that while the device "is an instrument which does measure the level of gases, it was not an instrument for doing that". It concluded that it did not fall within 9026. It therefore held that the proper classification was 8531.

30. The Upper Tribunal (on an appeal by Honeywell) held that the FTT had erred inter alia in that it had made a finding that the device recorded gas levels on the memory card and that must have meant that the device was for measuring within 9026. It found the FTT's finding that measurement was just a means to an end was an unjustified error caused by the inappropriate weight it gave to intended use. The Upper Tribunal found that there were two competing headings: 8531 and 9026. It applied Note 1(m) to Section XVI, which removed from chapter 85, and so from 8531, anything in chapter 90 (thus including 9026), and so held that 9026 prevailed.

31. The Court of Appeal was divided. It had been argued before it that there was a general principle that where an item was capable of falling within the words of more than one heading, the heading which was most consistent with the principal purpose of the item should be applied [66]. The Master of the Rolls rejected this principle although he accepted two narrower ones:

(a) that where a heading described a function, an item would fall within that heading if its principal or main function was the specified function even though the item might be used for some other purpose; and

(b) that where there were two potentially applicable headings one which was theoretically conceivable but highly improbable should be ignored.

32. As a result of his rejection of the wider general principle, he held that the Upper Tribunal were correct to reject an interpretation of 9026 limiting it to apparatus whose principal purpose was to measure for the sake of measurement alone.

33. Sales LJ, with whose reasons Davis LJ agreed, agreed with the narrower principles. He held: (i) there was ample evidence entitling the FTT to make its findings of primary fact [124]; (ii) these were such that it was entitled to make the "evaluative judgement that the device was not an instrument "for measuring or checking the ... levels ... gases"" and thus did not fall within 9026 [126]; (iii) on the FTT's findings there was no real possibility that the device would be used separately to measure gas levels [134] and, by application of narrower principal (b), that that use should be ignored [132]; and (iv) that the FTT was entitled to rule that on a proper interpretation of 9026 in order to fall within it the device had to be intended for use as a measuring instrument:

“as the main or principal purpose for using it. On a comparison of the language of heading 9026 and that of 8531, it is in my view that this is the force of the word "for" in the phrase, “Instruments and apparatus for measuring or checking the...level...of...gases”, particularly in the light of the examples given in heading 9026 itself ... I consider that [to succeed in 9026 it had to be shown] that the main or principal use of the device was to measure the level of gas ..." [136].

34. It was, he said, however fair to say that the FTT had gone too far in interpreting 9026 to mean that it covered devices whose only function was to measure the level of gas etc: it would be sufficient if that was the main function.

35. Davis LJ noted [102] that the specific factual finding of the FTT was that measurement of gases was not what the device was for and on that basis it did not fall within 9026; he considered [111] that some authorities did involve a principal function or main use principle to assess whether a particular clarification was right and at [112] suggested that 9026 could have succeeded if it could have been established that measurement was "the (or, possibly, a) main intended use of the device".

36. It is important to note that the key rationale of the FTT's decision and its affirmation by the Court of Appeal was that the device did not fall within 9026 and as a result fell within 8531 because that was the only competing classification. No other classifications were tested. If the device was also potentially classifiable under another

heading of chapter 90, then the decision would have been different since by virtue of Note 1(m) the chapter 90 heading would prevail.

37. That argument was in fact made in the course of the onward appeal to the Upper Tribunal and the Court of Appeal (because following the FTT hearing HMRC had changed their minds and had come to the conclusion that 9027 applied). But the Upper Tribunal and the Court of Appeal denied permission for that argument be run on procedural grounds. Thus the question of whether the device could have fallen within 9027 was not deliberated.

38. Nevertheless Sales LJ's judgement is laced with references to the artificiality of the binary choice before the Court between 8531 and 9026 without the possibility of consideration of 9027.

39. Mr McGurk rightly says that as a result caution must be exercised in drawing conclusions from the Honeywell cases. The Master of the Rolls, Davis LJ and Sales LJ all lamented that the court could not consider 9027 - the Master of the Rolls saying that the omission of 9027 from consideration left the appeal tinged with a heavy air of unreality, and Sales LJ emphasising the artificial binary choice between 9026 and 8531, saying that it was possible that the proper classification may have been under 9027. In that context he said that:

"the precise language of heading 9026 and its context, reading the heading as a whole together with the relevant HSEs, is different from the language and context of heading 9027",

and, at [140] (no doubt in recognition of the deliberations of the Combined Customs Committee), "it now appears that the proper classification for the [device] may be under heading 9027 ... I express no view about what position might now obtain, e.g. if HMRC seek to [apply 9027]".

40. The Honeywell decisions cannot therefore be taken as meaning that the only possible classification of a product equivalent to the Alert Micro Gas 5 is 8531. But they can in my view provide evidence of the objective characteristics and properties of the Alert Micro Gas 5 relevant to whether or not the Alert Micro Gas 5 can fall within 9027. I appreciate that since the parties before the FTT did not have the 9027 in mind that the evidence they adduced would not have been directed to 9027, but that does not mean to say it is of no value in addressing 9027. And because the Altair range is accepted as being similar, it is evidence which may be relevant to the classification of the Altair products.

The Regulation (2018/1208).

41. Another issue arose from the Honeywell litigation. I have explained that before the Upper Tribunal hearing HMRC had changed their minds and concluded that the Gas Alert Micro 5 fell within 9027. HMRC discussed this with other member states and discovered that they were classifying what they considered to be similar products under 9027. After the Upper Tribunal decision in favour of 9026, they raised the difference with the Customs Code Committee. That led to the issue of BTIs for gas detection

products being suspended for a while and to discussions in the 183rd and 184th meeting of that committee as to the proper classification of gas detection products.

42. The Committee considered two products which were designed to measure trace oxygen in pure and mixed gases. One "designed for use in a range of industrial applications including use in glove boxes, heat treating, solder reflow ovens, laboratory and industrial gas production" and the other in "industrial gas processes". The Committee agreed without dissent that 9027 was the right classification but said that the case could not be closed because a member state (the UK) was bound by a national tribunal ruling (which I was told was the Upper Tribunal decision in *Honeywell*). It was agreed to produce a Regulation. A draft regulation was approved by the committee at the 184th meeting and that Regulation was published on 27 August 2018 after the Court of Appeal gave its judgement. The text of the classification is set out later in this decision.

The Evidence

43. The evidence before me of the nature of the Altair detectors consisted of: (i) their description in the applications for the BTIs; which included an 11 page product guide with photographs (ii) the factual findings of the FTT in *Honeywell* in relation to the Gas Alert Micro 5 (which the parties accepted with similar to the Altair product) and (iii) Mr Cock's evidence that the product was equivalent to the Gas Alert Micro 5 for the purposes of 8351, 9026 and 9027. Normally advocates do not give evidence, but there was no inconsistency between the description of the Altair products in the BTIs and the description of the Gas Alert Micro 5's objective characteristics and properties in the FTT decision in *Honeywell*, so I accepted his evidence of equivalence. I therefore treat the description of the objective features of the Gas Alert Micro 5 as applicable to the Altair product.

44. The findings of another tribunal are second-hand evidence; they may have been reached with specific arguments in mind. Nevertheless they are evidence which I had a discretion to take into consideration and evidence which is not disputed by Mr McGurk. In those circumstances I thought it fair and just to take into consideration the FTT's findings as to the objective characteristics of the Alert devices and the way in which they worked.

45. In the current appeal HMRC, arguing for 9027, and the appellant have chosen to offer only the evidence described above and HMRC have not offered other evidence or sought to distinguish the Altair products from the Gas Alert Micro 5 as described in the FTT's decision.

46. This appeal is against a BTI decision that goods of the description in the BTI fall under that heading. But it seems to me that this appeal should not be treated as merely one as to whether goods of the description in the BTI fall within the relevant heading; since the BTI is addressed to the importer who has provided information in relation to the product in question, but should address whether, on the evidence available to the tribunal, the product (rather than its different or more limited description) falls within the relevant heading.

Factual Findings

47. My findings of fact are made in the description of the objective characteristics and properties of the products, and of their intended use which are set out in the sections below.

The approach to classification.

48. I approach the classification of the product thus:

- (a) determine from the evidence before me the objective characteristics and properties of the product (this being the “decisive criterion” for classification);
- (b) determine the intended uses of the product which are inherent in the product and capable of being assessed on the basis of those objective characteristics and properties (such use being capable of consisting an objective criterion for classification);
- (c) consider the terms of headings 8531, 9026 or 9027 (GIR 1) having regard to:
 - (i) the HSEN's, and
 - (ii) the potential application (by analogy or otherwise) of the classification Regulation 2018/1208,

and, whether the characteristics, properties and such intended uses found in (a) and (b) fall, prima facie, within any of them;

(d) if the result of the above is that the product is potentially classifiable under more than one heading, consider the application of Notes 1(m) and Note 3 of the relevant Section and Chapter headings;

(e) if the product remains classifiable under more than one heading consider the application of GIR 3 (a), (b), and (c).

49. No issue arose in relation to the sub headings of the possible classifications.

(i) the objective characteristics and properties of the product.

50. I have set out at [21XXX] above the description of the products in the BTI and the BTI application.

51. In *Honeywell* the Master of the Rolls described the FTT’s findings as follows in relation to the Alert device:

“[19] The FTT first noted (at para. [15]) that in its request for a review of HMRC's BTI decision Honeywell described the Device as follows:

"The product is a gas monitoring device which is carried on the person (portable) and used by people who work in confined spaces and may have reason to come into contact with high levels of potentially dangerous toxic gases.

The product (as described in the technical specification) detects the following gases and provides a 'parts per million' (PPM) LCD readout of each of these gases in real time (i.e. on a continuing basis): H₂S, CO₂, SO₂, PH₃, NH₃, HCN, CL₂, ClO₂, O₃ and combustibles.

The units contain[s] both audible, visible and a vibration alert mechanism."

[20] The FTT went on to consider (in para. [17]) the technical literature available online in relation to the Device, which stated under the heading "Protect yourself" that the Device could simultaneously monitor and display up to five atmospheric hazards.

[20] Based on the factual evidence provided by Mr Christopher Townsend of Honeywell which was accepted by the FTT, the FTT found (in para. [24]) that the Device detected whether there were gases at all in the relevant space entered into by the person wearing the Device and that, if there were, the level detected may or may not be dangerous. The alarm indications could be disabled at the discretion of the user, although Mr Townsend agreed that it was not best practice to disable the detection sensors in a gaseous environment.

[21] The FTT also found (in paras. [35]-[36]) that levels of gas building up on the filters on the Device caused electrical currents to be generated which were proportionate to the level of the gas. Those currents were measured and displayed on the LCD screen on the Device. Optionally the user could lock the readings and the Device could store several months of continuous data on a removable memory card. When a calibrated level of gases was reached the Device showed the word "ALARM" on the LCD screen which became backlit and displayed the ambient gas readings. It flashed, made a sound and vibrated.

52. These findings *as to the physical features* of the devices (thus postponing for the moment the description of their use in the second sentence of [19]) are consistent with the description of the devices in the BTI and the brochure before me. I take them as objective properties and characteristics of the Altair devices (subject to variations in the number of gases with which the devices worked).

53. The brochure before me describing the "Altair Family Gas Detectors" contained pictures of the detectors. It showed them being held in the hands of workers some of whom were wearing respiration hoods or other protective clothing. The pictures of the devices showed that they were about the size of a large and very thick mobile phone. Each had a number of robust buttons on its face. The centre of most devices was occupied by an LCD display screen which prominently displayed one or more numbers which I took to be the concentration(s) of the gas(es) being monitored. There were other symbols on the screens, not all of which I could make out from the copies before me, but one of which appeared to be an indication of the period of the use of the device and others may have been indicators of the safety of the environment in view of the (displayed) concentration of gases.

54. The FTT made the following finding (in para. [37]) as to the contents of the Alert device and how it worked:

"From the facts that we have found as to the contents of the device and the way it works, and from the appellant's written and Mr Townsend's oral description of it, we find that the Gas Alert Micro 5 has the characteristics and properties of an alerting device. Those characteristics and properties include the ability of the device to detect pre-calibrated levels of dangerous gases and the three different alarms together with the LCD screen display when a predetermined level of gas is reached. The ability to disable one or more alarms does not alter that."

55. I accept that the Altair devices will have the characteristic of an alerting device, but because of the physical features of the devices I have described in the penultimate paragraph, I do not consider that that is their only characteristic. They have, in my view, the important characteristic that they analyse, and display their analysis of, the ambient atmosphere (I address the meaning of 'analyse' in the headings later)..

(ii) the intended uses of the product which are inherent in the product and capable of being assessed on the basis of those objective characteristics and properties

56. The FTT made the following finding in relation to the use of the Alert device:

"38. We also find that the intended use, and actual use, of the device is the alerting of its wearer to the presence of noxious levels of gas in a confined space and it does that by at least one and usually two or three different types of alarm signal, visual, audible and vibrating. Put another way, in answer to the question: "What is the device for?" we find that it is to do that alerting. And we find that alerting is the only thing the device is intended to be used for.

39. We also find that one of the things the device does in order to be able to give its alerts is measuring (and as we have said HMRC do not dispute that measuring is one of the device's "functions"). It measures the quantity of gas (in ppm) and it also measures by reference to time, so that it can, depending on how it is calibrated, give alerts when a selected gas is present at a given level or range of levels over a given period. But we find that the measurement is a means to an end, not an end in itself: measurement is not its intended use."

57. The FTT concluded (in para. [77]) that:

"... the essential characteristics and properties and the only intended use (and in fact the only conceivable actual use) of the device is as an instrument for alerting its operator by visual, audible and vibrating signals to the presence of a dangerous build up or absolute level of particular hazardous gases and other noxious substances".

58. In the light of the pictures in the brochures and the FTT's description of the properties of the Alert device I do not come, on the evidence before me, to the same conclusion in relation to the Altair devices as the FTT came in relation to the Alert device as regards to the intended use of the devices. It seems to me that the LCD screen

showing a figure for the percentage of particular gases shows that inherent in those characteristics and properties is the use of the device to show the numerical result of the analysis of the ambient atmosphere, and that this is an important and intended use of the device.

59. In relation to the use described by the FTT in the second paragraph of the quotation from [19] of the Master of the Rolls' judgement, I note that the brochures showed workers holding the devices rather than wearing them, and that save for the fact that the size of the devices permitted them to be held in one (gloved) hand, I saw no feature which indicated that their use was confined to those who worked in confined spaces.

(iii) the competing headings

60. Under this heading I consider first the words and HSEN for 8531 and whether the products fall within it. I then compare the words of 9027 with 9026 and consider the effect of the Regulation. I then consider with reference to the HSEs whether the characteristics and properties of the devices fall within 9026 and 9027.

(A) 8531.

61. *Electric sound or visual signalling apparatus (for example, bells, sirens, indicator panels, burglar or fire alarms), other than those of heading 8512 or 8530..*

62. The section heading in which 8531 lies specifies "machinery and mechanical appliances; electrical equipment..." whereas that for Section XVII, in which 9026 and 9027 lie provides a more specific description in the current context: "...measuring, checking...instruments and apparatus.". That suggests that an instrument which signalled something but which also measured (or analysed in order to present a measurement) would not fall within 8531.

63. The HSEN for 8531 says (with certain irrelevant exceptions) that this heading covers:

"...all electrical apparatus used for signalling purposes, whether using sound for the transmission of the signal ... or visual indication ... and whether operated by hand (e.g. doorbells) or automatically (e.g. burglar alarms)."

It then gives a list of other items covered by the heading:

- (i) electric bells, ... door chimes etc ...
- (ii) electric sound signalling, horns, sirens
- (iii) other signalling apparatus (winking or intermittent lights etc)
- (iv) indicator panels (room indicators, lift indicators, station indicator panels)
- (v) burglar alarms - with a detecting part and a signalling part
- (vi) fire alarms with a detecting part and a signalling part.

(vii) “Electric vapour or gas alarms consisting of a detector and a sound or visual alarm to warn of the presence of hazardous gaseous mixtures (eg natural gas, methane) ...”

64. The first five examples point to products which give an alarm as the result of some action or event. The last two involve the giving of an indication when a gas or vapour is present. But none, even including fire alarms, encompass a device with a prior analytical function let alone one which displays, rather than signals, the numerical results of that analysis. They are systems which have a binary operation - the alarm is on or off - and do not provide quantitative information.

65. To my mind the Altair product is different from the examples given in the HSEN.

66. Nevertheless the FTT said that in its view the heading 8531:

"[78] ... describes accurately and clearly the essential characteristics and properties and the use (the only intended use) of the Gas AlertMicro-5 ..."

and Sales and Davis LJJ held that this was a conclusion which it was entitled to reach [124]

67. I conclude that 8531 is a potential classification for the Altair product.

(B) 9026 and 9027: A Comparison

68. I found it helpful first to compare the words of 9026 and 9027

9026. Instrument and apparatus for	9027. Instruments and apparatus for
measuring or checking the flow, level, pressure or other variables of liquids or gases	physical or chemical analysis
(for example, flow meters, level gauges, minorities, heat meters)	(for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus);
	Instruments and apparatus for measuring or checking viscosity ... quantities of heat, sound or light ...
9026.10 for measuring or checking the flow of liquids ...	9027. 10 gas or smoke analysis apparatus ...
9026. 20 for measuring or checking pressure ...	9027. 20 chromatographs and electrophoresis instruments
9026. 80 other instruments or apparatus	9027. 30 spectrometers

69. I draw two points from this comparison. The first is that each uses the word "for" in the same way. I can see nothing in the context of 9027 which indicates a different understanding of that word from that which is relevant to 9026.

70. In *Honeywell Sales LJ* said, as I have noted above, that "the force of the word "for"" in the opening of 9026 was that the specified use had to be the main or principal purpose of the device. Whilst later he said that the precise language and content of 9026 was different from that of 9027 it seems to me that, reading the heading together with the HSEs, the word "for" is used in the same way in both headings, and that whilst the other parts of the heading clearly differ, the meaning Sales LJ attached to "for" must be the same in both. However, it is less clear to me that the requirement in relation to 9027 is that the specified "use" has to be the principal use rather than the principal function of the device. I return to this later.

71. The second is the distinction drawn between analysis and measurement. "Analysis" to my mind carries with it the concept of taking something apart or examining its components, and is apt to encompass the process of determining the proportion of the components of particular gases in a mixture, whereas "level" in the context of "flow, level, pressure" indicates a physical measurement of an amount or quantity of gas or liquid without regard to its dissection into component parts. One would not ordinarily, I think, speak of the "level" of Chlorine in tap water although one might speak of the percentage concentration of Chlorine in such water.

72. That distinction is reinforced by the examples. Flow meters (9026) measure the passing volume of liquid, but spectrometers (9027) display the relative components of a source of light. Level gauges show the height of the liquid, but gas or smoke analysis apparatus indicates the composition of the gas.

73. Mr Cock says that the Altair products do not conduct any analysis on the results of the gas concentrations. That seems to me to postpone the concept of analysis to a second analysis of the results of an earlier analysis, because determining the relative presence of the components of something is, in my view, properly described as analysis.

74. In support of this submission Mr Cock relies on the CJEU judgement in *Fluke and Raytech* C-134/13. That case concerned inter alia the classification by regulation of an infrared thermal imager which, by collecting infrared radiation through a lens displayed an image coloured by reference to the temperatures of its constituent parts and which could also display the temperatures of different points in the image. The question before the national court had been whether such an instrument should have been classified under 9025 as a thermometer, or under 9027 as a device for physical analysis or carrying out a calorimetric measurement.

75. The CJEU held that 9025 applied. It held that 9027 did not apply because the devices in question

“display the results of temperature measurement without conducting another physical analysis beyond a mere temperature measurement, a more specific property covered by 9025...”

76. Mr Cock says that this establishes that a product which carries out and displays a measurement without conducting another analysis does not fall within 9027.

77. I do not agree. Measurement of temperature does not consist of determining the component parts of something – it is not on its own ‘analysis’. But a device which determines the percentage of one thing within another is analysing that other even where it displays the result of that analysis as a measurement.

(C) The Regulation

78. In *Krings GmbH* C-130/02 the CJEU said, at [33], that in order to determine the scope of a clarification Regulation, account must be taken of the reasons given in the Regulation, and that the application by analogy of the Regulation to a product not identical with that in a regulation, facilitated coherent interpretation of the CN. Then at [36], having regard to the reasons in the Regulation in that case and the fact that they also applied to the product at issue, it classified that product under the number given in the regulation.

79. In *Anagram* the Court again applied the classification in the regulation to a non-identical product holding that the differences between the product at issue and the regulation product did not affect the principal characteristics. Although not made explicit in this judgement it seems to me that by "principal characteristics" the Court had in mind those characteristics which were relevant to the stated reasons for the classification of the Regulation product.

80. The Annex to Regulation 2018/1208 describes the regulation product and the reasons for its classification under 9027 thus:

Description of the goods	Classification (CN-code)	Reasons
(1)	(2)	(3)
<p>A sensor based electrical analogue apparatus (so-called "oxygen analyser") measuring approximately 240 x 220 x 200mm and weighing approximately 4.3 kg.</p> <p>The apparatus uses coulometric technology in order to detect and measure trace oxygen and paramagnetic technology in order to accurately measure the</p>		<p>Classification is determined by general rules 1, 3(b) and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 9027, 9027 10 and 9027 10 10.</p> <p>The apparatus has characteristics and functions of an apparatus for physical or chemical analysis (gas or smoke analysis apparatus) of heading</p>

<p>percentage of oxygen in pure gas streams and multigas backgrounds. It includes an LCD monitor to display the results of the measurements. It also includes an audio and visual alarm and analogue and digital outputs and two-way serial communication.</p> <p>The apparatus is used in industrial gas process and quality control.</p>		<p>9027. See also the Harmonised System explanatory (HSEN) to heading 9027, first paragraph, point (8), which covers electrical gas or smoke analysis apparatus for determining and measuring the content of gases, used to analyse combustible or burnt gases in coke ovens, gas producers, blast furnaces, etc.</p> <p>Classification under heading 9026 as instruments or apparatus for measuring or checking the flow, level, pressure or other variables of liquids or gases is excluded as instruments and apparatus for physical or chemical analysis are more specifically covered by heading 9027 (see also the HSEN to heading 9026, first paragraph, exclusion (d)).</p> <p>The apparatus is a composite product within the meaning of GIR 3 (b) and is to be classified according to the component that gives the product its essential character. Detecting and measuring the oxygen within the gas is considered to be the function that gives the essential character to the apparatus.</p> <p>The apparatus is therefore to be classified under CN code 9027. 10. 10, as an electronic gas or smoke analysis apparatus.</p>
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81. In summary the reasons for the classification are:

- (a) that the product has the characteristics and functions of an apparatus for physical or chemical analysis;
- (b) that classification is supported by the HSENs to 9026 and 9027;

- (c) 9027 is more specific than 9026; and
- (d) the product was a composite and its essential characteristic for the purposes of GIR 3 (b) was to detect and measure oxygen within a gas.

82. It is plain that, although the regulation product's description contains many of the objective features of the Altair products, the Regulation does not apply directly to the Altair products which are much smaller and are not limited to oxygen analysis. The issue is whether it may be applied by analogy.

83. Mr Cock says that, although there are similarities, the Altair product differs from the regulation product in the following particulars.

84. *First*, The regulation product is larger and heavier (20 times heavier).

85. It seems to me that this characteristic is not relevant to the reasons given for the classification.

86. *Second*, the regulation product, he says, is an analyser whereas the Altair product is not.

87. I agree that the regulation product is an analyser. It is described as using coulometric (the measurement of electrical charge and discharge flow) and paramagnetic technology to measure percentage oxygen. That is analysis of the gas. But the FTT's description of the way in which the Alert Micro Gas 5 worked showed that that device used such technology to analyse gas (that is to say the ambient atmospheric gas) composition:

“[35] Levels of gases building up on the filters cause electrical currents to be generated which are proportionate to the level of the gas. These currents are measured and displayed on the LCD screen.”

... [39] ... it measures the quantity of gas (in ppm) ...”

88. Measuring in parts per million in this way is to my mind clearly coulometric analysis.

89. *Third*, he says that, in contrast to the Altair products, the alarms in the regulation product are insignificant compared to its main function of gas level measurement analysis and process control.

90. I see no basis in the description in the regulation for concluding that the alarm function of the regulation product was comparatively insignificant. It is true that the use of the product - "in industrial gas process and quality control" - is different from the use found by the FTT for the Gas Alert Micro 5 (being "as an instrument for alerting the operator ... to the presence of ... hazardous gases ...), but not only do I not find the Altair product to have such a circumscribed use, but the use of the product does not form an explicit reason for the classification in the regulation.

91. Thus those differences do not persuade me that the principal characteristics of the Altair devices as determined by reference to the reasons given for the classification

differ from those of the regulation the device such that the regulation may not be applied by analogy.

92. I note that, whereas the heading of 9027 speaks of a product “for physical or chemical analysis” the reasons in the Regulation say that the apparatus has the “characteristics and function of an apparatus for...analysis”. This points to structure and function, rather than use, as being the object of the word “for” in this heading.

93. Although Sales LJ used “function” and “use” interchangeably, it seems to me in the context of 9017 that they mean slightly different things. It seems to me that “function” relates more to the inherent working of the device, and intended use is concerned with how its features show it might be used. The words of 9027 and the Regulation point to my mind to analysis as being a requisite function.

94. I therefore consider that the Regulation taken together with Sales LJ’s analysis of the word “for” indicates that the words of the heading are satisfied where the (or, perhaps, a) main characteristic or function of the product is analysis.

95. The fourth reason in the regulation was that detecting and measuring oxygen was the function which gave the regulation device its essential character for the purposes of GIR 3(b). GIR 3 (b) applies where goods are prima facie classifiable under two headings (and where the product is a composite - which both regulation product and the Altair product are). This aspect of the reasoning in the regulation is relevant to the classification by analogy of the Altair product only if it is prima facie classifiable under two headings after the application of the relevant section and chapter notes: for only then is it necessary to rely upon GIR 3 (b).

(B) 9026

96. No argument was made to me that 9026 was the correct classification. Whilst the Upper Tribunal (erroneously) held that it was correct for the Alert device in the case of a binary choice between 9026 and 8531, that was not the choice before me.

97. Without the constriction of a binary choice, it seems to me that the "level" of a gas or liquid is an ill fitting description for the concentration of one gas in a mixture of gases; and that, even if the effect of Dalton's law of partial pressures¹ is that measurement of the concentration of a gas in a mixture of gases leads to the calculation of its partial pressure in a mixture of gases, that was not what the product did.

98. The dissection of ambient atmospheric gas into some of its components is properly understood as ‘analysis’ rather than measurement of a level. Thus (as the Regulation reasons also explain) 9027, in its reference to analysis, is more specific than 9026: a conclusion reflected also in para (d) of the HSEN for 9026 which provides that

¹ In a mixture of gases which exert no physical or chemical action on one another, each gas exerts the same pressure as if it alone occupied the entire vessel, and the total pressure is the sum of the partial pressures due to each gas.

instruments for physical or chemical analysis do not fall within that heading but fall within 9027.

99. I conclude that the Altair products are not properly classifiable under 9026.

(D) 9027.

9027- Instruments and apparatus for physical or chemical analysis (for example, polarimeters, refractometers, spectrometers, gas or smoke analysis apparatus); instruments and apparatus for measuring or checking viscosity...

100. The HSEN for 9027 lists a number of analytical instruments for determining the composition of light and materials. It then says:

"... (8) gas or smoke analysis apparatus. These are used to analyse combustible gases or combustion by products (burnt gases) in coke ovens, gas producers, blast furnaces etc ...

"It should be noted that the heading includes gas or smoke analysis apparatus for use in industrial processes (i.e. directly connected to furnaces, gas generators etc). But apparatus consisting mainly of laboratory glassware falls into heading 70.17.

"(9) ... electronic smoke detectors equipped solely with an alarm fall in heading 85.31.

101. Mr Cock emphasises the reference to industrial process usage which he says refers to a product quite different from the handheld portable Altair product.

102. I accept that distinction, but it does not seem to me to be relevant to the meaning of the heading which does not distinguish in any way between large potentially fixed industrial devices and smaller portable ones. The fact that large devices are expressly said to be included within the heading does not mean that small ones are not. The heading concentrates on the function of a device not its size or portability.

103. Note (9) reinforces the view that 8531 is concerned with binary alarms, and 9027 with products which provide quantitative information as the result of some form of analysis.

104. When discussing 9026 the FTT said that the ambit of 9026 was limited to items "whose only function and use is to measure the level of gas etc". I have explained above that Sales LJ considered that this was too narrow a reading "for", and that its meaning would be satisfied if the "main function" of the device was the measuring the level of the gas [138] (and that Davis LJ indicated that possibly a main use would suffice).

105. Applying that understanding of "for" in 9027, and my conclusion that the Regulation reasoning indicates that the question of what the product is for must be addressed in relation to its objective functions, it seems to me that since the objective features of the Altair products include the prominent display (and in some cases recording) of their analysis of the ambient atmosphere, they can be said to have a main function of conducting that analysis

106. That approach is consistent with the reasons given in the Regulation where the regulation product, which also had an LCD display and an alarm, was said to have the "characteristics and functions of an apparatus for physical and chemical analysis".

107. Thus, having regard to the objective characteristics and properties and therefore its functions I find that the product is capable of falling within 9027.

108. In so saying I acknowledge that I have come to a different conclusion in relation to function from that of the FTT at [80].

109. The FTT found at [37] that

"from the facts we have found as to the contents of the device and the way it works, and from the appellant's written and Mr Townsend's oral description of it ... that the Gas Alert Micro 5 has the characteristics and properties of an alerting device ...",

and at [38] that:

"the intended use, and actual use of the device is the alerting its wearer to the presence of noxious levels of gas..."

110. So, it said "alerting was the *only* thing the device is intended to be used for".

111. The Court of Appeal held that on the evidence before it the FTT was entitled to come to the evaluative conclusion that the device did not fall within 9026 as a device for measuring the level of gas. That finding, however, was not that such was the only possible conclusion; it was simply that it was not a perverse conclusion [105] or one to which it was not "entitled to make on the evidence before it".

112. I did not have the same evidence before me. I had the FTT's description of the device and how it works, the description of the Altair devices in the BTI application and a brochure, but I did not have the oral evidence of Mr Townsend or the other documentary material before the FTT.

113. I am not able to come to the same conclusion on this evidence. The prominent display on the face of the product of the results of the analysis of the ambient atmosphere indicates to me that at least one use of the product is for the analysis it conducts. Such a display permits the user to ascertain whether the concentration of the relevant gases is much less than, close to or greatly exceeds safe levels, and to monitor their change and rate of change. These uses are inherent in the device and must be uses for which the device is intended and are dependent on the main function of doing analysis. The ability of the devices to memorise and record gas concentrations, although not obvious from the brochure pictures of the devices, are clearly intended uses to which gas analysis is essential.

114. The prominence of the display on the face of the device indicates to me that this was a main function and also a main intended use. I accept that alerting and alarming were also important uses of the device but it does not seem to me that they were the sole intended use.

115. I conclude that the devices fall within the words of 9027, being devices for the analysis of gases since that is its main function and one of its main uses.

(iv)The effect of Notes 1(m) and 3 on the competing Headings.

116. I have concluded that the devices fall within the words of both 8531 and those of 9027.

117. The Notes to Section XVI (into which 8531 falls) say:

"1. This section does not cover ... (m) articles of chapter 90 ...

"3. Unless the context otherwise requires, ... machines designed for the purpose of performing two or more complementary or alternative functions are to be classified ... as being of that machine which performs the principal function."

118. Note 3 to Chapter 90 (into which 9027 falls) provides that the provisions of Note 3 to Section XVI also apply to that Chapter.

Note 3.

119. It seems to me that Note 3, because it relates to the nature of classification - and so bears on the meaning of a particular heading - must be considered before Note 1(m).

120. The FTT at [99] considered that the measuring function and the alerting function of the device were not "complementary or alternative functions since the measuring function was subservient to the alerting function. To my mind, however, not only was analysis not subservient to alerting, but the display of the analysis of the gas and the alarm function were complementary in the sense that the ability to see gas composition levels and changes as a safety measure was completed in the provision of an alarm, and conversely the binary alarm function was enhanced or complemented by the availability of quantitative information.

121. I find that the principal function of the devices is the analysis which feeds the displaying, recording and alerting functions. On this basis I find that 9027 prevails

Note 1(m)

122. If I am wrong in the preceding conclusion the devices would potentially fall within 9027 and 8531. In that case Note 1(m) means that they are to be classified under 9027.

Conclusion

123. I find on the evidence before me that the Altair devices are properly classified under 9027 and I dismiss the appeal.

Rights of Appeal

124. 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.

CHARLES HELLIER

TRIBUNAL JUDGE

RELEASE DATE: 13 November 2019