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UT (Tax & Chancery) Case Number: UT/2021/000176

**Upper Tribunal
(Tax and Chancery Chamber)**

Hearing venue: Royal Courts of Justice, London

**Heard on 20 June 2022
Judgment given on 02 September 2022**

CUSTOMS DUTIES – combined nomenclature - classification of 1) wireless charging pad with AC adapter 2) cable adapter for iPhone/ iPad enabling simultaneous charging/ audio- application of GIR 3(b) and determination of “essential character” considered - appeal allowed in relation to wireless charging pad with AC adapter, dismissed in relation cable adapter- appeal allowed in part

Before

**JUDGE SWAMI RAGHAVAN
JUDGE GUY BRANNAN**

Between

BELKIN LIMITED

Appellant

and

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

Respondents

Representation:

For the Appellant: Jeremy White, of counsel, and John Grayston, solicitor, of Cordery

For the Respondents: Mark Fell QC, Counsel, instructed by the General Counsel and Solicitor for Her Majesty’s Revenue and Customs

DECISION

Introduction

1. The Belkin group of companies, of which the appellant, Belkin Limited (“Belkin”) is a member, manufactures and distributes “connectivity” products and accessories such as computer and mobile device accessories including cables and chargers. This appeal concerns the classification, for customs duties purposes, of two particular types of products which Belkin imported and which were subject to the EU wide system known as the Community Customs Code to which the UK was a party at the relevant time. First, a wireless charging pad with AC adapter (“Charging pad / AC adapter”), and second, a cable adapter marketed as The Lightning Audio & Charger Rockstar (“cable adapter”) for iPhones and iPads which enabled a user to charge their device and listen to audio at the same time.

2. In relation to both, the FTT, in its decision of 6 July 2021, agreed with HMRC’s classification decisions made on 28 November 2017 and 8 March 2018 (“BTIs”) which meant the products were chargeable to customs duty¹. The FTT rejected the classifications which Belkin had advanced (which would have meant the products were free of duty). Belkin argue that, for a number of reasons, the FTT’s analysis was wrong in law. With the permission of the FTT, Belkin appeals against the FTT’s decision.

Background facts

3. No challenge is made to the findings of fact the FTT made and we summarise those of main relevance to the issues in this appeal.

Charging pad / AC adapter

4. Wireless chargers enable compatible devices to be charged without the need for cables to be connected from a power source to the device itself. The device receives power when it is placed in physical contact and properly aligned with the pad. The particular product in issue was bundled with an AC adapter which enabled the pad to be connected to mains electricity. The AC adapter converts the alternating current to direct current. The pad, a circular shaped plastic enclosure, around 12 cm in diameter and 1 cm in depth with sloping edges, containing electronics, converts the direct current to alternating current which in turn creates, via an induction coil, an electromagnetic field. The magnetic field provides power to a receiving device which is equipped with a receiving compatible coil. The device adopted the “Qi” standard. This is an international industry developed product standard for hand-held consumer electronics which ensures that devices that conform to it are capable of operating with each other. (FTT [15] / [13](2) / [19] [24] [25])

5. The FTT made further findings about the AC adapter as follows. The AC adapter had a three-pronged plug at one end and a small circular shaped connector (known as a “barrel plug”) at the other (which could be inserted into an opening at the side of the pad) which was not proprietary to Belkin. There is no standard size or length of a barrel plug. That, together with the specified output voltage of 15V, meant it would be unusual and/or difficult to find a device other than the charging pad that could be powered by the adapter (FTT [20]).

¹ The charging pad with AC adapter carried a 1.7% duty rate at the time the BTI was issued, this reduced to 0.8% on 1 July 2018 and 0% on 1 July 2019. The new UK Tariff provides 0% duty currently. The cable adapter carried a duty rate of 3.3% on the date the BTI was issued. This reduced to 2% on 1 January 2021 under the new UK Tariff and remains at that rate. The EU Tariff duty rate remains at 3.3%.

Cable adapter

6. The cable adapter “enabled the user to charge and listen to music at the same time. It was made for Apple devices (iPhone and iPad). It was marketed as “Lightning Audio + Charge RockStar”. It had two sockets at one end and an Apple “lightning” connector at the other.” (FTT [13(4)])

Background law and FTT Decision

7. Goods imported from outside the EU are classified, for customs duty purposes, under the Combined Nomenclature (“CN”) which is set out in Annex 1 to EC Council Regulation 2658/87. The CN uses an eight-digit numerical code to classify products. The first six digits are referred to as headings, eight-digit level numbers are referred to as subheadings.

8. The competing classifications were helpfully depicted by the FTT in the table below.

8504	Electrical transformers, static converters (for example, rectifiers) and inductors:
8504 40	– Static converters
8504 40 30	– – Of a kind used with telecommunication apparatus, automatic data-processing machines and units thereof
	– – Other:
8504 40 82	– – – – Rectifiers
	– – – – Inverters:
8504 40 84	– – – – – Having a power handling capacity not exceeding 7,5 kVA
8504 40 88	– – – – – Having a power handling capacity exceeding 7,5 kVA
8504 40 90	– – – – Other
8504 50	– Other inductors:
8504 50 20	– – Of a kind used with telecommunication apparatus and for power supplies for automatic data-processing machines and units thereof
8504 50 95	– – Other
8544	Insulated (including enamelled or anodised) wire, cable (including coaxial cable) and other insulated electric conductors, whether or not fitted with connectors; optical fibre cables, made up of individually sheathed fibres, whether or not assembled with electric conductors or fitted with connectors:
8544 42	– – Fitted with connectors
8544 42 10	– – – Of a kind used for telecommunications
8544 42 90	– – – Other

9. Regarding “the Charging pad / AC adapter” the issue was whether it was a “Static converter”, “Of a kind used with telecommunications apparatus, automatic data processing machines and units”

thereof” under 8504 40 **30**, as the appellant argued, or “Static converter”, “Other” under 8504 40 90 as HMRC argue.

10. The FTT also considered a similar product which contained a similar charging pad (square in shape rather than round) but where the power supply was a USB adapter. For both charging pads the primary issue raised was whether the products were of a kind used with telecommunications apparatus (such as mobile phones), and automatic data processing machines (such as tablets) and units thereof. HMRC argued the pads did not fall into this classification as they were designed to be compatible with a variety of devices. The FTT rejected this argument and accordingly found the pad with USB adapter fell into the classification the appellant sought. There is no appeal from that decision. However, in relation to the Charging pad / AC adapter it accepted HMRC’s argument in the alternative that as regards the AC adapter (which in contrast to the USB adapter, carried out a separate conversion function (converting AC to DC)) the application of the general rules of interpretation, which we explain in more detail below, meant the product had to be classified under 8504 40 **90**.

11. The issue regarding the cable adapter was: was it “Insulated...wire, cable...and other insulated electric conductors, whether or not fitted with connectors”, “Of a kind used for telecommunications” under 8544 42 10, as the appellant argued, or, “Insulated...wire, cable...and other insulated electric conductors, whether or not fitted with connectors”, “Other” under 8544 42 90 as HMRC argued, and the FTT found.

12. The Annex to the EU Regulation 2658/87 contains general rules for the interpretation of the CN known as “GRIs”. These provide, so far as relevant to this appeal, as follows:

GENERAL RULES FOR THE INTERPRETATION
OF THE COMBINED NOMENCLATURE

Classification of goods in the Combined Nomenclature shall be governed by the following principles :

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions :

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

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

13. Rule 3 is the one which is primarily relevant here².

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 :

² GRI 6 applies the principles set out for headings, as referred to in GRI 1 to 5, to subheadings

(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, insofar as this criterion is applicable.

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

14. The interpretation of tariff headings is assisted by explanatory notes produced by the World Customs Organisation (known as HSEs) and by the EU Commission (known as CNENs). We set out the relevant extracts of these when dealing with the relevant product below.

Impact of Brexit and treatment of comparable goods under new UK Tariff

15. Before turning to the detail of the FTT's analysis and Belkin's grounds in relation to the Charging pad / AC adapter it is convenient to deal with the parties' helpful joint submission, provided pursuant to our direction, on the impact of the UK's departure from the EU on this appeal and the treatment of comparable goods under the new UK Tariff. This explained that although the FTT decision, which is the subject of this appeal, was made on 6 July 2021 (i.e. after the implementation period for the departure of the UK from the EU expired on 31 December 2020), the relevant appeals to the FTT related to BTI decisions (made on 28 November 2017 and 8 March 2018, upheld in review decisions on 27 March 2018 and 23 August 2018) when the UK was still a full member of the EU. The decisions were made by reference to EU law, the Tariff in EC Council Regulation 2658/87 as incorporated into UK law under sections 2 and 5 of the European Communities Act 1972 ("ECA 1972"). The issue before the FTT was whether the BTI decisions correctly applied the Tariff or not and the subsequent departure of the UK from the EU and repeal of the ECA 1972 sections did not alter that.

16. Regarding reliance on Court of Justice case-law, neither party relies on a decision from that court which post-dated 31 December 2020, so the provision in s6(1)(a) of the European Union (Withdrawal) Act 2018 (under which the Upper Tribunal is not bound by such decisions but is entitled to have regard to them) does not apply.

17. The significant change which is of potential relevance, post 31 December 2020, concerns the means by which questions as to the validity of Commission Implementing Regulations which classify products and which HMRC rely on in this appeal, are dealt with. We mention this later when dealing with those regulations (see [56] below).

18. Following the UK's departure from the EU all UK BTIs were, on 1 January 2021, automatically transferred to the tariff rulings under the UK Tariff (referred to as UK Advanced Tariff Rulings (ATaRs) under s24 Taxation (Cross-border Trade) Act 2018 and Public Notices having the force of law issued by HMRC. BTIs and ATaRs expire three years after issue. The BTI for the Charging Pad / AC adapter expired on 28 November 2020 and so was not transferred to the UK system. The BTI for the cable connector was transferred but has since expired on 6 March 2021.

FTT's analysis: Charging pad / AC adapter

19. The FTT considered the charging pad in isolation from the power adapter (either a USB cable or AC adapter) and concluded it was a static convertor of a kind used with telecoms apparatus which, if sold alone without the adapter, would be classified to 8504 40 30.

20. The HSEN for CN 8504 explained that electrical static convertors are:

“used to convert electrical energy in order to adapt it for further use. They incorporate converting elements (e.g. valves) of different types. They may also incorporate various auxiliary devices (e.g. transformers, induction coils, resistors, command regulators etc)”.

21. The CNEN for 8504 40 30 stated:

“Static convertors for telecommunication apparatus or for automatic data-processing machines and units thereof serve to convert, for example, the alternating current (AC) drawn from the mains supply into the requisite direct current (DC).”

22. The Pad fell within “static convertors” rather than “other inductors” under 8504 50 because it included an induction coil. It was a static convertor “of a kind used with telecom apparatus”.

23. The CNEN explained that phrase included:

“electrical conductors fitted with connectors used in telecommunications networks, for example, to connect an automatic data processing (ADP) machine with a modem.”

24. However the CNEN clarified the subheading did not include:

“electrical conductors fitted with connectors, to be used for connecting different apparatus (for example, a DVD player with a monitor, or an ADP machine with a monitor, a printer, a keyboard, a projector etc)”; or “electrical conductors which serve only to supply power (for example, power cables)”.

25. As regards the case-law on the significance of the intended use of the goods the FTT noted ([47]):

“CN 8504 40 30 - when dealing with a classification criterion based on a specific use of the goods involved, that criterion is decisive for the classification of those goods. It is not enough that the goods are compatible with the specified use – it must be the main use for which the goods were intended: *TDK-Lambda* (Case C-559/18; 5 September 2019) at [33-34]”

26. The FTT found the main use of the charging pad was for charging mobile phones based on the objective characteristics of the pad given (i) its shape and size (ii) its adopting of the Qi standard (as most mobile phones adhered to this standard and an objective observer would know that “the lion’s share” of Qi-certified devices were mobile phones) (iii) the prominence of references in words and pictures on packaging and instructions ([79]–[82]).

27. The FTT then considered the significance of the fact that the pads were sold with an accompanying adapter (either a USB cable or AC adapter).

28. It considered GRI 3(a) was engaged as the product was sold in a “set put up for retail sale” and the two headings each referred to part only of the items put up for retail sale in that neither the USB cable nor the AC adapter would be classifiable to 8504 40 30. (The USB was not a static convertor and the AC adapter was not of a kind used with telecom apparatus – rather it was designed to be

used with charging pad (which was not telecom apparatus)). According to GRI 3(a) the two headings relevant to the pad and adapter/USB were to be regarded as equally specific.

29. That then meant the “essential character” test in 3(b) fell to be applied. Under the relevant case-law (which we will discuss below) that meant determining whether the product would retain its characteristic properties if one or other of its constituents were removed from it ([86] to [89]). The FTT accordingly considered whether the product would retain its characteristic properties if respectively the USB adapter or the AC adapter were removed from it. As regards the charging pad/USB it regarded its characteristic property as “its functioning to convert DC to AC, and then to convert AC to an electromagnetic field”. The FTT noted this property would be retained even without the USB cable ([89]).

30. In relation to the Charging pad/AC adapter, it noted the characteristic property was “its functioning to convert AC to DC, then to convert DC to AC, and then to convert AC to an electromagnetic field” and explained that “This property would not be retained without the AC adapter as it performs the first conversion” ([89]). GRI 3(b) did not accordingly determine the classification. That meant that under GRI 3(c) classification was made to the “lower”- i.e. last in numerical order amongst those which merited consideration i.e. 8504 40 **90** (as opposed to 8504 40 **30**).

31. It might appear counter-intuitive that a different classification is arrived at depending on whether the charging pad’s power source was DC (through a USB) or through an AC adapter. The appellant takes no issue with the classification of the Charging pad/ DC adapter but seizes on the inconsistency with the Charging pad/ AC adapter to reinforce its case that the FTT erred in the classification of that product. It is worth highlighting that the difference in outcome stemmed however from the FTT’s description of function which in turn reflected the parties’ agreed facts which the FTT had set out earlier in its decision (at [13] and cross-referenced (at [(13(1)(c))]) for the DC adapter pad and at [(13(2)(c))] for the AC adapter pad). Crucially, as regards the DC product (the charging pad/USB), the DC power source was not incorporated into the function of the product whereas for the Charging Pad /AC adapter the description of the product’s function specifically mentioned the function performed by the AC adapter of converting an alternating current into direct current.

Ground of appeal (charging pad / AC adapter) – FTT erred in identifying essential character of product

32. By the time of the hearing, Belkin’s grounds had narrowed to a single ground of appeal: that the FTT erred in its identification of the “essential character” of the Charging pad/AC adapter. (Belkin no longer pursued its ground that the FTT had erred in the finding the goods were “items in a set put up for retail sale” (which was the basis for GIR 3 being engaged). In support of Belkin’s submission, Mr White relied on the explanatory notes (HSEN)(point (X) to the GRI which set out that the classification was made according to the component or components taken together which can be regarded as conferring on the set as a whole its essential character (Mr White’s emphasis added). Based on the product’s objective characteristics, intended use, consumer perception, the essential character of the retail set was that of “charging a mobile phone”. It was the pad which gave the retail set this essential character. In Mr White’s submission, the test of whether the product would lose its characteristic properties, if a particular component were removed from it, but would retain them if other components were removed (which he termed the “removal test”) was not mandatory. But, if it was applied, it led to the classification for which he argued, in that if the AC adapter were removed the set would still retain its essential character of mobile phone charging whereas, if the pad were removed, it would not.

33. Mr Fell QC, for HMRC, emphasised the primacy, in accordance with the relevant case-law, of the removal test in applying the essential character test under GRI 3(b). The FTT was right to identify the key question as being whether the articles retain their key functional characteristics if either the AC adapter or the pad is removed and to find that the removal of either would deprive the Charging pad / AC Adapter of key functional characteristics of converting electricity. If the AC adapter were removed, there would be no AC/DC conversion; and if the pad were removed, there would be no conversion of DC to AC and to the electromagnetic field. Since these conversion functions were the characteristic properties of the combined Charging pad/AC adapter, the test under GRI 3(b) did not break the tie and it was necessary to move to GRI 3(c).

34. Mr Fell also reminded us that the FTT's findings in relation to the essential characteristics of the Charging Pad / AC adapter reflected the agreed statement of facts which in turn reflected the responses for further information HMRC sought from Belkin. Unless it was shown those findings were perverse they could not possibly be impugned at this point.

Discussion (charging pad / AC adapter)

35. There is no disagreement between the parties that the test as set out in the GRI 3(b) is one of essential character. The central issue raised by Belkin's ground is how that issue is approached and whether it is, as Belkin maintains and HMRC dispute, a broader matter than the facts the parties agreed regarding the product's function

36. In support of his case, Mr White referred us to excerpts from the explanatory note (HSEN) to GRI 3(b). At (VIII) the note explains:

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

37. As a starting proposition we would agree this is helpful to Belkin's case as it shows the question of how to determine a product's essential character is not reducible to a particular uniform factor. In our view it is however instructive to look at how the essential character test has been applied in the case-law to see if any high level theme can be discerned.

38. *Sportex v Oberfinanzdirektion Hamburg* (Case C-253/87) concerned “semi-finished products in sheet form composed of epoxy resin, carbon fibre and glass fibre mesh, and intended for the manufacture of tubing”. The court noted it was common ground that the “property which characteriz[ed] the product in question” was “its flexibility” (at [9]) and that without the epoxy resin it would lose that property. The product was accordingly classified under the heading for artificial resins and plastic materials as opposed to the competing heading for articles of stone or of other mineral substances.

39. In *Vau de Sport GmbH & Co. KG v Oberfinanzdirektion Koblenz* (Case C-288/99) which concerned a “child carrier” consisting of aluminium tubing, a child's seat of synthetic material, assembled by being sewn together with padded sides and at head level, safety belts, padded shoulder straps and a textile waist band, the question arose whether the aluminium support frame or the fabric textile parts gave the products its essential character. The European Court held as follows :

“26. In the case of a child carrier such as that in issue in the main proceedings, it must be observed that the fabric parts sewn together are by themselves sufficient to enable a child to be carried by an adult. An aluminium frame, on the other hand, is in no way

necessary for this, but merely enables the child to be carried with the maximum degree of comfort for both adult and child.

27 Contrary to *vauDe Sport's* argument, the aluminium support frame cannot therefore be regarded as the material or component that gives the child carrier its characteristic properties.

28 That being the case, the most important component of a child carrier such as the one at issue in the main proceedings is comprised of the textile parts, and it is these that give the product its essential character for the purposes of general rule 3(b).”

40. Thus the essential character of the child carrier was that of enabling a child to be carried by an adult.

41. In *Turbon International GmbH v Oberfinanzdirektion Koblenz* Case C-276/00), which concerned printer cartridges (and competing classification between the cartridge container and the ink therein) the Court found [at [27]]:

“In this case the element which gives the cartridge its essential character is the ink which it contains. The essential function of the cartridge consists in containing the ink and supplying the printer so as to enable the printer to transcribe on to paper work done with the aid of a computer.”

42. The essential character of the product was to supply products with ink.

43. In our view, the theme that emerges from these cases is that the essential character test, as well as being variable (consistent with the HSEN above), is approached in a broad holistic manner which is not constrained by a detailed recitation of the various components and functions of the constituted components, materials or goods making up the product. That is entirely in keeping with the ordinary meaning of the words “essential character” which suggests an evaluation needs to be made which is more than just a listing of each of the individual attributes, of the materials, components or goods in the retail set. Hence *the essence* of the product was distilled to be “flexibility”, “enabling a child to be carried by an adult”, “supplying products with ink” in respectively *Sportex*, *Vau de Sport*, and *Turbon*.

44. The above approach stands in contrast to the FTT’s approach which determined the product’s essential character by reference to the parties’ agreed description of the functional processes carried out by the product namely: converting AC to DC, converting DC to AC and then converting AC to an electromagnetic field (FTT [87] which in turn referred to the parties’ agreed fact set out at FTT [13(2)(c)].

45. We therefore see some force in Mr White’s submission for Belkin that the FTT erred in its approach by regarding the above description of the product above as definitive of its *essential* character. Rather we consider the test called for the tribunal to step back from the detail of the agreed facts to evaluate, in the light of all the factual findings it had made, what the product’s essential character was. Belkin’s case, that the FTT erred in its approach, does not therefore require any challenge to the FTT’s findings based on the parties’ agreed description of the product. The issue HMRC raise, regarding Belkin not having shown those facts to be perverse, does not arise. The point is that the parties did not, and did not purport to, agree the legal question of what the essential character of the product was. That question, which involves an evaluative judgment, remained open for the tribunal to determine.

46. Applying the broad holistic approach, which we think is evident from the case-law, and the ordinary meaning of “essential character”, we see no difficulty, in the light of the FTT’s findings of

fact, with saying the essential character of the Charging pad / AC adapter was, as Mr White submits, to enable mobile phones to be charged wirelessly. That the Charging Pad/AC adapter had conversion function from AC to DC, which HMRC sought to emphasise, was not in dispute. The presence of that function did not mean however that it was right to identify conversion from AC to DC as determining the essential character of the Charging pad / AC adapter.

47. Given Belkin has succeeded in identifying an error of law in the FTT's approach to the question of the essential character of the Charging pad/AC adapter, we will deal with the number of further submissions which Belkin made on the relevant legal principles and further respects in which it is said the FTT erred briefly. We reject, principally for the reasons which Mr Fell advanced, each of Belkin's further arguments.

48. We have already mentioned Mr White's submission that the "removal test" was not mandatory. (Mr White emphasised that in *Sportex* (at [8]) the Court used the word "may" when referring to the test). Noting that GRI 3 b) referred to different categories of composite goods i.e. those consisting of 1) different materials 2) different components and 3) goods put up in sets for retail sale, Mr White submitted that the case-law demonstrated the removal test was relevant to cases 1) and 2) but not to 3). (*Sportex*, *VauDe Sport*, and *Turbon* all concerned materials). Mr Fell rightly highlighted that Belkin's case did not go as far as suggesting the FTT was precluded from applying the removal test so the submission is of limited significance. But in any case there was nothing to suggest that there was any principled basis for drawing such distinction. Moreover, as Mr Fell pointed out, in *Sony Computer Entertainment Europe Ltd v Commission of the European Communities* (Case T-243/01)(at [126]) the CJEU cited *Metro* (Case C-121/95), whose facts involved a retail set, along with *Sportex*, *VauDe Sport* and *Turbon* when referring to the case-law support for the removal test.

49. Mr White also submitted it was important, when considering the essential character test in terms of functions to distinguish whether the product had the same function (noun) from whether it could function (verb). The FTT had wrongly considered the Charging pad / AC adapter would lose its essential character if the AC adapter were lost because it no longer functioned. However that mischaracterises the FTT's reasoning. As we have explained above, the FTT considered the function of converting AC to DC was part of the essential character of the product. It was for that reason, not because the charger no longer functioned due to lack of power, that the FTT thought the essential character would be lost without the AC adapter.

50. Mr White also suggested that one should, as a general presumption, strive to apply GRI 3(b) because GRI 3(c) was arbitrary (as it required classification into a competing number which was lower down the CN). There is nothing advanced by way of explanatory note or case-law to support this interpretation and we do not see that it would add anything to the analysis. Either GRI 3(b), as properly applied in accordance with the relevant principles, yields an answer or it does not. The presence of GRI 3 (c) clearly envisages that there will be cases where GRI 3(b) does not yield an answer and in that case provides the certainty of a definitive answer.

51. On behalf of Belkin, it was argued by Mr Grayston, that the FTT erred in not recognising the importance of complying with the World Trade Organization Information Technology Agreement ("ITA") under which the contracting parties, which included the UK, were committed to grant free of duty access to certain products used in the information technology sectors. He submitted that, in accordance with case-law which made clear that the ITA took precedence over EU secondary legislation, and where such legislation had to be interpreted consistently with the ITA, in circumstances where there was a choice, regarding products covered by the ITA regarding dutiable and free of duty products, the FTT should have picked the classification which ensured free of duty access to the EU/UK market for such products. As Mr Fell explained, to the extent the ITA, in

accordance with the case-law, required any changes – for instance adoption of a “main use” test to subheading 8504 40 30 – the FTT applied this. Crucially, no changes were made to the GRI and there was no basis for saying that should operate in a way which promoted free of duty access for products referred to in the ITA. Analysis of the ITA therefore adds nothing to the issue at hand.

Classification Regulation 2017/1465

52. HMRC argue that the FTT was, in any case, compelled to reach the classification it did by analogy with a classification regulation (Commission Implementing Regulation 2017/1465). Such regulations, which are adopted by the Commission following approval of a committee of customs experts of the Member States, describe a particular product and specify its classification and also provide reasons for the classification.

53. The Regulation classifies certain goods (wireless charger and AC adapter) at 8504 40 90 describing them as follows:

“A device (so-called ‘wireless charging plate’) consisting of an adapter with a cable of a length of approximately 180 cm and a charging plate. The cable has a connector to connect to the charging plate. The plate is circular shaped with a height of approximately 8 mm, a diameter of approximately 80 mm and a weight of 51 g.

The adapter converts (rectifies) alternating current (AC — 240V) into direct current (DC — 12V) and transfers this to the plate. In the plate this DC is converted (inverted) into AC and then that AC is converted into an electromagnetic field.

The device is designed to charge apparatus wirelessly. Both the plate and the apparatus being charged are equipped with ‘Qi’ technology, which is the standard for the wireless charging of apparatus. Wireless charging is performed via an electromagnetic field.

See image (*) [*The image is of a device which looks similar to Belkin’s product*]”

54. The reasons given for the classification to 8504 40 90 are expressed as follows:

“Classification is determined by general rules (GRI) 1, 3(c) and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8504, 8504 40 and 8504 40 90.

The functions of the device (current rectifying, inverting, and converting into an electromagnetic field) are covered by subheading 8504 40. Classification under subheading 8504 50 is thus excluded.

Classification under CN code 8504 40 30 as static converters of a kind used with telecommunication apparatus, automatic data-processing machines and units thereof is excluded as the AC/DC adapter is designed to provide current to a variety of electrical apparatus.

As neither current rectifying, inversion nor conversion into an electromagnetic field gives the device its essential character it has to be classified applying GRI 3(c).

Consequently, the device is to be classified under CN code 8504 40 90 as other static converters.”

55. HMRC submit the various electricity conversion functions carried out by the pad and adapter in the Regulation are entirely inconsistent with the approach suggested by Belkin. It is helpful at this point to consider the background to, and significance of, such classification regulations which was conveniently summarised by Lawrence Collins J in *VTech Electronics (UK) Plc* [2003] EWHC 59 (Ch):

“[21] Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, art 249 (formerly art 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.

[22] It is common ground between the parties that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed [*unless and until there is a declaration from the European Court that the Regulation is invalid*].”

56. The words in the last sentence above are in square brackets because, post-Brexit, it is no longer relevant so far as UK courts and tribunals are concerned, to refer to an invalidity declaration being made by a UK court or tribunal to the European Court. Instead, as explained in the FTT Decision (at [56]), the relevant means by which the regulation would be declared invalid is found in domestic legislation (the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019/673) which sets out the circumstances in which a court or tribunal can make the invalidity declaration and the procedure to be followed. Notice of any declaration of invalidity must be given to a Minister of the Crown in advance. The Minister is entitled to be joined as a party to the proceedings.

57. Lawrence Collins J continued:

“...Advocate General Mischo said (in reasoning which was followed and approved by the Court) that classification regulations are adopted “when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute.”(para 18). He went on:

“20. It should be borne in mind that a classification regulation is adopted . . . on the advice of the Customs Code Committee when the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute.

21. It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or to a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.

22. The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product.”

But, he said, the approach adopted by a classification regulation for a particular product could not unhesitatingly and automatically be adopted in the case of a similar product: “On the contrary, as always, where reasoning by analogy is employed great care is called for.” (para 24)”

58. The FTT received submissions on the Regulation. HMRC argued they were compelled to classify the product as they did by the Regulation because it applied directly³ or by analogy. Belkin argued there was no direct application or analogy and that in any case the Regulation was invalid. The FTT, having found in HMRC’s favour regarding the classification, did not address the relevance of the Regulation. However, given our conclusion above, that the FTT erred in law, the relevance of the Regulation is an issue we must consider. The issue is relevant, both in terms of whether the FTT’s error was material (because if the Regulation applied by analogy as HMRC

³ Before the FTT HMRC had argued the charging pad was compatible with all devices

suggest the error would not make any difference to the classification), and because of its relevance to any remaking of the decision.

59. Mr White argues no analogy can be drawn with Regulation 2017/1565, as HMRC submit, because whereas the device covered by the Regulation is a general device for all sorts of Qi-enabled devices, Belkin's Charging pad / AC adapter was found by the FTT to be used specifically with telecommunications apparatus. In addition, in contrast to the AC adapter referred to in the Regulation, which could be used with a variety of electrical apparatus, the FTT's findings indicated the Belkin AC adapter was specifically designed for use with the Belkin charging pad.

60. HMRC submit the crucial part of the reasoning, in the Regulation, which applies by analogy is that the AC adapter is excluded from the classification at issue. It did not matter whether that exclusion from the classification (which referred to telecoms apparatus) arose because (in the Regulation device's case) the adapter could be used with a variety of apparatus, not just telecoms apparatus, or whether the exclusion arose (under the FTT's findings) because it was designed for use with a charging pad which was not telecoms apparatus. What mattered was that the overall retail set could not be classified under GRI 3(b) because it was not possible to classify the adapter. Mr Fell pointed to the similarity in reasoning which was expressly by reference to how the product functioned and different stages of electric conversion (rectification referred to conversion from AC to DC) and maintained that was equally relevant for Belkin's Charging pad / AC adapter product.

61. Despite the superficial similarities in terms of appearance of the product considered in the Classification Regulation and Belkin's, and paying particular heed to the cautionary note set out in *Vtech* regarding reasoning by analogy, we consider it unsafe to draw an analogy as HMRC suggest. In particular, we cannot overlook the significance of the FTT's finding (at FTT([20(3)])) that it would be "unusual and/or difficult" to find a device, other than the Belkin charging pad that could be powered by the AC adapter. That the Belkin AC adapter was not intended for use with other devices, but was meant for the charging pad was made all the more clear to us when we saw the product for ourselves— the curved slope of the connector was designed to sit flush with the curved surface of the charging pad. The Belkin product was not therefore a generic wireless charger with a generic AC adapter, but a charger meant to be used with a specific device.

62. Where a product, such as that covered by the Regulation, contains an AC adapter which can be used with any number of products, rather than the product it is sold with, one can readily see how its function can feature more prominently in the definition of the product set's essential character for the purposes of GRI 3(b) than an AC adapter which is specifically designed as a power source for the charging pad it is sold with. Given our conclusion that the Regulation is not relevant we do not deal with Belkin's further argument regarding the Regulation being invalid.

Remaking decision

63. The FTT erred in law in its determination of the essential character of the product as a whole. The error was clearly material. The FTT made clear and extensive findings of fact on the evidence before it regarding the charging pad / AC adapter and we see no reason to remit the case back to the FTT but are able to remake the decision ourselves. As we have said above, those findings confirm Belkin's position that the essential character of the product was the wireless charging of mobile phones. When the removal test is applied to the pad, it is clear that character is lost, whereas when the AC adapter is removed, the essential character of wireless charging of mobile phones remains. Under GRI 3(b) the classification is 8504 40 **30**. For the reasons we have already explained the Classification Regulation 2017/1465 is not relevant to the analysis.

New argument that product “other inductor”

64. Belkin also raised, for the first time and mid-way through its oral submissions, the argument that the product was not a static convertor but an “other inductor” under 8504 50 and moreover one that was used with telecoms apparatus (8504 50 20). In making this argument Mr White sought to unpick the assumption by the FTT that there was a stage of converting AC current to an electromagnetic field. He acknowledged that such assumption stemmed from the facts agreed by the parties but argued it was “contrary to the science” and the underlying scientific evidence which was that a DC source was used to create pulses which both created an AC voltage in the coil (comprising an inverter) and a magnetic field around the coil (inductor). HMRC rightly pointed out that no permission had been given to run this argument. We agree with HMRC, that we should not grant permission to advance this argument. The argument was made at an extremely late stage, it went to matters of fact and, if it had been raised earlier, the evidence might well have been questioned differently, or different evidence might have been called. For these reasons we refuse permission for Belkin to raise the argument.

FTT Decision- cable adapter

65. As was widely publicised at the time, around 2012, Apple removed separate inputs for charging for audio and for charging on its new models of iPhone and iPad, replacing with a single “lightning” connector input. That meant a user had to choose between charging or using plug in headphones and could not, without an adapter such this, do both at the same time.

66. The FTT described the cable adapter (at [13(4)]) as:

“a cable adapter that enabled the user to charge and listen to music at the same time. It was made for Apple devices (iPhone and iPad). It was marketed as "Lightning Audio + Charge RockStar". It had two sockets at one end and an Apple "lightning" connector at the other.

67. It also noted the cable adapter “about 12 cm long” (at [23]).

68. Belkin argues at the subheading level for classification as “Insulated...wire, cable...and other insulated electric conductors, whether or not fitted with connectors”, “Of a kind used for telecommunications” under 8544 42 **10**.

69. The classification which HMRC sought, with which the FTT agreed was “Insulated...wire, cable...and other insulated electric conductors, whether or not fitted with connectors”, “Other” under 8544 42 **90**. (Before the FTT, and before us, up until the argument was dropped at the beginning of the hearing the Belkin argued in the alternative that the cable adapter was a static convertor because it had a main function of charging). The FTT rejected that argument and continued at [101]:

“...[the cable adaptor] should be classified to 8544 under “Insulated...wire, cable...and other insulated electric conductors, whether or not fitted with connectors”. Further, it was not “of a kind used for telecommunications” because its function was to provide power and audio transmission to a telecommunications device (iPhones), rather than itself being used in a telecommunications network (and so “for” telecommunications). We make this finding based on the wording of the CN, supported by the CNENs in relation to CN 8544 42 10 (see [41] above).

70. That CNEN in relation to 8544 41 10 was:

“The CNENs in relation to CN 8544 42 10 say that, for this subheading, the phrase "of a kind used for telecommunications" includes "electrical conductors fitted with

connectors used in telecommunications networks, for example, to connect an automatic data processing (ADP) machine with a modem." However, they say that the subheading does not include (1) "electrical conductors fitted with connectors, to be used for connecting different apparatus (for example, a DVD player with a monitor, or an ADP machine with a monitor, a printer, a keyboard, a projector etc)"; or (2) "electrical conductors which serve only to supply power (for example, power cables)".

Grounds of appeal and discussion (cable adapter)

71. Belkin argues the FTT was wrong to reason the capable adapter was not "of a kind used for telecommunications" because it was not "itself being used in a telecommunications network". The CNEN clarifies the following do not amount to cables of the requisite kind: 1) power cables used with telecommunications equipment 2) electrical conductors which connect telecommunications equipment to non-telecommunications equipment e.g. a DVD player. Here the cable adapter provides both charging and audio signals to and from an iPhone or iPad. These together with the audio function of an iPhone or iPad are respectively telecommunications equipment.

72. Before us, Belkin emphasises that the cable adapter not only allows audio to be transmitted from the phone to the user but also allows audio (from a microphone on the headphones) to be transmitted to the phone. Thus the cable adapter is used for telecommunications in that that the user can hear the audio and transmit audio in making a telephone call. Belkin acknowledges this was not a point that was made to the FTT but points out there was reference made in its notice of appeal that the adapter "supports...microphone from Lightning Audio headphones". Belkin also referred us to certain marketing material that was not before the FTT which confirmed the audio function was two way and could send as well as receive audio.

73. On behalf of HMRC, Mr Fell objected to this new evidence arguing that taking account of the *Ladd v Marshall* criteria it should not be admitted. The evidence could have been admitted before the FTT, if it had HMRC would likely have sought extensive clarification on what and how voice calls were enabled. But in any event it was not clear the evidence would change the outcome. We agree the additional evidence should not be admitted for the reasons HMRC advance.

74. Returning to the question of whether the FTT erred in law, HMRC contrasted the particular wording used in the classification "of a kind used **for telecommunications**" with wording in other classifications which refers to "**with** telecommunications apparatus". The latter sense is also wider because the product may be used with ADPs too whereas the former is only "for telecommunications". HMRC submit the cable adapter itself must be a piece of telecommunications technology. Thus the CNENs give the example of an ethernet cable, which itself carries data, as part of a telecommunications network. It is also consistent with Commission Implementing Regulations in the area. These were the arguments HMRC made to the FTT and it is plain the FTT agreed with this particular interpretation.

75. We see no error of law with the FTT adopting that interpretation. It appears consistent with the ordinary sense of the words "for telecommunications" and respects the CNENS, which clarify that something which simply provides power does not fall into the classification, nor would providing audio either as it is not for telecommunications. HMRC are right, in our view, to contrast the wider wording used in other classifications which refer to articles which are used "with telecommunications apparatus" (emphasis added). The FTT's interpretation of "for telecommunications" is consistent with the different terminology used. We accordingly reject the appellant's case in relation to the cable adapter and that is sufficient to dispose of the appeal regarding that product.

76. Even if we were to consider the new argument that the cable adapter enabled transmitting as well as receiving audio, we are doubtful that would make a difference; the cable adapter would still not be “for telecommunications” in the sense discussed above of being part of a telecommunications network. It would simply be another means by which the telephone apparatus at the end of the telecommunications network (the mobile phone) would be used. So instead of the phone having to be held to the user’s ear and the user speaking into the inbuilt speaker, the user would listen through the headphones and speak through the microphone. The headphone cable would not thereby become part of the telecommunications network, still less the cable adapter which enabled the headphones to be connected to the phone.

Conclusion

77. Belkin’s appeal in relation to the Charging pad / AC adapter is allowed. We set aside the FTT Decision insofar as it relates to that product and remake the decision so as to classify the product as “Static converter”, “Of a kind used with telecommunications apparatus, automatic data processing machines and units thereof” under 8504 40 30.

78. Belkin’s appeal in relation to the cable adapter is dismissed and the FTT Decision in so far as it relates to that product is upheld.

Signed on Original
JUDGE SWAMI RAGHAVAN

JUDGE GUY BRANNAN

RELEASE DATE: 08 September 2022