TC01824

Appeal number: TC/2009/13944

CUSTOMS DUTY – classification – Combined Nomenclature – "box assembly relay" – whether principal function that of connection so within heading 85369010, or control and distribution of electricity within heading 8537 – nature of test to be applied by Tribunal – held, on facts, heading 8537 appropriate – appeal dismissed

Evidence – admissibility of, and weight to be given to, expert opinion evidence from employees of company associated with the Appellant

Procedure – whether Tribunal should admit late alternative submission by HMRC that original classification be applied – held, not in interests of justice to admit that submission

Procedure – form of order where decision upheld on review and subsequent decision by HMRC to change classification

FIRST-TIER TRIBUNAL
TAX

FURUKAWA ELECTRIC EUROPE LIMITED **Appellant**

- and -

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

TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
GILL HUNTER

Sitting in public at 45 Bedford Square, London WC1 on 21 and 22 November 2011

Valentina Sloane of Counsel, instructed by the Appellant, for the Appellant

Mark Fell of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("Furukawa") appeals against a decision of the Respondents ("HMRC") on the classification for Customs Duty purposes of an item referred to as a Box Assembly Relay ("BAR").

2. This appeal had been listed to be heard in 2010, but as a result of Mrs Sloane having been taken into hospital, it had to be postponed and the hearing could not be rearranged to take place before November 2011.

3. As the hearing lasted for the full two days and there was insufficient time for Mrs Sloane to make her submissions in reply to HMRC's submissions, we agreed that she should provide them in writing after the hearing. We received these submissions on 7 December 2011, and have taken them into account in arriving at this decision.

The legal framework

4. The parties each made submissions relating to the legal framework, as described below in the context of those submissions, so we do not repeat these details in this section of our decision. The Combined Nomenclature (CN) headings specified by the parties as relevant to this appeal were:

> "**8536**
>
> Electrical apparatus for switching or protecting electrical circuits, or for making connections to or in electrical circuits (for example, switches, relays, fuses, surge suppressors, plugs, sockets, lamp-holders and other connectors, junction boxes), for a voltage not exceeding 1000 V; connectors for optical fibres, optical fibre bundles or cables:
>
> . . .
>
> Lamp-holders, plugs and sockets:
>
> . . .
>
> - Other:
>
> - - Other 85366990
>
> . . .
>
> Other apparatus:
>
> - Connections and contact elements for wire and cables 85369010
>
> . . .
>
> - Other
>
> - - - Other 8536908599"
>
> "**8537**
>
> Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating

> instruments or apparatus of Chapter 90, and numerical control apparatus, other than switching apparatus of Heading No. 8517:
>
> For a voltage not exceeding 1 000 volts:
>
> . . .
>
> - Other
>
> - - Other 85371099"

The facts

5. The evidence consisted of a single agreed bundle of documents, and included witness statements given on behalf of Furukawa by Yasifumi Kurogi and Fumikazu Naimi, together with translations, and by Mitsuko Maeda-Nye, the translator. A witness statement was also given by Linda Witham, HMRC's Review Officer dealing with the review by HMRC of the classification decision. A statement in the form of an expert report produced for HMRC was produced by Bevan John Clues. Oral evidence was given by Mr Kurogi and Mr Naimi, in each case with the assistance of an interpreter. To avoid any possibility of his evidence being in any way influenced by hearing Mr Kurogi's evidence, Mr Naimi was excluded from the hearing while Mr Kurogi gave evidence. As the interpreter was not available on the second day, a different interpreter assisted while Mr Naimi gave evidence.

6. From the evidence we find the following background facts; as this appeal turns largely on questions of fact, we consider below the matters which were disputed.

7. The BAR is a bespoke product made by one of Furukawa's sister companies in Japan and imported by Furukawa into the UK. The BAR is made to a specification given by Honda, and used in Honda vehicles. It is a form of electrical apparatus; its detailed description and functions are considered later in this decision, as these are at the centre of the classification dispute.

8. Between August 2006 and May 2009 Furukawa imported quantities of BARs under CN heading 8536.

9. The full code used was 8536 90 10 00, and the description of the goods was:

> "Fuse box. Designed to be incorporated into a motor vehicle. Goods comprise a housing that is adapted to contain electrical fuses. This is mounted onto a common busbar for connecting one end of the fuses directly to a pole of an electric battery within a motor vehicle."

10. On 13 May 2009 Mr Vic Palmer, an officer of HMRC, visited Furukawa's premises and had doubts as to whether the CN code being used by Furukawa was the correct one.

11. On 10 June 2009 Mr Palmer wrote to Furukawa referring to his visit. In the light of his doubts whether the fuse boxes imported for supply to Honda were being imported under the correct classification, he had requested written confirmation from

HMRC's Tariff and Statistical Office ("TSO"). The "heading found" by the TSO was 8536 9085 99 (see paragraph 4 above). The justification for the decision was given as:

> ". . . classification is determined according to GIRs 1 and 6. CN Code 85369085 includes other than wafer probers".

The comments given [by the TSO] were:

> "excluded from earlier commodity code [ie that used by Furukawa] as not considered a contact element for wires and cables".

12. On 25 June 2009 Mr Palmer wrote again to Furukawa referring to the classification of the "fuse boxes". He repeated he had had doubts and had requested written confirmation of the classification from the TSO. He stated that the TSO considered the goods to be proper to commodity code 8536 9085 99 rather than the code 8536 9010 00 under which they had been entered. The latter heading was a duty free heading, whereas the result of applying code 8536 9085 99 was that the duty rate was 2.3 per cent. As a result, charges to duty of £194,343.39 and VAT of £33,823.89 now arose. Mr Palmer indicated that a demand form C18 would subsequently be issued. (We refer to this letter as "the Original Classification Decision").

13. HMRC subsequently issued the C18 Post-Clearance Demand Note. The copy in evidence [page 1 only, without copies of any attachments] does not show an issue date, but states: "The enclosed remittance advice sheet or payment instructions are to be returned by 05/07/2009".

14. A request for a formal departmental review of Mr Palmer's decision was made by Furukawa on 1 July 2009. Furukawa set out grounds for review of the classification, and arguments for the classification which it claimed should be applied. It also requested that, given the size of the requested repayment and the fact that the initial decision had been formulated on the basis of incomplete information, the C18 demand note should be suspended until such time as the departmental review had been completed.

15. On 22 July 2009 Paul Choi of HMRC emailed Furukawa and indicated that he was assisting HMRC's review process. He asked, "due to insufficient technical information", for samples and literature on the actual products.

16. Mr Mark Grimwood of Furukawa replied, indicating that a sample would be provided to HMRC. He explained that Furukawa did not have any literature for the product, since it was specifically designed for one particular motor car, the specifications having been drawn up by the motor manufacturer; a complete description of its characteristics had already been included in Furukawa's letter requesting the review. In response to a further message from Mr Choi requesting any types of connectors or cable loom that was used with the product, Mr Grimwood explained that he could only supply HMRC with the product itself; all the other elements mentioned were not of Furukawa's manufacture and therefore he was not in a position to supply them.

17. On 13 August 2009, Ms Witham wrote to Furukawa with the results of her review. She indicated that it was common ground that the BAR came within heading 8536. She described the BAR, and continued:

> "The majority of the connectors are of the plug in type and it is this that gives the product its principle [*sic*] function. As composite goods they meet the criteria legal Note 3 to Section XVI which renders GIR 3 and GIR 3(a) inapplicable and therefore not appropriate."

After referring to the CNEN to 85369010, she continued:

> "The fuse box would be excluded from the CN 85369010 because the majority of the contact elements are of the plug in type and therefore deemed to be correctly classified to the next one dash Subheading, which in this case is 85366990.
>
> Commission guidelines require Member States to be consistent across the EU with the legislation and guidance available. A number of Binding Tariff Information (BTI) rulings exist, that classify this type of product to the CN level beyond 8536 9010 00 'Connections and contact elements for wire and cables'.
>
> In particular DEM/816/07-1 which has classified a similar junction box/fuse box to 85366990.
>
> . . .
>
> **Conclusion**
>
> I have upheld the decision to issue Post Clearance Demand Note reference C18022188 relating to the misclassification of fuse boxes. . .
>
> There is no facility to suspend collection of the amount in question."

18. Furukawa responded on 27 August 2009, and raised various issues which it referred to as factual inaccuracies and points for clarification. It requested comment from Ms Witham on the impact of those inaccuracies, as well as the impact on the original C18 demand. It pointed out that she had erroneously referred to a sample having been provided to the TSO; a sample had not been taken at this initial stage, but only when the review was being conducted.

19. In her reply dated 3 September 2009, Ms Witham explained that the confusion over the sample had been a misunderstanding on her part, on taking over the case. She stated that the formal departmental review had been undertaken on the decision to issue the Post Clearance Demand Note, albeit relating to the "misclassification". She explained that the liability ruling was an internal HMRC document; the methodology and justification had been provided as a matter of courtesy and for Furukawa's information. The basic description of the goods had been "taken when the product was examined by the Classification Department and would not mirror anything of a commercial nature." She re-stated her conclusion that the product should be classified to heading 8536 69 90 90. She explained what would be required if Furukawa wished to have a BTI decision, but pointed out that a BTI was only valid on a future or an envisaged importation.

20. On 9 September 2009, Furukawa gave Notice of Appeal to the Tribunals Service.

21. On 12 October 2009 Ms Witham wrote to Furukawa acknowledging receipt of its Notice of Appeal. In the light of one of the points raised in the attachment to that Notice setting out the grounds for appeal, she asked for confirmation whether the fuses and relays were supplied at the time of importation.

22. Mr Grimwood replied on Furukawa's behalf on 19 October 2009. He explained:

> "In answer to your query concerning the time of supply of both the fuses and the relays, please be advised that the fuses and core relays are present at the time of importation of the goods. There are spaces for two surface mounted pluggable relays which can be installed by another company post-importation according to the specific car model type identified by the part number of each Box Assembly Relay."

23. Following this confirmation, Ms Witham wrote again to Furukawa on 26 November 2009 stating that HMRC's liability ruling classifying the BAR to heading 8536 69 90, carrying a duty rate of 2.3 per cent, was incorrect. Instead, HMRC considered that the BAR should be classified to section XVI, meeting the scope of the headings 8537 and CN 85371099 (carrying duty of 2.1 per cent). She referred to a German BTI classifying a product under the latter heading. She had notified Mr Palmer, who would be writing to Furukawa with the amended calculations for the C18 demand note.

24. Mr Palmer wrote to Furukawa on 27 November 2009. He referred to Furukawa's payment on 22 September 2009 of the sums set out in the C18 demand note. He explained:

> "In the intervening period the item had been physically examined and is now considered to be proper to 8537 1099 99 (2.1%).
>
> We do not issue a revised demand in these circumstances but this letter is formal notification of the change. This letter does not constitute a new demand merely an amendment. Since this is the case, the tax point in relation to the original demand is considered still to apply to this amendment.
>
> An overpayment of duty has therefore occurred. The recalculated charges are £177,446.70 Customs Duty and £30,882.68 VAT (£208,329.38).

He indicated that the overpayment of £16,899.69 Customs Duty would be repaid to Furukawa.

25. Following this amended decision, Furukawa lodged an (undated) amended Notice of Appeal, and HMRC lodged an (undated) amended Statement of Case. [No copy of HMRC's original Statement of Case was included in the bundle.]

Arguments for Furukawa

26. Mrs Sloane submitted that heading 85369010 was the correct heading. She referred to the International Convention on the Harmonised Commodity Description and Coding System, generally known as the "Harmonised System", and to the explanatory notes relating to that system, known as "HSENs". The EU is a contracting party to that Convention, and the CN comprises three elements:

> (a) the nomenclature of the Harmonised System;
>
> (b) Community sub-divisions to that nomenclature; and
>
> (c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

27. She explained that the CN contains general rules of interpretation ("GIRs") for the nomenclature; these are mandatory. [We refer as necessary to the GIRs later in this decision.] The consequence of GIR 1 was that reference to the headings of the CN and any relevant section or chapter notes was the primary method of determining classification; the other GIRs applied only if the application of GIR 1 did not enable classification to be made, and only in so far as they were not inconsistent with the headings (*Skatteministeriet v Imexpo Trading A/S*, Case C-379/02). She referred also to *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) at [14].

28. The ECJ had repeatedly stated that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes or chapter headings to the CN. One example was *Neckermann Versand AG v Hauptzollamt Frankfurt am Main-Ost* (Case C-395/93), at [5]. This case also indicated at [7]-[9] that in the absence of a definition, the objective characteristics of the product could be sought only in the use, or where appropriate, the main use, for which it was intended. The case of *Ikegami Electronics (Europe GmbH v Oberfinanzdirektion Nürnberg* (Case C-338/95, [1997] ECR I-6495) at [17], [23] to [26], showed that the basic purpose or use of a product could be discerned from the objective characteristics of the components with which that product was equipped.

29. In *Flir*, HMRC had submitted to Henderson J that the Tribunal had erred in adopting a layman's, non-technical approach to the interpretation of language that was essentially technical and scientific in nature. At [28] Henderson J indicated that he found himself unable to accept this submission, and continued—

> "I was shown no authority which supports the proposition that the language of the relevant headings should be interpreted with scientific precision, and it seems to me inherently improbable that such an approach should have been intended for a tariff code which has to be applied by businessmen and customs authorities worldwide. The appropriate linguistic register is in my view that of the intelligent businessman, not that of a GCSE physics student."

Mrs Sloane also referred to *Imexpo* at [17], in which the ECJ interpreted the CN by reference to the "customary meaning" of the term in question, submitted that this Tribunal was well able to decide on the appropriate heading for, and the functions of,

the BAR. The process was that of applying headings by interpreting them in common parlance.

30. In a case where a product performed more than one function, assistance in respect of the approach to determination of the principal function could be derived from the case law of the ECJ on the analogous task of determining a product's "essential character" for the purposes of GIR 3(b). She referred to *Sportex GmbH & Co v Oberfinanzdirektion Hamburg* (Case 253/87, [1988] ECR 3351 at [8]). In the context of the BAR, there were relevant section notes, notes 3 and 4 to Section XVI:

> "3. Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.
>
> 4. Where a machine (or a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or 85, then the whole falls to be classified in the heading appropriate to that function."

31. HMRC had contended, without elaboration, that the introductory words of note 3 did not apply in the context of the present case. However, Mrs Sloane submitted that as all the witnesses had indicated that the BAR performed two or more complimentary functions, both headings had to be considered and so note 3 was prima facie engaged. She emphasised that the word used was "requires", not "permits". The BAR's principal function was a legal question for the Tribunal to determine on the basis of the evidence. It would need to decide "the basic purpose to which the product in question is intended to serve" (*ROSE Electrotechnik GmbH & Co KG v Oberfinanzdirektion Köln* (Case C-280/97, [1999] ECR I-689 at [20]).

32. She referred to the status of the explanatory notes. The European Commission issues Explanatory Notes of its own to the CN; these are known as "CNENs". The two categories of explanatory notes, ie the HSENs and the CNENs, do not themselves have legally binding force, but are acknowledged by the ECJ as an important aid to the interpretation of the scope of the various tariff headings. The content of the Explanatory Notes must be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. As an example of the latter principle, she referred to *Intermodal Transports BV v Staatssecretaris van Financien*, [2005] ECR-I-8151 at [47] and [48]. The case of *Olicom A/S v Skatteministeriet* (Case C-1432/06) at [16] to [18] set out the applicable principles to be followed in arriving at a classification decision, but also indicated at [26]-[27] and [31] that the HSENs must be examined to determine whether they clarified the position, or were inconsistent with the provisions of the CN. Further examples of the ECJ disregarding the Explanatory Notes where their content altered the meaning of the CN by adding an unwarranted gloss or an unjustified exclusion included *Develop Dr Eisbein GmbH & Co v Hauptzollamt*

Stuttgart-West (Case C-35/93, [1994] ECR I-2655 at [18]-[23]), and *ROSE Electrotechnik* at [22]-[24].

33. She made specific submissions relating to the facts of Furukawa's case; we consider these below. She indicated that Furukawa did not now import the BAR in the same quantities, so that the matter under appeal was now largely a historic issue.

34. A procedural issue arose as a consequence of HMRC's changes of view as to the appropriate classification to be applied to the BAR. Furukawa's appeal was against the review decision. This had been based on HMRC's second choice of classification, 85369085. The position was governed by ss 14 to 16 of the Finance Act 1994 ("FA 1994"). It appeared that HMRC were not relying on the classification referred to in the review decision, but this was the decision against which Furukawa's appeal had been made. In their Statement of Case, HMRC relied on heading 8537, so that was the case on which Furukawa was relying in its skeleton argument. Mrs Sloane described HMRC's case as "procedurally something of a mess", and commented that this needed to be sorted out during the hearing.

35. Mrs Sloane made submissions, both in her opening argument and as part of her written reply submissions, as to the weight to be placed on the evidence of Furukawa's witnesses. We deal below with the arguments concerning this issue.

Arguments for HMRC

36. Mr Fell stated HMRC's primary case to be that the BAR fell within heading 85371099. This was based on the GIRs and on note (b) to heading 8536 in the relevant HSEN. If HMRC's primary case was not accepted, Mr Fell submitted that the applicable heading should be 8536908599.

37. He referred to the general principles, and summarised the GIRs. In support of the principle that products must be classified by reference to their objective characteristics and properties, as defined in the headings of the CN, he cited *Hauptzollamt Bielefeld v Offene Handelsgesellschaft in Firma H.C. König* [1974] ECR 607 at [18]. It was for the national court to determine the objective characteristics and properties of the product, having regard to the physical appearance, composition and presentation of the product, as indicated in *Wiener SI GmbH v Hauptzollamt Emmerich* (Case C-338-95, [1997] ECR I-6495 at [21]).

38. The use or intended use of a product could be determinative if it was ascertainable from the objective characteristics of the product itself and was not dependent on subjective intention; this was shown by *Ikegami* at [21], [23]. He also referred to *Olicom*, where the ECJ stated:

> "18. Finally, for the purposes of classification under the appropriate heading, it should be recalled that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties . . ."

39. Where explanatory notes were attached to the CN itself, such explanatory notes were an important factor in its interpretation; this was confirmed by *Firma Hako-Schuh Dietrich Bahner v Hauptzollamt Frankfurt am Main Ost* (Case 54/79, [1980] ECR 311 at [6].

40. Mr Fell referred to the HSENs and the CNENs. The ECJ had stated in *Develop Dr Eisbein* at [47]-[48] that HSENs could be used for persuasive, but non-legally binding, guidance. It had been held in *Intermodal* at [48] that the explanatory notes in the CNENs and HSENs were an important aid to construction of the scope of the headings of the CN, albeit that neither of those sources was legally binding. The content of HSEN and CNEN notes would be ignored if they were incompatible with the CN, as indicated in *BAS Trucks BV v Staatssecretaris van Financien* (Case C-400/05, [2007] ECR I-311 at [40] and *Bioforce GmbH v Oberfinanzdirektion München* [1997] ECR I-2581 at [11].

41. Mr Fell made various submissions in support of HMRC's primary case; as these relate to issues of fact, we consider these below. He also made various submissions in support of HMRC's alternative case. As raising that alternative case at the hearing stage involved issues which were the subject of strong disagreement between the parties, we consider such issues separately below.

42. With reference to the witness statements in support of Furukawa's case, he submitted that, in addition to merely factual evidence, these included assertions of opinion; these were properly matters for expert evidence, or submissions from Furukawa's Counsel at the hearing. Furukawa had not sought and had not been granted permission to rely on evidence from an expert witness. He further submitted that, to the extent that Furukawa's witnesses purported to offer expert opinion evidence on such matters, the Tribunal should give their evidence no, or only very limited, weight. He referred to *Liverpool Roman Catholic Archdiocesan Trustees Inc v Goldberg (No 3) (Practice Note)* [2001] 1 WLR 2337 at [13], and to *Cash & Carry v Inspector of Taxes* [1998] STC (SCD) 46 at p 50 a to d. In his submission, these sources showed it to be well established that, as a matter of public policy, no weight should be placed on what was in effect expert evidence from a witness who was not independent.

43. He referred to the nature of the process to be carried out by the Tribunal, in the light of what he described as the slightly unusual facts. The appeal was strictly against the review decision. That decision itself related to the decision to issue the form C18; strictly speaking, this was not a classification decision. Consequently, for this Tribunal to determine the appeal, it would need to consider the classification. He referred to the powers under s 16(5) FA 1994. If HMRC succeeded in relation to heading 8537, Mr Fell would invite the Tribunal to review the classification and substitute a decision that the decision to issue a C18 be varied. If the Tribunal decided that 85369099 was the appropriate heading, he would invite the Tribunal simply to dismiss the appeal, in that the C18 would stand, at the duty rate of 2.3 per cent.

44. Although he indicated that it was outside the boundaries of what the Tribunal had to decide, he commented that any unpaid duty would either be recoverable under

Article 242 of Council Regulation 2913/92/EEC, or as having been repaid under a mistake of law.

45. He presumed that, if the Tribunal were to accept Furukawa's case, it would quash the review and order repayment of the duty paid.

46. He referred to certain issues having been raised in Mrs Sloane's opening. He submitted that as it had been agreed between the parties that Ms Witham should not be called to give oral evidence, these issues being irrelevant to the issue to be decided, it would be inappropriate for the Tribunal to make detailed findings relating to the correspondence. There had been no opportunity to respond to the comments made on such issues, and he submitted that the Tribunal should ignore such points in the correspondence.

Discussion and conclusions

Preliminary matters

47. Although it did not arise first in point of time, we deal first with the subject of HMRC's alternative submission, which if accepted would have had the effect of reverting to HMRC's Original Classification Decision applying heading 8536908599.

48. As we have not seen HMRC's original Statement of Case, we are unable to check that document to establish whether this made any mention of HMRC's alternative submission. However, we deduce from the copy of Furukawa's attachment to its original Notice of Appeal dated 9 September 2009 that HMRC had dropped its initial classification contained in the Original Classification Decision. The arguments put by Furukawa as part of that Notice of Appeal related solely to the classification of the BAR to heading 8536699090.

49. Subsequently to the exchange of correspondence concerning Furukawa's arguments in support of its Notice of Appeal, HMRC abandoned that classification in favour of heading 85371099. Neither Ms Witham's letter dated 26 November 2009 nor Mr Palmer's letter dated 27 November 2009 made any mention of the classification contained in the Original Classification Decision.

50. We have found nothing in such part of the subsequent correspondence between Furukawa and HMRC as is included in the bundle to suggest that HMRC might have notified Furukawa of the possibility that the original classification might be revived. It appears that the issue was not raised until HMRC's skeleton argument (dated 7 November 2011) was served on Furukawa and on the Tribunal.

51. In opening Furukawa's case, Mrs Sloane simply referred to the three different classifications which HMRC had adopted. She made no reference to HMRC's alternative case as contained in the latter's skeleton argument. She stated that in their Statement of Case, HMRC relied on heading 8537, so that was the case on which Furukawa was relying in its skeleton argument.

52. When Mr Fell, in the course of his argument, reached the subject of HMRC's alternative case, he commented that the argument had only been formulated in the course of the appeal. He submitted that *Flir* assisted. In that case as indicated by Henderson J at [2], the appellant had raised an alternative contention which had not been included in its grounds of appeal; it had been raised for the first time in the skeleton argument of Counsel for the appellant. The Tribunal had allowed it to be advanced. Mr Fell referred us to paragraph 2 of the Tribunal's decision (*Flir Systems AB*, (2008) Customs Duties Decision C00253), where the Tribunal stated:

> "We should mention that the last heading was raised only in Miss Sloane's skeleton for the first time, to which Mr Beal objected, though not very strongly. We allowed her to raise it but the consequence was that we did not have the benefit of written expert evidence on it."

53. Mr Fell submitted that the classification was in the C18 Demand Note. In relation to the amendment of the Statement of Case, HMRC were happy to apply for this. However, he submitted that this should not be required, as it was in HMRC's skeleton argument.

54. Mrs Sloane indicated that Furukawa did object. In *Flir*, there was no real prejudice to HMRC. Here there was very serious prejudice; at the moment the C18 was in its amended form. Furukawa was assuming that its appeal was against duties of £177,000; this was the ground in the amended Notice of Appeal, and also the basis on which HMRC had responded. The duty based on heading 8537 was at the rate of 2.1 per cent. If Furukawa won the appeal, it would not have to bear the duty of £177,000; if it lost, it would do so. The effect of HMRC's alternative argument being admitted would be that it could lead to an order for the original C18 to be reinstated; HMRC would try to seek payment of the extra duty, at the rate of 2.3 per cent. This would mean that Furukawa would be in a "worse off" position by bringing the appeal; there would be an additional demand of approximately £30,000. This was a factor which Furukawa would have wished to take into account. HMRC's alternative argument had been "sprung on" Furukawa.

55. She acknowledged that the Tribunal could always of its own motion raise another heading. However, the risk was materially increased where HMRC could contend in the alternative for another heading. This was an unintended effect of bringing the appeal. There was therefore very serious prejudice to Furukawa.

56. HMRC had given no good reason why their alternative contention had not been included in their Statement of Case. She described this as a casual disregard for the procedural rules. There had been no correspondence on the subject. Furukawa therefore objected very strongly to the admission of that alternative submission; it would lead to very serious prejudice.

57. In response Mr Fell questioned how any alleged prejudice was caused. He submitted that the cause of any prejudice would be losing the argument. The question to which the Tribunal was to have ultimate regard was getting the decision right. If the Tribunal could gain the submissions of the parties, this would aid in that process.

58. We adjourned briefly to consider whether we should hear argument on HMRC's alternative case. Having done so, we announced to the parties our decision that we should not. We did not give detailed reasons at that stage, but commented that (as Mrs Sloane had indicated) this would not preclude us from deciding of our own accord after the hearing that the appropriate heading was 8536908599.

59. We agreed that we would set out in this decision our reasons for refusing to admit HMRC's alternative case. These reasons were:

(1) The basis on which Furukawa's witnesses had been examined and cross-examined did not involve any consideration or mention of HMRC's Original Classification Decision. In the same way, that classification was not considered in the course of Mr Clues' expert evidence. Thus nothing in the evidence had been directed at the consideration of that alternative case. In *Flir* at paragraph 2 (quoted above) the Tribunal referred to not having the benefit of written expert evidence on the alternative heading raised in Mrs Sloane's skeleton argument; we read the reference to written evidence as indicating that there was the opportunity to consider oral evidence on the subject, to that extent that this proved necessary. Here, we were given no such opportunity. In the absence of proper consideration in the course of the evidence, we did not consider it to be possible to address the question whether on the facts HMRC's alternative case might prove to be the preferred conclusion.

(2) As indicated above, Mrs Sloane accepted that the Tribunal might decide that heading 8536908599 was the appropriate one for the BAR. However, for any tribunal to arrive at a conclusion other than those specifically contended for by the parties, it would be necessary for that tribunal to be satisfied that there was a proper basis in fact for applying an alternative classification. Any decision without such a proper basis would be open to challenge on the grounds that no reasonable tribunal could have arrived at it on the actual evidence available to that tribunal.

(3) In *Flir* Mr Beal, counsel for HMRC, objected to the admission of the appellant's argument for classification of the product under an alternative heading. However (as appears from the paragraph quoted above) the Tribunal referred to him as having objected, "though not very strongly". Here the objections were very strong, based on the potential prejudice to Furukawa in bringing its appeal against a classification which was not that referred to in HMRC's Original Classification Decision.

(4) In procedural terms, it is essential that each party should have a proper opportunity to consider, in advance of the hearing, the full case being put by its opponent. Although there may be cases where the admission of alternative arguments raised at the stage of exchanging skeleton arguments could be accepted as appropriate, it will be for the Tribunal to consider whether it is in the interests of justice for a particular alternative argument to be raised in this way. This entails considering whether doing so may cause prejudice to the party on whom, to use Mrs Sloane's expression, the raising of the alternative argument is "sprung".

(5) Our conclusion was that serious prejudice would be caused to Furukawa if HMRC's alternative case were to be admitted. We accepted that, given the rather complicated history of the matter, Furukawa might have decided to accept classification under heading 8537109999, on the basis that (a) this gave a somewhat reduced rate of duty and (b) accepting the position adopted by HMRC would avoid the trouble and expense to Furukawa of pursuing an appeal against the classification decision. In our view, having regard in particular to this question and to the absence of relevant evidence to facilitate proper consideration of HMRC's alternative case, it was not in the interests of justice for that case to be admitted.

60. The other preliminary matter to be considered is the status of the evidence given by Mr Kurogi and Mr Naimi. Mr Fell argued that such evidence, to the extent that it consisted of assertions of opinion on matters to be covered by expert evidence, should be given no, or only very limited, weight.

61. Mrs Sloane referred to the Upper Tribunal decision of Arnold J in *Megantic Services Ltd v Revenue and Customs Commissioners* [2011] STC 1000 at [78]-[80], and to *ex parte Goldberg (No 3)* at [10]-[14]. The latter case was dealing with very different issues; it related to the admission of expert evidence. In the present case Furukawa was not claiming their evidence to be expert evidence; it was accepted that they were not independent.

62. She submitted that it was incorrect to say that no weight could be given to non-expert opinion evidence. She argued that both Mr Kurogi and Mr Naimi had appropriate technical expertise, with graduate/postgraduate qualifications in engineering and experience of designing specialist products in the relevant field. The BAR was a bespoke specialist product and Mr Naimi had been responsible for its design. Mrs Sloane accepted that they could not stand as experts, since they were employed by a sister company of Furukawa and so could not satisfy the criterion of independence. However, in the particular circumstances of this case, she invited the Tribunal to place considerable weight on their evidence, particularly that of Mr Naimi. They were peculiarly well able to give evidence relating to this product.

63. In assessing the weight to be given to such evidence, she submitted that employment was one factor. The Tribunal would take its own view as to their credibility and honesty.

64. In her post-hearing reply submissions, she commented that HMRC had not objected to any of Furukawa's evidence, including in particular the opinion evidence of Mr Kurogi and Mr Naimi. She submitted that it was entirely a matter for the Tribunal what weight to place on the evidence of the witnesses; she referred to *Megantic* at [80].

65. She submitted that as to the evidence on the components of the BAR and how it worked, there had been no dispute between the witnesses on the components and very little dispute on how it worked. HMRC had not raised any issue as to the probity or credibility of either Mr Kurogi or Mr Naimi and had made no objection to the Tribunal placing weight on their evidence of fact. In relation to the opinion evidence

of the witnesses on the principal function of the BAR, HMRC had contended that the opinion evidence of Mr Kurogi and Mr Naimi should be admitted but that no weight should be placed on it. Mrs Sloane submitted that this was an extreme position which was not supported by the case law relied on by HMRC. She characterised this position as illogical; she questioned what the point was of admitting the opinion evidence if no weight could ever be put on it.

66. In Furukawa's submission, the proper approach for the Tribunal was for it to take account of the witnesses' links to Furukawa as one of the many factors relevant to the Tribunal's assessment of the witnesses' evidence, including their probity, their credibility, their technical expertise and their knowledge of the product. She referred to *Cash & Carry* at p 50 a to e: the fact that the Revenue in that case relied on evidence from a Revenue employee who (unlike Mr Kurogi and Mr Naimi) claimed to be an independent expert did not lead the Special Commissioner to place no weight at all on that employee's evidence. The latter's link to the Revenue was simply borne in mind and his evidence evaluated objectively.

67. Mrs Sloane also commented on Mr Clues' opinion evidence. To the extent necessary, we consider this in the context of the main issues raised by this appeal.

68. Our conclusion in relation to the opinion evidence given by Mr Kurogi and Mr Naimi is that we should not go as far as to give it no weight (which for practical purposes would require us to ignore it). We accept that their employment by a company (or companies) associated with Furukawa could have had the effect, whether conscious or unconscious, of drawing them towards opinions which might be more favourable to Furukawa's case than those which wholly independent individuals with equal technical knowledge might hold. Against this, their familiarity with the BAR (particularly in Mr Naimi's case, as the individual who had been responsible for the design of this product) offers us a degree of specific technical knowledge which may be greater than that available from any independent person. We agree with Mrs Sloane that the proper approach for us to adopt is that taken by the Special Commissioner in *Cash & Carry*. In doing so, we necessarily apply considerable caution, and test their respective assertions of opinion even more rigorously than we do in evaluating opinion evidence from an independent expert. We would also emphasise that the process which we are carrying out requires us to arrive at our own decision as to the appropriate heading under which the BAR is properly to be classified, and that the opinion evidence of all the witnesses may prove to be of limited assistance to us in reaching our decision.

The parties' main submissions on classification

69. Furukawa's case is that the BAR is correctly to be classified under heading 85369010, covering "connections and contact elements for wire and cables". Mrs Sloane's broad submissions were that—

(1) The correct approach was to interpret the terms of the rival headings as would a businessman on the basis of ordinary parlance, rather than as a matter of technical precision;

(2) Where a piece of apparatus performed more than one function, the relevant notes in the CN (ie notes 3 and 4 to section XVI) required that classification be determined according to the "principal function". HMRC had applied heading 8537 without regard to the fact that it was subject, in a case where a product served more than one function, to those section notes. She argued that this was incorrect, for reasons considered below;

(3) In the present case the principal function of the BAR was to connect the two power sources and the wire harness of a vehicle. That function was critical to the use of the product and was reflected in its objective characteristics.

70. HMRC's case is that the BAR should be classified to heading 85371099. Mr Fell stated that the case for classification to heading 8537 consisted primarily of two propositions:

(1) Under GIR rule 1 (or, in the alternative, GIR rule 3(a)), the BAR fell within the terms of 8537 and therefore, pursuant to the GRIs, it fell to be classified to that heading;

(2) The classification to that heading was supported by note (b) to heading 8536 of the HSEN.

71. We are grateful for both Mrs Sloane's and Mr Fell's expositions of the legal framework, which we accept. Accordingly, we see no need in this section of our decision to re-state those principles.

The nature and description of the BAR

72. We were given an opportunity to examine two samples of the BAR. The first was in its complete form, as imported by Furukawa. The second was a "cutaway" version, so that we were able to look at the construction and, to the extent visible, the components of the BAR. In addition, diagrams (including "exploded" diagrams) were included in the bundle as an enclosure to a letter dated 26 February 2010 written by Mr Kurogi, and Mr Clues' statement contained various views of the BAR, including the lower view with cable connectors visible and the upper view with relays and power input terminals visible.

73. We would like to emphasise the importance in classification cases of allowing the Tribunal, and, at each of the earlier stages in such discussions, HMRC, to examine one or more samples of the items in question. Neither of Mr Palmer's letters sent to Furukawa in June 2009 specifically stated that he had examined any samples of the BAR; we consider it desirable for decision letters to state whether the HMRC officer concerned has examined one or more samples of the product in question. It appears that the TSO did not see a sample before arriving at its initial classification; we think it would have been better for it to have done so. From the evidence provided to us, it is clear from an email sent to Mr Grimwood by Paul Choi of HMRC on 27 July 2009 that at the review stage HMRC did have a sample of the BAR for examination.

74. We make the following findings relating to the BAR. It is constructed out of plastic. It is a sealed unit with no access to its interior. It has upper and lower

protective covers, which are kept in place for normal use of the vehicle in which it is installed. With the covers removed, the dimensions of the BAR are 165 mm by 165 mm by 110 mm high. It is imported by Furukawa, which supplies BARs to Honda for installation into road vehicles. When installed in a vehicle's engine bay, permanent connections from the vehicle's battery and alternator are made to the BAR by means of two screwed and clamped connections which are tightened to a required torque for safety reasons. The wires connecting the battery and alternator are not part of the BAR. The BAR is fixed to the body of the vehicle using two brackets; the brackets are not made by the Furukawa group, and Furukawa supplies the BARs to Honda without the bracket assembly.

75. The connection point from the battery and alternator is at the external end of the bus bar which extends from the BAR housing. The connection point is a screwed and clamped connection through which the tightened connector bolt passes.

76. The interior of the BAR contains a board, to which the following components are attached as at the time of importation: 24 fuses; 8 relays; a bus bar; and a current detector. In addition to these components which are present on the BAR when imported, there are a number of sockets into which further fuses can be plugged and a number of sockets into which further relays can be plugged.

77. On the bus bar circuit an "Electrical Load Detector" ("ELD") is installed in order to measure the current flowing to the bus bar; it is used to measure the amount of current used by each electrical device within the vehicle. Data indicating the measured current is transmitted to the Fuel Injection Electrical Control Unit ("ECU", which is not part of the BAR) and the ECU increases or decreases the amount of electrical power from the alternator as appropriate.

78. The bus bar circuit is connected to a high current fuse in order to protect the internal circuitry of the BAR and to protect the wires that connect the alternator to the BAR.

79. From the bus bar the current passes to the low current circuit, passing initially through fuses in order to protect the printed circuit boards ("PCBs"), of which there are two or three depending on the relevant vehicle model type. The ratings of these fuses are to protect the PCBs, the object being to enable a more compact size for the BAR. A further purpose of these fuses is to protect external circuits of the vehicle, once the external connectors (which are not part of the BAR) are connected to the bottom of the BAR. Typical examples of the circuits involved are headlights, wipers and heated mirrors.

80. A relay mounted to one of the PCBs provides a power control (on/off switch) function; it supplies or prevents the flow of current to the electrical devices within the vehicle. In addition, two further relays are attached to the BAR by the vehicle manufacturer; these are not part of the BAR as supplied by Furukawa. Further relays included within the BAR are magnet clutch relays and "Hi/Lo" relays; the latter are linked in the course of vehicle assembly to air conditioning and circuits of fans within

the engine bay. Power control of the relays is achieved by means of signals received from the operation of each circuit switch within the vehicle.

81. When installed, the BAR is connected via male connectors at the bottom of the BAR (containing 38 pins) to the female connectors on the wire harnesses which are part of the circuitry of the vehicle, thus supplying power via separate electrical currents to the various electrical devices within the vehicle. The female connectors and wire harnesses contained in the vehicle are not part of the BAR and are not manufactured by the Furukawa group.

82. Thus, to describe the way in which the BAR works, but without for the present addressing the question of its function (or functions), current travels from the battery, or once the vehicle's engine is started, the alternator, through the BAR to whichever circuits within the vehicle the driver may be using, or may be operated by the vehicle's control systems. As an example, if the air conditioning is turned on, the current will travel through the BAR to the relevant harness.

Submissions for Furukawa on the classification of the BAR

83. Mrs Sloane referred to GIR 1. The key terms of the alternative headings were nowhere defined in the CN or its notes. She submitted that the correct approach was to interpret those terms as would an intelligent businessman on the basis of natural and ordinary parlance, rather than as would an engineer on the basis of narrow scientific precision (Henderson J in *Flir* at [28], see above).

84. In her submission, HMRC were seeking to apply heading 8537 without having regard to the fact that (being part of Chapter 85) it was subject, where the product served more than one function, to the section notes 3 and 4 to section XVI of the CN, including in particular the principal function test. That heading covered products which had the principal function of controlling or distributing electricity; a product which did not have that principal function could fall elsewhere, even if it was equipped with two or more apparatus of heading 8535 or 8536. She referred to junction boxes; these were fitted with terminals but they remained within heading 8536 (*ROSE Electrotechnik*).

85. She submitted that the principal function of the BAR was the connection of the current from the two sources, battery and alternator, to the vehicle wiring harness. As established by the evidence from all the witnesses, the BAR did have other components (fuses and relays) serving other complementary functions such as power management, circuit protection and power distribution. However, these complementary functions were not enough to justify classification under heading 8537. The terms of that heading had to be read subject to note 3 to section XVI. The real issue was whether the principal function of the product was connection (heading 85369010) or electric control/distribution of electricity (in which case the product could fall within heading 8537).

86. The BAR's main function was to act as the primary connector between the power sources of a vehicle and the wire harnesses, which supplied power to various

electrical devices. Applying the analogous "essential character" test in *Sportex*, if the clamp connectors which carried out that function were removed, it would be deprived of its characteristic properties; indeed, it would be unable to function.

87. In contrast, if the other functionality of the BAR were removed (ie the components which served the function of electricity control, distribution and protection) and were located elsewhere, the BAR would retain its characteristic properties; this was borne out by Mr Naimi's evidence. It followed that the essential characteristic of the BAR was to connect the power sources and the vehicle's wire harness. If all other functionality were removed elsewhere, the BAR would still perform that crucial function and would retain its essential utility. In contrast, if the components of the BAR which connected the power sources and the harness were removed, the BAR would have no function. It followed that the BAR was classifiable under heading 85369010.

88. HMRC had criticised the use of the *Sportex* test. That test laid down by the ECJ consisted of a hypothetical exercise; if one of the components of the machine were to be removed, would the product retain its essential characteristics? This required the Tribunal to consider, hypothetically, what would happen to the utility of the BAR if it were redesigned without one or other of its components. Mrs Sloane emphasised that, as shown by the facts of *Sportex* itself, the test was not whether it would be possible to "wrench out" one or other component of the BAR as it was currently designed and, if so, what would happen.

89. HMRC had also submitted that the Tribunal should dismiss the evidence of Mr Kurogi and Mr Naimi on the effect of making the BAR without certain components; that submission had been made on the basis that it would lead the Tribunal to consider a product which was "not the BAR", ie a redesigned product. However, that was the very test which *Sportex* showed was the appropriate one to carry out.

90. Even if the BAR were also prima facie classifiable under heading 8537, the same outcome would result, by virtue of the application of GIR 3; since headings 8536 and 8537 would each refer to part only of the BAR, GIR 3(b) would apply and the BAR could be classifiable as if it consisted of the component which gave it its essential character. The components which gave the BAR its essential character were the clamp connectors, thus determining the correct classification as heading 85369010. The evidence of all the witnesses supported this conclusion.

91. HMRC's case on heading 8537 failed to address the fact that the BAR also fell under heading 8536, thus requiring the rule in note 3 to section XIV to be applied. HMRC had suggested that heading 8536 was designed to cover "components of a more limited functionality" while heading 8537 covered "apparatus of greater complexity", and that heading 8536 covered "components" while heading 8537 covered "assemblies". Mrs Sloane submitted that this approach introduced a rule or criterion which was nowhere to be found in terms of the headings. This was an unwarranted and impermissible gloss on the headings. Mr Clues had described the BAR as "a simple piece of kit", which "functions like a piece of wire". The

suggestion that heading 8536 was limited to "components" and excluded "assemblies" was disproved by the example of a junction box.

92. HMRC also relied on the HSEN to heading 8536, which stated that the heading excluded "Assemblies) other than simple switch assemblies) of the apparatus mentioned above". That exclusion was not to be found anywhere in the terms of headings 8536 and 8537. Mrs Sloane submitted that it impermissibly extended the scope of heading 8537 and restricted the scope of heading 8536. The HSEN should therefore be disregarded (*Develop Dr Eisbein* at [18]-[23], *ROSE Electrotechnik* at [22]-[24], concerning the same HSEN, and *Olicom* at [27]-[31]. If an "assembly" was a "combination of components which work together", as HMRC had suggested, the exclusion in the HSEN was wrong, as it would apply to junction boxes consisting of connectors and fuses which worked together; these were established to fall within heading 8536, irrespective of whether they could be described as an assembly.

93. HMRC's primary case that the BAR fell within heading 8537 and was somehow excluded from heading 8536 was unsupported and wrong.

94. Mrs Sloane also made submissions, for completeness, on HMRC's alternative case. We are grateful for these submissions, but in the light of our decision not to consider that alternative case, we do not think that we should comment on them.

Submissions for HMRC on the classification of the BAR

95. Mr Fell submitted that, judged by its objective characteristics, specifically its components and its function, the BAR fell within the terms of heading 8537 and not heading 8536.

96. As to components, the BAR was a board which (at the time of importation) was equipped with various items of electrical apparatus. These included a number of items which fell under heading 8536, including 24 fuses and 8 relays. In addition there were further sockets into which further fuses and further relays could be plugged. The BAR also included a current detector, which was an instrument or apparatus of Chapter 90.

97. As to function, the BAR was for the distribution of electricity and for electrical control. Electrical current passed into the BAR from the alternator and the battery via the two input connections. The electrical current was then distributed through the BAR. Electrical control was achieved through the relays in the BAR.

98. It followed that, rather than simply being an electrical apparatus for the protecting of electrical circuits or making connections to or in electrical circuits (heading 8536), the BAR was a board equipped with two or more apparatus of heading 8535 or 8536 for the distribution of electricity and for electrical control (heading 8537). Accordingly the BAR fell within the latter heading.

99. He further submitted that, when construing the CN, the terms of the relevant headings should be considered together and as a whole. When this was done, it was clear that heading 8536 was intended to apply to components of a more limited make-

up and functionality than the BAR. This was supported by the list of components in heading 8536, and by the limited nature of the wording under which Furukawa sought to have the BAR classified: "connections and contact elements for wire and cables". Further, heading 8537 was clearly intended to apply where components of heading 8536 were combined to constitute an item of greater complexity of make up and greater functionality than heading 8536 would encompass on its own. This was underscored by the summary of heading 8537 in the HSENs. That heading was for assemblies of components; the BAR was the latter, and under GIR 1, fell within heading 8537.

100. If GIR 1 did not facilitate classification, the BAR fell to be classified under heading 8537 by virtue of GIR 3(a); this provided that where goods were classifiable under two or more headings, then the heading which provided the most specific description was to be preferred. Mr Kurogi had stated that control and distribution of electricity were functions performed by the BAR (he had classified them as secondary functions). Mr Fell further submitted that heading 8537 provided a more specific description of the BAR than heading 8536.

101. The classification under heading 8537 was also supported by note (b) of the HSENs, which stated that heading 8536 did not include assemblies of the apparatus mentioned in that heading other than simple switch assemblies, and that assemblies of the apparatus mentioned in 8536 would fall within heading 8537. Mr Fell argued that when the BAR was judged by its objective characteristics, note b of the HSENs supported the classification of the BAR to heading 8537 and not 8536. The BAR was an assembly of apparatus mentioned in heading 8536, as a number of items of apparatus mentioned in heading 8536 were assembled on a board. The BAR was plainly not a simple switch assembly.

102. Comparisons with junction boxes were not appropriate, both because the BAR was a bespoke product, and as resorting to GIR 4 would not be following the correct hierarchical order while the question was being considered on the basis of GIR 1.

Our conclusions on the function of the BAR

103. The rival contentions of the parties raise the issue of the function (or functions) of the BAR. The functions listed at the four digit level in the respective CN headings contended for by the parties are as set out at paragraph 4 above. Is the function of the BAR "for switching or protecting electrical circuits, or for making connections to or in electrical circuits" (heading 8536) or does the BAR fall within "boards . . . and other bases, equipped with two or more apparatus . . . , for electric control or the distribution of electricity" (heading 8537)?

104. In their evidence, both Mr Kurogi and Mr Naimi expressed the view that the primary function of the BAR was to connect the current from the two power sources, the battery and the alternator, to the vehicle wiring harness; without the connections to those power sources, all other electrical equipment of the vehicle would not function. They considered the secondary functions to be power management, power supply and protection of circuits, power control (on/off), and final power distribution and

connection. Mr Naimi also stated that the functional features other than the connection to power sources were not related to the function of the BAR itself. The basis for this view was that the fuses, relays and ELD were secondary parts which could be separated from the BAR and could be located elsewhere within the vehicle circuitry without affecting their function.

105. Mr Clues (a chartered electrical engineer and a member of the Institute of Electrical Engineers) described the BAR as essentially the power distribution module for a road vehicle taking power from the battery/alternator and distributing this via fuses to various circuits requiring electrical power within the vehicle; there were also relays which were used to control the various items of electrical equipment within the vehicle. He referred to the BAR as being similar in concept to a fuse board used in domestic and industrial installations. He stated that the term "board" was commonly used in electrical installations to describe an item of equipment (for example, a fuse board, a relay board or a meter board) where one or more items such as fuses were mounted together.

106. He commented that the nature of electricity was that a product such as the BAR provided, primarily, a means for distribution of electricity. He described this function as similar to that of a domestic consumer unit in the home. Electricity was fed from the main fuse into the consumer unit. In such a system the BAR (and the consumer unit) did not in any sense control the power to be drawn. The total current passing through the input terminals of the BAR was the sum of the currents drawn by the individual circuits.

107. He referred to Mr Kurogi's letter dated 26 February 2010, on which the subsequent (and more detailed) witness statements of Mr Kurogi and Mr Naimi appear to us to have been based, and made various comments. He considered the prime function of the BAR to be that of protected power distribution within a vehicle. In relation to the subsidiary functions described in that letter, he did not consider it entirely accurate to refer to "power acquisition management"; there was no "management" of power in any sense. Since the battery and the alternator were connected in parallel, there was effectively no control over the power source.

108. He also considered the heading "power control" to be a little misleading. The real function was to control various items of equipment within the vehicle. The objective was not to control the load but to control the equipment, which, in turn, performed the various functions.

109. In response to various points made in Furukawa's revised Notice of Appeal, he made a number of comments. His main point was that the principal function of the BAR was distribution of power and protection of circuits by means of fuses. It was implicit that there had to be a means of connecting to a power source and to the load circuits. He considered that these implicit functions could not be more important than the principal function of distribution of power and protection of circuits. He agreed that if the BAR was removed, the vehicle would be rendered unworkable. It was almost the same thing when Furukawa said that the BAR was the key connection between the sources of power and all the electrical circuits in the vehicle. However,

that was not at all the same thing as saying that the BAR was a connector. In reality the BAR provided the functions of distribution, protection and switching of electricity.

110. In the light of the comments of Henderson J in *Flir* as set out above, we attempt our own description of the function or functions of the BAR. The BAR provides a means of allowing current to flow from one or other of the power sources (the battery or the alternator) to the various circuits within the vehicle. This appears to us to amount to "distribution", as current flows to the relevant circuit or circuits as required. The BAR also provides a means of control; as we understand to have been implied by the evidence of all three witnesses, it would not be safe to have direct connections between the battery and alternator and the vehicle circuits. (One of us has direct practical experience of the risks involved, having inadvertently allowed a connection from a positive terminal of a battery on an older vehicle to touch that vehicle's bodywork, producing powerful sparks.) Some form of regulation and control of the current flow is required.

111. Mr Naimi indicated that, for example, a fuse or a relay could be placed outside the BAR and could still function (although some form of redesign process would be required). We deduce from the need to place the fuses and relays somewhere in the overall circuitry within the vehicle that they are an essential part of that overall circuitry. The product which we are examining, ie the BAR in its existing form, contains fuses and relays at the time of importation, whether or not additional fuses and/or relays are subsequently installed by the vehicle manufacturer.

112. Our description of the way in which the BAR functions is based on the factual elements of the evidence of all three witnesses. We have approached the question of opinion evidence with caution, because of the status of both Mr Kurogi and Mr Naimi as employees of one or more companies associated with Furukawa. We have also applied the appropriate degree of caution in evaluating the opinion evidence of Mr Clues. In her reply submissions, Mrs Sloane emphasised that none of the witnesses was asked to conduct, was able to conduct, or purported to conduct, a determination of the "principal function" of the BAR as a legal test, based on the principles set out in the jurisprudence of the ECJ. She submitted that the Tribunal should make its own determination as to the principal function of the BAR, applying the guidance from the case law of the ECJ, and taking into account the witnesses' factual evidence on the components of the BAR. We accept this submission as to the approach which we should adopt.

113. GIR 1 states:

> "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 headings and any relevant section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions."

114. The effect of GIR 1 is that if the classification can be determined by reference to the criteria which it specifies, there is no need to refer to any of the other GIRs. As

Mrs Sloane submitted, we are required by GIR 1 to take account of the section notes to section XVI, under which Chapter 85 falls. Notes 3 and 4 [cited above] raise the question of the tests to be applied where a "machine" (which, by virtue of note 5, means "any machine, machinery, plant, equipment, apparatus or appliance cited in the headings of Chapter 84 or 85") is "designed for the purpose of performing two or more complementary or alternative functions", or "consists of individual components . . . intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or 85". Note 3 applies the "principal function" test. We are therefore required to consider which of the functions of the BAR performs the principal function.

115. Mr Fell submitted that the test of looking at the functions of a product and applying the hypothesis of removing one or more functions to establish the principal function amounted to considering a product which was not the one undergoing the classification process. While we have some caution in approaching what Mrs Sloane in effect described as the *Sportex* test, we do find it of help in analysing the functions of the BAR.

116. If all the functional elements of the BAR other than that of connection were to be removed from the BAR, being placed elsewhere in the vehicle, the BAR would become something akin to a junction box. The control of current and its distribution among the circuits within the vehicle would have to be achieved by relays, fuses and a current detector installed in each case somewhere in circuits beyond the BAR.

117. Although we accept that connection to the power sources (the battery and the alternator) is essential to enable the BAR to function at all, we do not consider that connection itself amounts to the principal function. Applying the "*Sportex* test", so much would have to be achieved by removing all the other functional elements from the BAR and placing them elsewhere that the BAR in its altered form would be virtually unrecognisable as compared with the product which we are considering. We view the function of connection as incidental to the overall functions of the BAR, and not as a principal function. We consider that the BAR is a composite unit designed to combine the functions of safely supplying and controlling power to the vehicle, and providing a means of distributing the power to the various circuits within the vehicle as demanded by the switches and other control mechanisms within the vehicle.

118. Thus we do not accept Furukawa's submission that the principal function of the BAR is "for making connections to or in electrical circuits". Nor do we accept the submission that the essential character of the BAR is given its essential character by specific particular components, namely the clamp connectors. For the reasons just given, we see these as part of the incidental function of connection.

119. In contrast, we view the functions of controlling and distributing electricity as the principal functions of the BAR. We therefore find that the appropriate heading under which the BAR falls to be classified is heading 8537, as submitted by Mr Fell for HMRC, the full detailed heading being 85371099.

120. Although the latter finding determines the outcome of the appeal, we consider the other issues raised, in case for any reason that finding proves to be incorrect.

121. Although we decided not to admit HMRC's alternative submission on classification of the BAR, which was that it should be placed under heading 85369085, we find it necessary to comment on Ms Witham's review letter. The decision under review was the Original Classification Decision, namely the decision to classify the BAR under 85369085. Ms Witham's letter referred to the next one dash sub-heading beyond 85369010. However, she described it as being 85366990. This appears to us to be an error, as this is the third two dash sub-heading beyond the heading "Lamp-holders plugs and sockets", falling under "- Other". We can only assume that Ms Witham looked at the wrong part of 8536, and was then led into considering the German BTI classifying a product under 85366990. The relevant part of heading 8536 for her to be considering was that beginning with "Other Apparatus:" as this was the series of sub-headings under which Furukawa's claimed classification fell. According to the Original Classification Decision, the appropriate heading was the second one dash sub-heading after that claimed by Furukawa, namely "- Other . . . 85369085.

122. Despite stating the correct heading to be 85366990, Ms Witham upheld the Original Classification Decision, which placed the BAR within heading 85369085. If the classification had not subsequently been changed by HMRC to 85371099 in the light of Furukawa's original grounds of appeal and the additional information which it then provided, we would have had to consider whether Ms Witham's apparent errors on review called the validity of her review into question. However, given the subsequent events, we do not consider it necessary to undertake that process.

123. Mrs Sloane criticised Mr Fell's submission that there was a contrast between the nature of the items covered by heading 8536 and those covered by heading 8537. She submitted that this was introducing an unwarranted gloss on those headings. Mr Fell had characterised those within 8536 as being at the "component level", and those within 8537 as being "assemblies".

124. Looking at heading 8536 (set out at paragraph 4 above), we find that the language used indicates to us that the items falling within it do so at what Mr Clues described as "the component level"; in other words, it provides a list of individual items. The types of apparatus covered by heading 8536 include various items included with the BAR as supplied to Honda. As we have found, although (following installation in a vehicle) the BAR stands as part of the electrical circuitry of that vehicle and is connected both to the battery and alternator and to the wire harnesses which in turn supply current to the various electrical devices within the vehicle, we do not consider it correct to describe it as "apparatus . . . for making connections to or in electrical circuits". Although the BAR includes items which individually can be seen to fall within heading 8536, we do not consider that sufficient to bring the BAR as a unit within that heading.

125. Heading 8537 (see paragraph 4 above) refers to "boards . . . for electric control or the distribution of electricity . . ." The word "board" as used in the context of

electrical equipment is not defined in the Oxford English Dictionary. We accept Mr Clues' evidence as to the use of the word in the context of electrical installations; this accords with our own (very limited) practical experience of the use of the term in that context. The heading also refers to "other bases", which we consider would apply to the BAR even if it was not considered to be a "board". In cross-examination Mr Fell asked Mr Kurogi whether he would describe the board within the BAR as a base. Mr Kurogi responded: "In our car design we refer to this as a basic board." He accepted that the BAR could possibly be described as a case assembly, but did not consider it to be a simple switch, nor a switch assembly. We find that the BAR falls within the description of a "board", or failing that, a "base", within heading 8537.

126. There are other elements of heading 8537 which we need to take into account. The first is the words "equipped with two or more apparatus of heading 85.35 or 85.36". As already indicated above, the latter refers to switches, relays, fuses and various other items performing one of the functions specified. As confirmed by Mr Grimwood's fax to Ms Witham dated 19 October 2009 (see paragraph 22 above), the BAR as imported contains certain fuses and core relays; further fuses and/or relays may be added by Honda to the BAR to meet the requirements for the particular type of vehicle in which it is being installed. The second is the words "including those incorporating instruments or apparatus of Chapter 90". The BAR contains the ELD, which we find to be a device falling within Chapter 90 and thus reflected in that further part of heading 8537.

127. On the basis of the respective headings, the factual evidence, and GRI 1, we find that the appropriate heading under which the BAR falls to be classified is 8537.

128. Although we do not depend on it in arriving at our conclusion, we find that our view is supported by the final part of the wording of the HSEN to heading 8536:

> "The heading also excludes:
>
> (a) . . .
>
> (b) Assemblies (other than simple switch assemblies) of the apparatus mentioned above (**heading 85.37**)."

129. We do not consider this HSEN to be inconsistent in this respect with the headings of the CN, and accordingly we do not consider that there is any reason to disregard it.

130. We do not find it of assistance to refer to any of the BTIs contained in the bundle, as none of these relates to the classification heading which we have found to be appropriate for the BAR.

131. As Mr Fell submitted, it is necessary for us in the light of our findings to review the classification applied by Ms Witham's review decision and substitute a decision that the decision to issue a C18 be varied. We therefore substitute for that review decision our own decision that the BAR falls to be classified under heading 85371099, and that the decision to issue a C18 Demand Note be varied by amending

the classification to 85371099 and making appropriate amendments to take account of the duty rate of 2.1 per cent.

132. We order accordingly, and dismiss Furukawa's appeal.

Right to apply for permission to appeal

133. 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.

JOHN CLARK
TRIBUNAL JUDGE
RELEASE DATE: 15 February 2012