[2019] UKFTT 0547 (TC)

TC07341

CUSTOMS DUTY – tariff classification of bank note validator PRO-RC – whether Commission Implementing Regulation EU 2016/1750 arguably gives incorrect classification – whether referral to the CJEU should be made to determine the validity of the Regulation – yes – referral to be made

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2018/00883

BETWEEN

JCM EUROPE (UK) LIMITED — **Appellant**

-and-

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

TRIBUNAL: JUDGE AMANDA BROWN
MRS JO O'NEILL

Sitting in public at Taylor House, 88 Rosebery Avenue, London on 13 June 2019

Mr Stephen Cock of The Customs Consultancy for the Appellant

Ms Lyndsay Frawley, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. The appeal is concerned with the correct tariff classification of a bank note validator model iPRO-RC ("**the iPRO-RC**") imported by JCM Europe (UK) Limited ("**the Appellant**").

2. Following an adjournment of the appeal in April 2019, the provision of further information and an additional witness statement, at the resumed hearing, it was common ground that the PRO-RC was identical to the product described in EU Regulation (EU) 2016/1760 ("**the Contested Regulation**").

3. The Appellant contends however, that the tariff classification provided for in the Contested Regulation is inconsistent with the Combined Nomenclature ("**CN**") and Common Customs Code and, as such, is invalid and should be disapplied in classifying the iPRO-RC for customs purposes.

4. It is agreed that this Tribunal is bound by the Contested Regulation and has no power to determine its invalidity, the sole power to determine validity resting with the Court of Justice of the European Union ("**CJEU**").

5. The essence of the dispute concerns whether the Tribunal should make a reference to the CJEU with a view to the Contested Regulation being annulled.

DESCRIPTION OF THE IPRO-RC

6. The Tribunal heard evidence from Mr Dragoljub Grekulovic product manager for the Appellant and had access to the iPRO-RC from which the following facts are found.

7. The iPRO-RC is described as and performs the functions of a bank note validator and recycler. It is designed for installation in a variety of host devices such as self-service checkouts, vending machines, ticketing and gaming machines. The iPRO-RC will usually sit within the casing of the host device and will be connected to it via electronic cabling, it is otherwise independent of it.

8. Its functions are to: (i) validate and accept/reject bank notes, (ii) store bank notes in a recycle compartment or cash box and (iii) when required by the host device, pay out notes stored in the recycling compartment.

9. There are three key component parts to the iPRO-RC all housed in a chassis. The whole device is then installed into the host device. These key components are: (i) the verification unit, (ii) the recycle unit and (iii) the cashbox. As set out below the iPRO-RC cannot act independently from the host device though it does have some autonomous features.

10. The verification unit sits at the top of the chassis and its "mouth" is the only part of the iPRO-RC which is visible to users of the host device. When a customer using the host device wishes to make payment using a bank note the note is slid into the opening of the "mouth" and the iPRO-RC is activated.

11. The bank note entered is drawn into a scanning head on rollers. The scanning head consists of a number of optical and magnetic sensors and a microcontroller. The note passes through the optical sensors which consist of different LEDs and a photodiode (a semiconductor device that converts light into an electrical current). In essence, light of different frequencies is shone through the banknote and received by sensors. An image is generated from the input from the sensors.

12. In addition to the optical element there is a magnetic sensor used to identify if the bank note contains ferromagnetic particles in the ink or magnetic stripe. The magnetic sensor generates a magnetic field which is used to detect predefined parameters of the bank note. If

the magnetic field is disturbed, the output signal of the magnetic sensor changes its value and this is also used in the validation process.

13. Through these processes the dimensions of the bank notes are physically measured, the colours of inks and printing are checked, the transparency of the notes (and thereby the material the note is made of) is determined and existence of the required magnetic elements is verified.

14. The data collected from the entered note is then compared to the data sets within the memory of the micro controller. The fact that there are 4 orientations in which a note can enter the device means that each denomination of note can generate 4 distinct images. The micro-controller holds data sets for all 4 orientations of each denomination of note which is accepted meaning that it can recognise and validate a note irrespective of how it is entered. These data sets are taken from both unused and used banknotes and regularly updated to ensure maximum accuracy. The data sets are held in a micro controller and are updated via a data transfer either by upload via USB or serial port. The iPRO-RC cannot itself be connected to the internet thus new data sets will be uploaded via the host device being connected to the internet or it can be done manually during maintenance or otherwise when the device is attended.

15. If the detected points measured match the parameters that have been stored in the micro controller and are within the predefined tolerances, the denomination and authenticity of the bank note will be reported to the host controller which will then communicate whether it is an accepted denomination.

16. Where the note is not accepted it will be rejected and returned to the customer.

17. Where the note is accepted it is taken into the "transport pass" where it is held in escrow as the host device determines whether to the transfer the note to the recycler or the cash box. The transport pass consists of a number of mechanical rollers that move the note down the back of the scanner unit and into the recycler or onwards down to the cash box.

18. If the bank note is sent to the cash box it will be irretrievable by the iPRO-RC and inaccessible to the host device. The bank notes are not stored by denomination in the cash box; and the bank notes in the cash box can be removed only manually when the cash box is emptied. The cash box is at the bottom of the chassis.

19. Where the host device determines that the bank note be sent to the recycler, it will be stored there by denomination. As and when the host device determines that a note is required to be paid out, the host device controller will communicate with the micro controller in the iPRO-RC which will then extract notes from the storage area of the recycler identified by the host controller.

20. Notes are recycled on a last in first out basis. The exiting notes will not be completely revalidated but the scanner head will measure the dimensions of the note and compare those measurements to the data held in the micro controller to ensure that the instructions of the host device controller are being followed and that the correct note is being dispensed. If the measurements of the first note selected are not verified as matching the desired pay-out, the incorrect note is moved to the cash box and the next note is selected. If that too is incorrect the machine will notify the host controller to cancel the transaction.

21. The iPRO-RC counts the notes but will not maintain any record of the number of notes held. All of this information is within the host device controller.

22. The iPRO-RC cannot be used as a stand-alone device it needs to be connected to an external host device and controller and will usually be housed within the host device i.e. the self-service check out, ticket machine etc.

23. The Appellant's customers are usually original equipment manufacturers who install the iPRO-RC within the host devices wherever the host device needs to accept and verify notes.

24. The iPRO-RC is not suitable for use in banking auto teller machines.

25. The Appellant company market, by reference to its website, as confirmed by Mr Grekulovic, is in currency and transaction management providing automated solutions to the problems associated with money handling and reducing the cost of money management.

26. The Appellant company's marketing of the iPRO-RC places particular emphasis on the recycling capability: "reduce operational costs and keep customers happy with the amazing new iPRO-RC from JCM Global. iPRO-RC has two large capacity chambers with Roller Friction Recycling Technology holding recycled notes for instant pay-outs, keeping your equipment running and your customers happy. Plus, iPRO-RC has JCM Global's anti-stringing technology, proven note acceptance and lockable removable cash box". However, Mr Grekulovic stated that the only difference between the iPRO and the iPRO-RC is the recycler, the marketing material for the iPRO markets more specifically the "proven note acceptance" technology.

27. On the basis of the examination of the iPRO-RC itself, the Tribunal finds that the intended use of the iPRO-RC is to validate, by measurement and accept banknotes with a view to securely storing them or paying them out at the direction of the host controller.

BACKGROUND TO THE DISPUTED BINDING TARIFF INFORMATION

28. By an application dated 18 November 2017 the Appellant sought from HMRC a Binding Tariff Information ("**BTI**") in respect of the iPRO-RC under classification code 9031 49 90: Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors – other – other.

29. HMRC issued a BTI on 3 January 2018 classifying the iPRO-RC to subheading 8472 90 90: Other office machines (for example, hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin sorting machines, coin counting or wrapping machines, pencil sharpening machines, perforating or stapling machines) – other – other.

30. HMRC's decision to so classify the iPRO-RC was by reference to the terms of the Contested Regulation which had classified a product of the following description under the CN subheading 8472 90 70 (following the restructuring of CN heading 8472 on 1 January 2017 with the consequence that subheading 8472 90 70 became 8472 90 90):

> "an apparatus consisting of a bank note validator and cash boxes (so called 'note float unit') with total dimensions of approximately 10 x 24 x 44 cm.
>
> The bank note validator uses optical scanning technology to check the authenticity of bank notes according to predefined specifications.
>
> Bank notes that are approved by the validator pass to a cash box. When this cash box has reached its capacity (generally 30 bank notes), the bank notes are automatically sorted and distributed towards other cash boxes with a capacity of generally 300 bank notes.
>
> The apparatus is used, for example, in gaming vending, parking machines etc. to pay for the service or for the product obtained. The apparatus is also capable of dispensing bank notes.
>
> The apparatus is always connected to a so-called 'host controller' (not present upon inspection) which regulates the predefined bank note specifications and the bank note flow to the different cash boxes."

31. The reason given was:

> "Classification is determined by general rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8472, 8472 90 and 8472 90 70.
>
> Classification under heading 9031 as a measuring or checking instrument is excluded, because the apparatus is more than a checking instrument covered by that heading. In addition to checking the authenticity of bank notes, it also carries out other functions such as sorting and distributing bank notes between different storage boxes and dispensing bank notes. All the functions carried out by the apparatus are covered by heading 8472.
>
> The apparatus is therefore to be classified under CN code 8472 90 70 as an office machine."

32. The history to the Contested Regulation is that in January 2012 Germany issued a BTI classifying a bank note validator machine to CN sub-heading 8472 90. In February 2012 the UK issued a BTI ruling for a bank note validator and recycler to subheading 9031 49 90. In light of these apparently contradictory BTI rulings, Germany requested that the European Commission Customs Code Committee ("**the Committee**") provide a consistent classification. The matter was initially discussed in June 2015 but was not finally resolved until the meeting in February 2016 at which time 26 of 27 member states voted for classification under the CN subheading 8472 90. Of particular note in the present case is that the UK was the one member state who did not vote in favour of such classification.

MEANS TO CHALLENGE THE CONTESTED REGULATION

33. As indicated in paragraph 4 above this Tribunal has no power to override or annul the Contested Regulation that power resides solely with the CJEU. The sole question for this Tribunal is whether, in all the circumstances, it is appropriate to make a reference to the CJEU requiring it to consider the validity of the Contested Regulation.

34. The circumstances in which a reference is appropriate has been considered by the tribunal most recently in the matter of *Pfizer Consumer Healthcare Limited* [2019] UKFTT 0093 though HMRC also placed considerable reliance on the Upper Tribunal and CJEU judgments in *EP Barrus Limited and Kubota (UK) Limited* [2016] UKUT 0359 and C-545/16 respectively.

Barrus and Kubota

35. These cases concerned the classification of vehicles designed and intended for use off-road, fitted with a sturdy flat-bed tipping body designed for the transportation and tipping of any kind of material used on quarries, building sites etc.

36. HMRC had issued BTIs to the taxpayers following successful appeals regarding the appropriate classification of the vehicles. Subsequent to the issue of the BTIs the Committee issued an Implementing Regulation which classified similar vehicles under an alternative subheading. HMRC revoked the BTIs.

37. The taxpayers disputed the revocation on the basis that the vehicles in question were not sufficiently similar to those which were the subject of the Implementing Regulation but also contended that if the Implementing Regulation determined the classification a reference to the CJEU was required in order for them to challenge the validity of the regulation.

38. The FTT and the UT both determined that the decision of HMRC to revoke the BTI was not unreasonable in light of the Implementing Regulation.

39. At paragraphs [99] – [103] the UT set out the principles derived from the CJEU case law concerning the circumstances in which the need to make a reference in customs classification cases arise:

> "99. The European Court of Justice has on several occasions found classification regulations to be wholly or partly invalid. Examples include *F.T.S International BV* Case C-310/06, *Kawasaki Motors Europe NV* Case C-15/05, *Jacob Meijer BV* Case C-304/04 and C-305/04 and *Cabletron Systems Ltd* Case C-463/98 …
>
> 100. It is clear that the tribunal has no jurisdiction to declare that Community legislation such as Regulation 2015/221 as invalid *Foto-Frost* Case C-314/85 at [20].
>
> 101. Nor do the Appellants have the right to challenge the validity of the Regulation directly. That right arises under Article 263 of the Treaty on the Functioning of the European Union ("**TFEU**") only if a regulation is "of direct and individual concern" to a taxpayer. Here Regulation 2015/221 is not addressed to the Appellants in particular, and would apply to any person importing a vehicle within the Regulation.
>
> 102. In such a situation, national courts must permit individual taxpayers to apply to the national courts for permission to challenge the validity of the regulation before the European Court: see *Union de Pequenos Agricultores v Council* Case 50/00 P at [40].
>
> 103. Several decision of the European Court emphasize the importance of enabling individual taxpayers to challenge the validity of a regulation directly, by means of a reference by the national courts to the CJEU under Article 267 TFEU. As stated in *Jégo – Quéré & Cie SA* Case-236/02 at [29]:
>
>> "It should be noted that individuals are entitled to effective judicial protection of the rights they derive from the Community legal order, and the right to such protection is one of the general principles of law stemming from the constitutional traditions common in member states. That right has also been enshrined in Articles 6 and 13 of the ECHR (see, in particular, *Johnson* [1983] ECR 1651 paragraph 18 and Case C-500/00 P *Union de Pequenos Agricultores v Council* [2002] ECR 1-6677 paragraph 397)"

40. Counsel for the taxpayers in that case articulated that there were grounds to argue that the Implementing Regulation was invalid and HMRC resisted the need for a reference. The Tribunal proceeded:

> "108. In considering whether or not to refer the validity issue to the CJEU, we have taken into account the note "*Recommendations to national courts and tribunal in relation to the initiation of preliminary ruling proceedings*" (Official Journal of the European Union 2012/C 338/01).
>
> 109. This note makes it clear that, whatever the wishes of the parties to the proceedings, it is for the national court or tribunal alone to decide whether to refer a question for a preliminary ruling.
>
> 110. The note contains the following guidance:
>
>> "**References on determination of validity**
>>
>> 15 Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid;
>>
>> 16 All national courts or tribunals *must* therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity

> of such an act, stating the reasons for which they consider that the act may be invalid".
>
> 111. In assessing whether or not to refer, we have considered the relevant standard to apply in relation to the Appellants' submissions. Some decided cases describe the threshold for referral in positive terms and others in negative. See for instance the following passage from the judgement of Mitting J in *R (on the application of Telefonica & others) v Secretary of State for Business and Regulatory Reform* [2007] EWHC 3018 (Admin) at [3] and [4]:
>
> > "[3] … If I am satisfied that the challenge to the validity of the Roaming Regulation is unfounded, I can and should so declare and would give effect to any conclusion by refusing permission. If I consider the issue to be arguable, I cannot determine it myself but may refer it for a decision of the European Court of Justice …
> >
> > [4] The underlying question therefore is the validity or otherwise of the Roaming Regulation. There is no doubt that it has a significant direct and indirect effect on the business activities of the Claimants. If satisfied that the challenge to its validity is reasonably arguable or, put negatively, not unfounded, I should refer the issue to the European Court …"

41. The UT determined to make a reference.

42. On the referral the CJEU made a number of observations on the role of the Committee and its role in connection with a ruling as to validity:

> "23. It must be recalled, as a preliminary point, that according to the Court's settled case-law, the Council of the European Union has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures referred to in Article 9 of Regulation No 2658/87 does not authorise it to alter the subject-matter and the scope of the tariff headings (judgment of 4 March 2004, *Krings,* C-130/02, EU:C:2004:122, paragraph 26, and the case-law cited.
>
> 24. In the present case, it is necessary to examine whether the Commission, in having proceeded to make the tariff classification of the vehicle designated in column 1 of the table in the annex to Regulation 2015/221 under subheading 8704 21 91 and not under subheading 8704 10, altered the content of those two tariff subheadings."

Pfizer

43. Pfizer concerned the correct classification of a range of therapeutic heat products the classification of which fell within the terms of Implementing Regulation 2016/1140. The taxpayer in that case sought a reference to the CJEU in order to challenge the validity of the regulation.

44. A particular focus of the tribunal was to determine the threshold which the taxpayer needed to reach in order for the tribunal to make a reference. In particular, whether the taxpayer must show that the disputed regulation contained a manifest error before a reference should be considered.

45. The tribunal in that case noted that:

(1) Prior to the issue of the disputed regulation in that case HMRC had agreed with the taxpayers proposed classification of the products [20] with the consequence that it was difficult to see that the taxpayer's challenge was "unfounded" [21].

(2) Following consideration of the judgment and Advocate General's opinion in *Cabletron Systems Ltd* Case C-463/98 that the requirement to evidence a manifest error arose only where the dispute concerned classification at the eight digit subheading level on the basis that classification at the eight digit level is a matter of community law and not a matter of compliance with international obligations [25] – [26].

(3) To require an importer to show that a disputed regulation displayed a manifest error in order to challenge its validity would, contrary to the CJEU judgement in *Union de Pequenos Agricultores v Council*, have the consequence that there was no justiciable challenge in circumstances where the regulation were made only in error, rather than manifest error.

46. On the basis of these observations the judge determined that where the dispute between the parties concerned classification at heading or subheading level (i.e. four or six digit level) the relevant test in determining whether to refer was that it was strongly arguable that the disputed regulation was invalid"

Invalidity

47. It appears from the case law of the CJEU that the critical determinant for invalidity, certainly at CN heading or sub-heading level is to determine whether the Contested Regulation restricts the scope of a heading/subheading (*Kawasaki Motors Europe NV* [2006] C-15/15 at [50]) or, by corollary, by impermissibly extending the scope (*GROFA GmbH and GoPro Cooperatief UA* [2017] C-435/15 and C-666/15 at [51] – [52].

48. In *Barrus and Kubota* it was recognised, as in this case, that the appellant taxpayers had played no part in arguing on what basis the items should be classified and, with no direct right of challenge to the relevant Regulation before the European Court the only means of challenge is against a BTI on the basis the regulation is invalid and seeking a referral on that issue.

49. In accordance with *Pfizer* it is clear however, that the Appellant cannot simply invite a reference on the basis that it is the only means by reference to which its contention that the Contested regulation is wrong. Invalidity of the Contested Regulation must be strongly arguable.

SUBMISSIONS OF THE PARTIES

Appellant's submissions

50. The Appellant contends that it is strongly arguable that the Contested Regulation is invalid on the following grounds:

(1) The properties of the machines pursuant to which the conflicting German and UK BTIs referred to the Committee had not been properly communicated to the Commission because, in particular the description of the apparatus in the German BTI described its principal function as that of counting money.

(2) The minutes of the Committee describe the machines as banknote readers.

(3) Classification under heading 8472 90 90 ignores the terms of note 1(m) to Section XVI of the CN which provides that Section XVI (into which Chapter 84 and heading 8472 falls) excludes from Chapter 84 articles also classified under Chapter 90.

(4) The terms of note 3 to Section XVI (also applicable to the interpretation of Chapter 90 by virtue of note 3 to Chapter 90) providing that: "unless the context otherwise

requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complimentary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function" had not been correctly applied in determining the applicable CN heading.

(5) The terms of note 4 to Section XVI (also applicable to the interpretation of Chapter 90 by virtue of note 3 to Chapter 90) providing (so far as is relevant): "where a machine (including a combination of machines consists of individual components … intended to contribute together to a clearly defined function covered by one of the headings in [Chapter 90/Section XVI] then the whole falls to be classified in the heading appropriate to that function" did not appear to have been correctly applied either.

(6) The Contested Regulation did not appear to classify the machine taking proper account of the non-binding explanatory notes to the CN drawn up by the Commission and/or the explanatory notes to the Harmonised System (drawn up by the World Trade Organisation) ("**HSENs**") despite such notes being recognised as important aids to interpretation. In particular:

(a) The HSEN to CN heading 9031 which provides: "this heading includes measuring or checking instruments, appliances and machines, whether or not optical"; "this heading also covers optical type measuring and checking appliances and instruments ... [and] remain classified in this heading whether or not they are suitable for mounting on machines"

(b) The HSEN to CN heading 8472 which provides: "this heading covers all office machines not covered by the preceding three headings or more specifically by any other heading of the Nomenclature. The term "office machines" is to be taken in a wide general sense to include all machines used in offices, shops, factories, workshops, schools, railway stations, hotels etc. for doing "office work" (i.e. work concerning the writing, recording, sorting filing, etc., of correspondence, documents, forms, records, accounts etc.) Office machines are classified here only if that have a base for fixing or for placing on a table, desk etc. The heading does not cover the hand tools, not having such a base of Chapter 82. … The heading includes *inter alia:* (4) coin sorting or coin counting machines (including bank note counting and paying out machines). … (5) Automatic banknote dispensers, operating in conjunction with an automatic data processing machine, whether on-line or off-line"

51. The Appellant contended that when the notes to the CN and explanatory notes were properly considered the proper classification was properly 9031 with the consequence that classification under 8472 invalidly extended the scope of heading 8472 and invalidly reduced the scope of 9031.

HMRC's submissions

52. By their skeleton argument, HMRC contend that note 1(m) to Section XVI has no application because classification is by reference to the Contented Regulation and that therefore classification under 9031 is expressly excluded

53. HMRC further contend that as a consequence of the similarity of the iPRO-RC and the machine considered by the Committee and by reference to the reasons stated for classification under 8472 90 90 within the Contested Regulation, the iPRO-RC cannot be classified under heading 9031 as the iPRO-RC is more than a checking machine.

54. In the hearing HMRC placed particular emphasis on the market position and marketing material used by the Appellant to assert that the principal function of the iPRO-RC is that of automated cash handling in precisely the environments considered in the HSEN for 8472. In HMRC's submission "office" is to be construed broadly and that the iPRO-RC is essentially a machine used within an environment falling within that broadly construed meaning of office and that bank notes would fall within the meaning of document with the consequence that the iPRO-RC neatly meets the description of an office machine for sorting and filing documents.

55. HMRC further contended that there was no invalidity on the basis that office machines needed a base for fixing or standing on a desk and that the relevant section of the HSEN was merely seeking to distinguish machines within 8472 from hand tools. That this must be the case was substantiated, according to HMRC, by reference to the inclusion within the specified HSEN list of office machines as including ATMs which are most commonly built in.

56. HMRC appeared to contend, by reference to *Barrus and Kubota* that in order for the Appellant to achieve a reference to the CJEU it must be shown there was a manifest error in the Contested Regulation by reference to the procedure adopted by the Committee in recommending the implementation of the Contested Regulation. HMRC criticised the approach taken by the judge in *Pfizer* on the basis that in reaching its conclusion the judge had considered case law predating the creation of the Committee which, it was claimed, justified a different approach as implementing regulations were now the product of a consultative exercise which should only be challenged on the grounds that an incorrect procedure had been followed.

57. However, HMRC also indicated that in many regards they were neutral to the question of a reference but were of the clear view that it was not strongly arguable that the Contested Regulation was invalid. HMRC contended that the Committee had patently, by reference to the Chapter and Section notes and to the HSENs, made the correct decision as to classification.

DISCUSSION

58. As to the question of the requirements to be met for a reference to be made, the Tribunal has carefully considered the judgments of the UT in *Barrus and Kubota* and that of the FTT in *Pfizer*. *Barrus and Kubota* is binding on this Tribunal. By reference to the doctrine of judicial comity, this Tribunal should adopt the same approach as that of Judge Poole in *Pfizer* unless it considers that judgment to be wrong. It is noted that HMRC did not inform the Tribunal that it had appealed or sought leave to appeal the decision in *Pfizer* and the time limit for such an appeal has now passed the decision as to the circumstances in which a reference are to be made is therefore final.

59. This Tribunal considers that the approach taken by Judge Poole is broadly consistent with that taken by Judge Scott in *Barrus and Kubota* though *Barrus and Kubota* was not cited in *Pfizer*. The role of the Committee at the eight digit subheading level is broad and it is therefore right that the ability to challenge the validity of an implementing regulation determined at that level should be restricted to situations of manifest error be that a procedural error or an application error.

60. Importers have no right of participation in the considerations of the Committee, they may have no real visibility at all until an implementing regulation is issued that goods imported by them are the subject of debate at a community level. The only means an importer (certainly an importer into the UK) has to challenge classification determined by an implementing regulation is by way of appeal to the Tribunal. Where they can satisfy the Tribunal that the goods in question are sufficiently dissimilar to fall outside the terms of the relevant implementing regulation the implementing regulation will not be binding on the tribunal which will proceed to determine the classification without reference to it implementing regulation. Where asserted invalidity of the regulation is unfounded it is a waste of the resources associated with a

reference to make one. Where the alleged invalidity is not unfounded i.e. it is reasonably arguable *Barrus and Kubota* would indicate that a reference should be made and the need for a reference grows with the strength of the agreeability of the invalidity.

61. So the real question for this Tribunal is whether the Appellant's submission that the Contested Regulation is invalid is unfounded?

62. The Tribunal takes the view that HMRC's position on the applicability of note 1(m) must be wrong. If the Committee classified the class of banknote validators under 8472 without reference to the terms of note 1(m) that would, of itself, appear to be a ground of potential invalidity.

63. Note 1(m) clearly provides that classification under Chapter 90 takes precedence over Chapter 84 with the consequence that consideration of the provisions of Chapter 90 should have been the starting point for classification of the iPRO-RC. From the minutes of the Committee it is certainly not apparent that consideration was given to classification under Chapter 90 before moving on to Chapter 84.

64. The Section Notes relevant to both Chapters 84 and 90 provide that "unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complimentary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function".

65. On the basis of the finding at paragraph [9] above it is clear that the iPRO-RC is a composite machine consisting of two machines or at the least components performing complementary functions: scanning head and micro controller validating/measuring/checking and the recycler and, on the face of it, note 3 to Section XVI and thereby Note 3 to Chapter 90 require an assessment of the principal function.

66. Note 4 to Section XVI and note 3 to Chapter 90 provide that where the component elements contribute together to a clearly defined function covered by one of the headings in [Chapter 90/Section XVI] then the whole falls to be classified in the heading appropriate to that function.

67. Again it is not obvious from the meeting minutes that the Committee considered or determined the function or principal of the machine they were examining (if indeed they examined a specific machine at all). HMRC contend that the function of the iPRO-RC is automated cash handling and do so by reference to the marketing material for the iPRO-RC and the market positioning of the Appellant. They contend that as such it meets the clearly defined function covered in heading 8472. The Appellants contend that the principal function is the bank note validation which, they say, involves optical and magnetic checking and measuring meeting the function covered by heading 9031.

68. As set out at paragraph 26 the Tribunal has found that the intended use of the iPRO-RC is the validation of bank notes with a view to securely storing them or paying them out at the direction of the host controller. This has been determined by reference to the observable features of the machine. The Tribunal has not taken account of the marketing material or market position of the Appellant in reaching this conclusion on the basis that the intended use of a product is relevant for classification purposes only where it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties *RUMA* [2007] C-183/06 ECR I-1559.

69. As to the question of the principal function of the composite machine the Tribunal determines on balance that it is to validate the notes. Without validation of the associated

acceptance of the notes all other functionality becomes largely irrelevant or at the least subsidiary.

70. On the basis of the findings of the Tribunal it is considered that a contention that the Contested Regulation is invalid is not unfounded and reasonably arguable (applying the test articulated in *Barrus and Kubota*) and that it is strongly arguable (applying the test articulated in *Pfizer*).

71. The Tribunal therefore determines that it will make a reference to the CJEU to seek a preliminary ruling as to the validity of the Contested Regulation.

DRAFT ORDER FOR REFERENCE

72. Subject to further consideration of the form of the reference with the assistance of the parties, the provisional view of the Tribunal is that the CJEU should be asked to rule whether the Contested Regulation is invalid, on any or all of the basis that it does not take account of the Section and Chapter Notes and/or Explanatory Notes.

73. This appeal is to be stayed for not more than 30 days from the date of the release of this decision to enable the parties to reach agreement, as far as possible, on the form of the proposed questions for reference and accompanying Schedule. If the parties cannot agree, then a hearing will be provisionally listed for the end of that period although it is anticipated that settlement of the final form of the order for reference will be made on the papers.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

74. 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 (“**Tribunal Rules”**). 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.

75. Decision amended pursuant to rule 37 of the Tribunal Rules on 22 September 2019.

AMANDA BROWN
TRIBUNAL JUDGE

RELEASE DATE: 27 AUGUST 2019