Neutral Citation: [2024] UKFTT 00590 (TC)

Case Number: TC09229

FIRST-TIER TRIBUNAL
TAX CHAMBER

sitting at Taylor House, London EC1

Appeal references: TC/2020/00773, TC/2020/01740, TC/2021/01578

CUSTOMS DUTIES – Combined Nomenclature heading 8713 – carriages for disabled persons – appellants imported mobility scooters – Invamed *judgements in CJEU and Court of Appeal considered – were the imported mobility scooters solely for persons with a non-marginal limit on their ability to walk – Held: yes – was classification regulation 718/2009 (which did not affect the* Invamed *litigation) applicable by analogy? – Held: the imported mobility scooters were not sufficiently similar to the regulation vehicles – and the* Stryker *line of cases indicated that it was not necessary to apply the regulation – thus the classification regulation was not to be applied by analogy – appeal allowed*

Heard on: 8-12 April 2024
Judgment date: 3 July 2024

Before

TRIBUNAL JUDGE ZACHARY CITRON
MS GILL HUNTER

Between

(1) ELECTRIC MOBILITY EURO LIMITED
(2) SUNRISE MEDICAL LIMITED

Appellants

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Timothy Lyons KC and Philippe Freund of counsel, instructed by Fieldfisher

For the Respondents: Simon Pritchard of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

1. This appeal was about the correct customs classification of 'mobility scooters' (and parts thereof) that had been imported by the appellants. The competing customs classifications were (1) "*vehicles principally designed for the transport of persons*" (heading 8703 of the combined nomenclature ("**CN**")) or (2) "*carriages for disabled persons*" (heading 8713). The latter was free of duty; the former attracted a duty of 10%.

DETAILS OF THE IMPORTATIONS AND APPEALS

2. The importations by the first appellant were made between 12 December 2016 and 2 October 2018. A "C18" (post clearance demand note) sent with a letter dated 9 January 2020 demanded £979,063.63: £815,901.84 customs duty and £163,161.79 import VAT. A second C18, sent with a letter dated 13 April 2020, demanded £12,562.05: customs duty of £10,782.86 and import VAT of £1,779.19. HMRC's statement of case accepted that the relevant C18 should be reduced by £125.10 of customs duty and £25.02 VAT.

3. The second appellant's appeal related to:

   (1) a C18 sent with a letter dated 18 December 2019 demanding £364,457.09: customs duty of £303,821.15 and import VAT of £60,635.94; and

   (2) a C18 dated 22 February 2020 demanding £9,639.80: customs duty of £8,159.71 and import VAT of £1,480.09 (HMRC's statement of case accepted that this should be reduced by £721.07 of customs duty and £144.20 VAT).

The above related to importations between 29 November 2016 and 3 October 2018.

4. The second appellant also appealed against HMRC's refusal, in a letter dated 20 April 2021, of its refund application in respect of importations of certain mobility scooters. The amounts claimed were £178,344.44 customs duty and £35,668.89 import VAT. These importations took place between 12 February 2018 and 28 September 2020: the second appellant had declared the scooters under headings 8703 and 8708 but then said that it was wrong to do so and so sought repayment of the duty paid.

EVIDENCE BEFORE THE TRIBUNAL

5. We had a main trial bundle of 4,378 pages, consisting of pleadings, witness statements, correspondence leading up to the decisions under appeal, Tribunal decisions and directions, applications, further documentary evidence (model brochures, technical specifications, and shipping documentation), and EU Commission documents. Correspondence between the parties was in a separate 215 page hearing bundle.

6. There were four witnesses: Jonathan Hearth (managing director of the first appellant) and Adam Williams (a director of product management at the second appellant), who gave evidence about (inter alia) the appellants and their businesses, about the models of imported mobility scooters, and about the question of whether the imported mobility scooters were "for" disabled people, all from their perspectives; and HMRC officers Samantha Rzepala-

Lewis and Ben Key, who gave evidence about the 'compliance history' i.e. interactions between the appellants and HMRC, leading to the making of these appeals.

THE LAW

7. We set out in this section the underlying law whose application was, broadly speaking, uncontroversial (in the Discussion section below, we address in greater detail certain aspects of the law whose application was somewhat in dispute).

The effect of Brexit

8. Most of the importations in question took place prior to 31 January 2020 i.e. while the UK was an EU member state. Some took place later in 2020, during the "implementation period" when EU law continued to apply to the UK.

9. The following propositions, based on the European Union (Withdrawal) Act 2018, were not in dispute in the appeal:

(1) the principle of the supremacy of EU law applies in relation to the interpretation of the customs classification law in this appeal

(2) CJEU general principles and case-law established prior to 31 December 2020 bind the Tribunal in this appeal

(3) the Tribunal cannot make a reference to the CJEU under the preliminary ruling procedure.

Classification to CN headings and subheadings

10. Goods imported from outside the EU are classified, for customs duty purposes, under the CN set out in Annex 1 to EC Council Regulation 2658/87. The CN uses an eight-digit numerical code to classify products. The first four digits are referred to as headings; eight-digit level numbers are referred to as subheadings. The CN is amended annually and reproduced in the UK tariff.

11. It was agreed that the imported mobility scooters fall within the following parts of the CN:

(1) Section XVII "Vehicles, aircraft, vessels and associated transport equipment" and

(2) Chapter 87 "Vehicles other than railway or tramway rolling stock, and parts and accessories thereof".

12. The relevant CN headings and subheadings in this appeal are:

8713	Carriages for disabled persons, whether or not motorised or otherwise mechanically propelled:
8713 90 00	- Other
8714	Parts and accessories of vehicles of heading 8711 to 8713.

8703	Motor cars and other motor vehicles principally designed for the transport of persons (other than those of heading 8702), including station wagons and racing cars:
8703 10	- Vehicles specially designed for travelling on snow; golf cars and similar vehicles
8703 10 18	- Other

Objectivity in customs classification

13. As was stated by the CJEU in Case C-198/15 ("***Invamed CJEU***") at [18] and at [22]:

> 18. … it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the section or chapter notes …
>
> …
>
> 22. 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 …

14. The following was said by the Court of Appeal in *HMRC v Honeywell Analytics* [2020] EWCA Civ 243 at [127] and [130]

> "127. … it is clear from relevant EU case-law that the marketing literature and manuals issued by a producer of an item are themselves part of the objective materials to which it is legitimate and appropriate to have regard when considering the application of the tariff headings."
>
> …
>
> " … given the importance for tariff classification under various headings of the use to which an item is intended to be put, it seems to me that it would be most odd and contrary to principle to leave out of account the way in which consumers are encouraged to use the item in question by materials placed into the public domain and objectively verifiable for the purposes of tariff classification".

Earlier mobility scooter litigation: *Invamed*

15. Mobility scooters were the subject of earlier litigation which culminated in the decision of the Court of Appeal in *Invamed v HMRC* [2020] EWCA Civ 243 ("***Invamed CA***"). The *Invamed* litigation concerned mobility scooters imported between 2004 and 2007 (i.e. before the issuance of an EU Commission 'classification regulation' in 2009 – more on that below) . The Court of Appeal, overturning the decision of the Upper Tribunal in [2018] UKUT 305 (TCC), reinstated the Tribunal's decision ([2016] UKFTT 775 (TC)), which, following a reference to the CJEU (*Invamed CJEU*)), classified the mobility scooters in question to heading 8713.

16. (Both appellants were also parties in the *Invamed* litigation; and eight of the models of mobility scooter at issue in this appeal bore the same names as models at issue in the *Invamed* litigation (four of the first appellant's 'Rascal' models; and four of the second appellant's models: Pearl, Little Gem, Little Star and Sapphire 2).)

17. *Invamed CJEU* decided that:

(1) the words "for disabled persons" in heading 8713 mean that the product "is designed solely for disabled persons", and

(2) the fact that a vehicle may be used by non-disabled persons is irrelevant to the classification under heading 8713: [27];

(3) "disabled persons" under heading 8713 means persons affected by "a non-marginal limit on their ability to walk"; the duration of that limitation and the existence of other limitations to their capacities are irrelevant: [34]. *Invamed CA* accordingly found (at [62]):

> "It must follow that if the objective characteristics of the vehicles demonstrate their intended use as being by persons with non-marginal walking difficulties alone then they are properly classifiable under heading 8713."

18. *Invamed CA* concluded as follows:

> 72. The national court must therefore focus on the relevant design characteristics or features of the vehicle and decide whether they establish that the intended use was restricted to disabled persons in the sense described in [*Invamed CJEU*]. The more that the design features of the vehicle cater for the disabled rather than those who can (but do not wish to) walk the more obvious it will be that the vehicle was designed specifically for such persons. The golf cart is a good example of a vehicle which would not pass the test. But where the line is to be drawn in any given case is a matter for the FtT based on the evidence and using its own expertise…
>
> 73. The Upper Tribunal considered that the FtT had erred in law by asking whether the design of the scooters did not benefit the able-bodied and by failing to take into account that their core structure provided the able-bodied with "the same facility for mechanised travel". But in my view neither of those points amounts to an error of law. The weighing of the benefits and disadvantages of the vehicles to disabled and non-disabled persons is simply a means of assessing who they were designed and intended to be used by. I am not clear what the Upper Tribunal means when it refers to their core structure. But if the point is that they have four wheels, a seat and a platform on which to place one's feet then, of course, it is right that they share design features with, say, a golf buggy. But, unlike most golf buggies, they are designed for only one person; they are small and slow; and are designed to be used along pavements and in shops where access is limited and a tight-turning vehicle is important. They are not as specialised as electric

> wheelchairs which are designed to cater for persons with a range of disabilities. But in the light of [*Invamed CJEU*] they do not have to be.
>
> 74. The factors to which the FtT had regard were all in my view relevant to its overall assessment of the design purpose of the vehicles. These are matters of judgment and impression such as feature in any multi-factorial assessment of this kind. The courts have repeatedly emphasised the need for an appellate tribunal to recognise the expertise of specialised tribunals. And in this case it was for the FtT to bring its own judgment and expertise to bear on the issue of classification. I can see nothing in that assessment which amounts to a failure to apply the guidance given by the CJEU in *Invamed* or to some other form of misdirection. The weight to be given to those factors was a matter for them. The Upper Tribunal (at [74] and [75]) has criticised the FtT's assessment of the evidence on the basis that the disadvantages which they identified to non-disabled persons in the use of the scooters were not sufficient to justify a finding that they were designed solely for the disabled. But I disagree. They were all factors which the FtT could properly have regard to in assessing intended use. The decision in [*Invamed CJEU*] makes it clear that use by the non-disabled is a factual possibility but was irrelevant unless the vehicle was designed for such use. The fact that the Upper Tribunal may have disagreed with the weight to be given to various factors by the FtT does not make their assessment wrong in law.

Explanatory notes

19. The interpretation of tariff headings is assisted by explanatory notes produced by the World Customs Organization (known as HSENs) and by the EU Commission (known as CNENs). As was said in *Invamed CJEU* at [19-20], these notes are "are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force"; their content "must therefore be in accordance with the provisions of the CN and may not alter their meaning".

20. The HSENs to heading 8703 contain the following text:

> "The heading also covers lightweight three-wheeled vehicles of simpler construction such as: . . .
>
> - those mounted on a T-shaped chassis, whose two rear wheels are independently driven by separate battery-powered electric motors. These vehicles are normally operated by means of a single central control stick with which the driver can start, accelerate, brake, stop and reverse the vehicle, as well as steer it to the right or to the left by applying a differential torque to the drive wheels or by turning the front wheel."

21. From 4 January 2005, the CNENs in respect of heading 8713 contained the following text:

> …

However, motor-driver ) fitted with a separate, adjustable steering col s subheading. They can have the following app eading 8703:"

Classification regulations

22. Commission Regulation (EC) No 718/2009 of 4 August 2009 (the "**2009 Regulation**") entered into force on 28 August 2009. The annex to the 2009 Regulation describes a four-wheeled mobility scooter and a three-wheeled mobility scooter. The text of the 2009 Regulation is appended to this decision.

23. An oft-cited summary of the law relating to classification regulations was provided by Lawrence Collins J in *VTech Electronics (UK) Plc v HMRC* [2003] EWHC 59 (Ch):

> **[18]** Article 9 of Council reg 2658/87 makes provision for the adoption of regulations concerning, inter alia, the classification of goods in the CN. Such regulations are proposed by the European Commission but must be submitted to the Customs Code Committee, a committee composed of representatives of the Member States and chaired by representatives of the Commission (Council reg 2658/87, art 7).
>
> **[19]** The Customs Code Committee is a body constituted specifically for the purposes of classification, and its composition varies depending on the nature of the product at issue. Where the Committee approves the Commission's proposals, they may be adopted by the Commission; where it does not, they must be communicated to the Council which may take a different decision (Article 10).
>
> **[20]** The consequence is that the Council has conferred upon the Commission, acting in co-operation with the customs experts of the Member States, a broad discretion to define the subject matter of tariff headings falling to be considered for the classification of particular goods. But the power of the Commission to adopt the measures does not authorise it to alter the subject matter of the tariff headings which have been defined on the basis of the harmonised system established by the International Convention whose scope the Community had undertaken not to modify: Case C-309/98 *Holz Geneen v Oberfinananzdirektion Munchen* [2000] ECR I-1975, para 13.
>
> **[21]** Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, art 249 (formerly art 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.
>
> **[22]** It is common ground between the parties that where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from the European Court that the Regulation is invalid. In Case C-119/99 *Hewlett Packard BV v Directeur Generale des Douanes* [2001] ECR I-3981, Advocate General Mischo said (in reasoning which was followed and approved by the Court)

that classification regulations are adopted "when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute."(para 18). He went on:

> "20. It should be borne in mind that a classification regulation is adopted . . . on the advice of the Customs Code Committee when the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute.
>
> 21. It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or to a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.
>
> 22. The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product."

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

24. *Invamed CA* referred to the 2009 Regulation at [22]:

> "It is common ground that the [2009 Regulation] came too late to apply to the imported goods which feature on this appeal. Had it applied then it would have been binding and definitive for present purposes subject only to a possible challenge to its validity in the CJEU…"

25. We note that in *Hewlett Packard BV* itself (the case cited by Lawrence Collins J), it was held that "in the interpretation of a classification regulation, in order to determine its scope, account must be taken inter alia of the reasons given" ([20]).

26. Another CJEU case, *Anagram International Inc* (Case C-14/05) cast light on the process of applying a regulation by analogy. In that case – about toy balloons – the classification regulation described the balloons as comprising plastic foil on the exterior of which an aluminium layer is bonded. The product in question in the case was the other way round. The court said at [33]:

> The only difference between the product at issue and the product referred to by the description contained in point 3 of the table set out in the Annex to Regulation No 442/2000 consists in a mere inversion of the materials from which the product is made and, as the Commission also notes, its principal characteristics are not affected. It follows that that regulation is applicable to Anagram's product by analogy.

27. It was also reiterated in *Anagram* that the application by analogy of a classification regulation to similar products "facilitates a coherent interpretation of the CN and the equal treatment of traders" ([32]).

FINDINGS OF FACT

28. We make findings here about the objective characteristics, or design features, of the imported mobility scooters, so far as relevant to the primary legal issue in this appeal –

whether those mobility scooters were "for" "disabled" persons, as those concepts are interpreted in the binding legal authorities (principally, *Invamed CJEU* and *Invamed CA*).

29. Whilst the oral evidence was helpful in providing background and in raising questions to be considered in making our factual findings (and in deciding what factual findings were material to the legal issue before us), it was not, on the whole, determinative; this is because, as just mentioned, the legal authorities clearly require us to make findings on, and base our legal decision on, the *objective* characteristics of the imported mobility scooters; the opinions of the witnesses – and, indeed, any information they might provide that was not evident from the objective characteristics of the mobility scooters themselves – was not of any direct assistance to us in that exercise (as we say, it was indirectly of some assistance, as it gave us things to think about in making our objective determination).

30. The imported mobility scooters came in 29 different models, 18 models of the first appellant and 11 models of the second appellant. All the models bore the core design features of a 'mobility scooter', which we would articulate as follows: battery-powered, relatively slow-moving (in practice, walking speed or thereabouts) vehicles with one seat, a low (i.e. near the ground) floor (or 'platform'), a steering device, three or four wheels, and no covering. Their dimensions were: not much wider than the person sitting on the single seat; and not much longer than required to accommodate the seat, the steering device, and the wheels. These core design features can be readily apprehended, visually, by looking at the photographs elsewhere in this decision (which are not of the imported mobility scooters themselves, but are of other 'mobility scooters', which have the same core design). There was a range of size amongst the imported mobility scooters, from the shorter and narrower (which tended to be the slower, the somewhat less comfortable, the less sturdy, and so the less appropriate for outdoor use), to the wider and longer (and somewhat faster, more comfortable, more sturdy, and so more appropriate for outdoor use); but all conformed to the core design as just set out.

31. We were presented with a good deal of evidence about the variants that could be seen within this core design, amongst the various models; for example, exactly how wide or long they were; exactly how large the wheels were; whether the tyres were pneumatic or made of other material; whether the maximum speed of which the scooter was capable was 4 miles per hour or up to 8; additional features such as a basket or a collapsible covering; whether or how easily the scooter could be taken to pieces for storage or transportation in (say) a car; whether ignition was by key or by switch; and whether or not there were armrests. However, for reasons that will become evident in the Discussion section below, we do not consider that these variations (within the core design features) are material to the legal issue before us; and so we decline to needlessly lengthen (and, in so doing, obscure the core reasoning of) this decision by elaborating, or making further detailed factual findings, on them.

32. The following aspects of the brochures for the models of mobility scooter in question have, in our view, some relevance to their objective characteristics:

(1) brochures for the first appellant's mobility scooter models bore the logo, "Your new route to independence";

(2) several of the brochures referred to the mobility scooter's connection with the customer's "independence" and/or "freedom" and/or ease of life;

(3) the owner's manual for the first appellant's mobility scooter models had one of the following statements, in the section headed "Intended use of the vehicle":

> "These vehicles are designed for use by adults with a disability (up to the maximum recommended weight - see Technical Specification sheet) …";
>
> or
>
> "This vehicle is designed to help any single disabled adult (up to the maximum recommended weight) who requires a scooter for mobility …".

DISCUSSION

33. In what follows, we have assimilated the parties' submissions, to the extent we have accepted them, into our reasoning; where we have rejected a significant and material argument made by a party, we have sought to explain why, though without always identifying the provenance of the argument. We mean no disrespect to the parties' counsel (all of whom were excellent) in adopting this approach (which rather 'anonymises' their individual submissions in the hearing) – but we think it makes for a clearer and shorter decision.

Are the imported mobility scooters designed or intended solely for those with a non-marginal limit on their ability to walk?

34. The primary question in this appeal, based on heading 8713 as interpreted in *Invamed CJEU* and *Invamed CA*, is whether the imported mobility scooters, judged by their objective characteristics or design features, are intended for use solely by persons with a non-marginal limit on their ability to walk.

35. We start by observing that having a non-marginal limit on one's ability to walk, covers a range of forms of disability. At one end of the range is someone unable to walk, at all. But included in the range is someone who walks so slowly, or requires so many significant breaks in the course of walking, that their ability to walk can fairly be said to be non-marginally limited; the same can be said for someone who can walk but in doing so endures significant pain or discomfort (such that, in an extreme case, they would require medical treatment, or extended rest, afterwards): such a person could also fairly be said, depending on the precise circumstances, to have a non-marginal limit on their ability to walk. In practice, all these measures of ability (or disability) – duration of walking, speed of walking, need for breaks, degree of pain and/or discomfort – may well combine or coalesce in any one person's non-marginal walking disability. We note this because it is important to keep this spectrum of forms of disability within "non-marginal limitation" in mind, when considering who the mobility scooters are solely designed for. For example, it would be a mistake only to think of the needs of someone at, or near, the "unable to walk, at all" end of the spectrum.

36. In our view, is clear from their design features that the imported mobility scooters are designed for persons with a non-marginal limit on their ability to walk (note that at this stage of the analysis we have not put the word "only" before the word "for" – we will turn to that shortly): a relatively small, relatively slow, one-person vehicle clearly enables such persons, without assistance from someone else, to get from A to B (where A and/or B may be indoor locations inaccessible to large vehicles like cars or buses) where, otherwise, due to their disability, they would simply not be able to do so, or doing so would cause them significant pain, or take them significantly longer than the time taken by those without such limitation. So, for example, many of the imported mobility scooters would (judging from their design) enable such persons, without assistance from someone else, to move around environments where the 'norm' would be to walk: indoor spaces (e.g. homes; shops; restaurants); and outdoor public spaces normally reserved to pedestrians (e.g. pavements; parks; squares).

37. Clearly, the imported mobility scooters do not enable the user to fully replace the walking function e.g. they do not go up or down stairs, or across very uneven surfaces. However, this does not detract from the fact that (judging from their design) the scooters enable those with a non-marginal limit on their ability to walk to move, or 'mobilise', independently, in ways that they would otherwise not be able to do (or, would not be able to do without excessive pain, or without taking an excessive period of time).

38. The point was made to us that the design features of some of the larger mobility scooters did not indicate design for (solely) indoor use; rather, their features indicated that they could be used, for example, to travel on roads, at a fairly slow speed (compared to other road-users like cars and motorcycles), for a modest distance (perhaps, to the local shops); and that there they might be "parked up" whilst the user goes on foot (perhaps into a shop). It does not seem to us that this kind of possible use means that these larger mobility scooters are not, objectively, designed for those with a non-marginal limit on their ability to walk: for persons in this category who can walk very short distances (i.e. pop into a small shop), or who are able to walk slightly longer distances slowly, or with breaks, or with some pain, this sort of use would be welcome and appropriate.

39. A similar point can be made about the fact that some of the imported mobility scooters provided their users with more than just mobility (getting from A to B) – they had facility for carrying goods (in, say, a basket). To our minds, this is no indication that (objectively) the mobility scooters are not designed for the those with a non-marginal limit on their ability to walk; it is perfectly consistent with use by such persons in, say, getting to the local shops.

40. We would also make the wider point that, just because mobility scooters provide mobility at somewhat greater speeds than walking, or for greater distances than an average person may be willing to walk, does not indicate that they are not, objectively, designed for those with a non-marginal limit on their ability to walk. The impact of walking-disability is not limited to inability to get from place A to place B wholly on foot – it extends to inability to get from place A (home) to place B (local bus stop) *and therefore inability to get to place C* (the shops a few stops away by local bus). People with such limitation face barriers in using buses or trains or other public means of transport; and so, for them, a vehicle which, to

some extent, enables them to do, independently, what others can do by, say, taking a local bus, is also welcome and useful.

41. But are the mobility scooters intended **solely**, or uniquely, for those with a non-marginal limit on their ability to walk, judging by their design features?

42. We find that they are, essentially because those able to walk (which we mean to include those with only a marginal limit on their walking ability) clearly have better alternatives, in whatever mode or environment the mobility scooter might, realistically, be used:

> (1) in moving around indoor, and outdoor-pedestrian, spaces (homes, restaurants, pavements), any benefit of avoiding having to use one's legs is more than countered by being lumbered with a cumbersome vehicle unable to negotiate commonly occurring phenomena like steps, and occasionally occurring (but far from rare) phenomena like particularly uneven pedestrian surfaces (outside), and particularly tight spaces or barriers (outside or in);
>
> (2) the same applies to moving relatively short distances ("walking distance") out of doors; and the point about being "lumbered" is more pronounced here as, in contrast to using one's legs, using the scooter involves having to work out what to do with it if one has used it to, say, reach a bus stop or train station;
>
> (3) as for moving longer distances out of doors, the scooter is strikingly inferior to the obvious alternatives open to the walking-able: a car, bus or train, all accessible to the walking-able with much greater ease than to those with a non-marginal limit to their ability to walk, are obviously far quicker and can accommodate a group of people moving together, rather than just one.

43. The repeated references in the marketing material to the scooters providing "independence", "freedom", and ease of life, are further evidence that, objectively, the imported mobility scooters are both <u>for</u> those with a non-marginal limit on their ability to walk, and <u>exclusively for</u> them (as this kind of "messaging" to the consumer would be, at best, confusing, and, more likely, quite off-putting, to the walking-able).

44. We note that our conclusions about what the imported mobility scooters are "for" are generally in line with those of the Tribunal in *Invamed* (following receipt of the ruling in *Invamed CJEU*), as follows:

> 57. The scooters in this appeal are not in our view "normal" vehicles for the transport of persons. They are small, they are slow, they are for one person only; their design makes them usable in shops and indoors. Those are not normal features.
>
> 58. The design of the scooters is such that they all have features which alleviate the effects of a *non marginal* limitation on the ability to walk. These features are their small size, their tight turning circle, and their non marking tyres. A non marginal limitation on the ability to walk would make it impossible or unduly difficult to get around the house, get out of the

> house, or to go shopping etc. These particular features help a person so afflicted to overcome the effects of that limitation.
>
> 59. The design of the vehicle and these features do not aid, or confer an advantage on, a person who does not have such a limitation. Such a person, even one with only a marginal limitation on his walking ability, would find being on their own two feet faster and more flexible and, when in a shop or a house or on a pavement, less cumbersome. Whilst the scooters could be used by such persons, these features do not make the vehicle more attractive to such persons and the vehicle cannot be said to have been designed for such persons or to be "suitable" for them to use.
>
> 60. The design of the vehicles is thus a special design to help disabled persons, and the vehicles may properly be described as designed solely or specifically for disabled persons.
>
> 61. These features are such that the main or logical use of the vehicle is for a person with a non marginal limitation on the ability to walk. That is because they will clearly assist such persons and logically they will not assist persons without that limitation

45. We conclude that the imported mobility scooters fall within heading 8713.

Does the 2009 Regulation affect the classification of the imported mobility scooters under heading 8713?

46. Our starting point here is that the imported mobility scooters are not *identical* to the vehicles in the 2009 Regulation; the question is whether the classification regulation is to be applied *by analogy*.

47. We find that, if we looked only to the left hand column of the 2009 Regulation, we would have concluded that the imported mobility scooters were similar to those in the regulation: the regulation vehicles bear the core design features of 'mobility scooters', as we have found them. We do not find it helpful, as the appellants invited us to do, to find distinctions in the fine details, or specifications, of the regulation vehicles, as these are not in our view *material* differences.

48. However, the case law is clear that it would be wrong to pay attention only to the left hand column: the 'reasons' column must be taken into account in determining the scope of the regulation. The classic case illustrating this principle, *Hewlett Packard BV* (the authority cited by Lawrence Collins J in *VTech*), was about a machine that could perform the functions of both a fax machine and printer; the relevant CN provided that, with multifunctional machines, classification was to follow the component which performed "the principal function"; and the classification regulation considered in the case stated in the 'reasons' column that the fax function was the principal function of the machine considered in the regulation. Following AG Mischo, the CJEU rejected interpreting the classification regulation as meaning that all machines that could operate both as fax machines and printers (per the description in the left hand column of the regulation) must be treated as having the fax function as their principal function (the 'reasons' column). Rather, the correct interpretation

is that the regulation only applies **if** the fax function **is in fact** the principal function (see [22] of the CJEU's decision). We see this as an illustration of AG Mischo's dictum that great care needs to be employed when seeking to apply a classification regulation by analogy to a non-identical product.

49. Here, the 'reasons' column in the 2009 Regulation says that classification under heading 8713 is excluded "as the vehicle is not specially designed for the transport of disabled persons and it has no special features to alleviate a disability". The HSEN and the CNEN are then referred to. It seems to us the situation is akin to that in *Hewlett Packard*, in that the 'reasons' column of the regulation makes a statement that echoes one of the key factual variables in deciding the correct heading: in *Hewlett Packard*, it was a statement that the fax function was the principal function; in the 2009 Regulation, it is a statement that the vehicles are not specially designed for the transport of disabled persons. What *Hewlett Packard* tells us is that one cannot infer from such a statement in the "reasons" column about a factual characteristic of the product in question, that every product like the one in the left hand column, inevitably has that factual characteristic; rather, one is to infer the reverse – that, to fall within the regulation, the product must in fact have the factual characteristic mentioned in the 'reasons' column. In our case, we have found that the imported mobility scooters *do not have* the factual characteristic of being "not specially designed for the transport of disabled persons" (interpreting "disabled" in line with *Invamed CJEU*); we therefore conclude that, for this reason, and exercising the "great care" required, the imported mobility vehicles are not sufficiently similar to the vehicles in the 2009 Regulation, such that the regulation should be applied here by analogy.

50. We note that when this point came up at the hearing, Mr Pritchard submitted that there was a material difference between our situation and that in *Hewlett Packard*, in that, there, the statement in the 'reasons' column (about the fax function being the principal function) was about an objective characteristic. We are not swayed by this submission, as, in our view, a statement about which function of a product was the "principal" one, and a statement about what sort of people a product was specially designed for, are equally statements about the product's objective characteristics.

51. We are also persuaded by an alternative line of argument put forward by the appellants (but one which, as we will explain, in essence invokes the same basic principle about employing great care in applying a classification regulation by analogy), based on a line of CJEU authorities starting with Case C-51/16 *Stryker EMEA Supply Chain Services BV*. That case was a preliminary ruling by the CJEU on two matters: (1) the interpretation of a CN heading (could a certain medical implant screw, solely intended to be inserted into the human body for treatment of fracture etc, be classified under heading "X"?) and (2) whether a classification regulation (classifying a particular medical implant screw to heading "Y") was valid. The CJEU concluded on the first question at [57], classifying the medical implant screws at issue to heading X, based on their characteristics and method of manufacture, which meant they were to be distinguished from "ordinary" goods. The CJEU then went on to the second question:

> 61. … according to case-law, the application by analogy of a classification regulation to products similar to those covered by that regulation facilitates consistent interpretation of the CN and the equal treatment of traders (judgment of 4 March 2004, *Krings*, EU:C:2004:122, paragraph 35).
>
> 62 However, such an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading.
>
> 63 In those circumstances, there is no need to address the second question.

52. As context for this, we note the following explanation of what the CJEU does in a preliminary ruling, taken from *Invamed CJEU* at [16-17]:

> "16. … when the Court is requested to give a preliminary ruling on a matter of tariff classification, its task is to provide the national court with guidance on the criteria the implementation of which will enable the latter to classify the products at issue correctly in the CN, rather than to effect that classification itself, a fortiori since the Court does not necessarily have available to it all the information which is essential in that regard. In any event, the national court is in a better position to do so (judgments of 7 November 2002 in Lohmann and Medi Bayreuth, C-260/00 to C-263/00, EU:C:2002:637, paragraph 26, and 16 February 2006 in Proxxon, C-500/04, EU:C:2006:111, paragraph 23).
>
> 17 However, in order to give the national court a useful answer, the Court may, in a spirit of cooperation with national courts, provide it with all the guidance that it deems necessary (see judgment of 22 December 2010 in Lecson Elektromobile, C-12/10, EU:C:2010:823, paragraph 15 and the case-law cited).

53. Case C-24/22 *PR Pet BV* was similar to *Stryker* in that it was a preliminary ruling about (1) the interpretation of a CN heading, and (2) whether this had any implications for the validity of certain classification regulations. Having answered the first question, the CJEU noted the similarity between the products in the classification regulations and the goods in issue; it then said:

> 71. That said, even assuming that [the classification regulations] are actually applicable by analogy, the Court has already held that such an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading [*Stryker* cited].
>
> 72. Therefore, it is unnecessary to rule on the validity of [the classification regulations].

54. In Case C-227/17 *Medtronic GmbH*, the referring court had suggested three possible classifications for a product. At [54] the CJEU concluded that the product could not be

classified to one of these possible headings if it was established that the product was not "intended principally" for a certain use (the treatment of fractures). At [56], the CJEU noted that the referring court had asked whether the product in issue should be so classified on the ground that the product consists in part of something similar to a product that was the subject of a classification regulation. The CJEU then said:

> [59] … it should be noted that, while the application by analogy of a classification regulation to products similar to those covered by that regulation facilitates consistent interpretation of the CN and the equal treatment of traders, such an application by analogy is neither necessary nor possible where the Court, by its answer to a question referred for a preliminary ruling, has provided the referring court with all the information necessary to classify a product under the appropriate CN heading … [*Stryker* cited]
>
> [60] It follows that if the referring court were to conclude that the [product] at issue in the main proceedings, having regard to their objective characteristics and properties as well as their intended and actual use … were not intended principally for the treatment of fractures, then [the classification regulation] should not be taken into account for the purpose of their classification under the appropriate CN subheading.

55. It seems to us that these authorities are saying that where the CJEU has, through a preliminary ruling, given "all the information necessary to classify a product under the appropriate CN heading", then application of a classification regulation to that product by analogy is (1) not necessary; and (2) not possible. It seems to us we are in just such a situation, given the ruling in *Invamed CJEU*. HMRC argued that our circumstances are different, in that we are not in a situation where the CJEU has been asked, at the same time, to opine on the interpretation of the CN (heading 8713) and to comment on the validity of a related classification regulation. However, we are not persuaded that this difference in circumstances makes any difference to the underlying principle: if the CJEU has spoken as to how to go about classifying mobility scooters (and it clearly has), it is unnecessary to go through the (painstaking) process of applying a classification regulation *by analogy*.

56. HMRC also argued that to apply the *Stryker* line of cases here, would be to disregard the statement in *VTech* at [22], that where products are similar, the classification regulation is to be followed unless and until declared invalid by the CJEU. However, *Stryker* and *Medtronic* (CJEU authorities that did not exist when *VTech* was decided) each clearly acknowledge the general principle behind following classification regulations (consistent interpretation, equal treatment, etc); yet in each case the CJEU immediately went on to state that, in the given circumstances, application of the regulation by analogy was unnecessary/impossible. This seems to us very clear guidance by the CJEU on the point and so, to that extent, stronger authority than *Vtech* at [22].

57. Although the *Stryker* line of authorities is a different line of reasoning than the one we initially used (based on insufficient similarity), it seems to us that they both reflect a common principle: the need for great care when applying a classification regulation by analogy.

58. We are of course aware of what was said in *Invamed CA* at [22] about the 2009 Regulation, had it applied, being "binding and definitive" – but this clearly obiter statement was, equally clearly, not attempting to encapsulate the whole of the law as regards applying classification regulations by analogy, in a single sentence.

59. We also acknowledge that, in 2021, the Commission issued a further classification regulation, 2021/1367, that classified another vehicle (which had all the core design features of a 'mobility scooter') to heading 8703. However, this makes no difference to our analysis: due to its timing, it does not affect the classification of the imported mobility scooters; and our analysis does not turn on what the Commission may or may not have intended, whether in 2009 or in 2021: in turns on the correct approach, in law, to applying the 2009 Regulation by analogy.

60. It follows from the foregoing that, in our view, the 2009 Regulation does not affect the classification of the imported mobility scooters to heading 8713.

DISPOSAL

61. The conclusions reached above mean that the appeal succeeds: the imported mobility scooters are to be classified to heading 8713.

62. We acknowledge that the appellants pursued further detailed arguments as to the invalidity of the 2009 Regulation (in the event that we had decided, contrary to the above, that the regulation *did* affect the classification of the imported mobility scooters), and the powers of the Tribunal to treat the 2009 Regulation as invalid, post-Brexit. HMRC opposed these arguments. However, in the light of our conclusion that the 2009 Regulation does not affect the classification of the imported mobility scooters to heading 8713, it is unnecessary for us to resolve those arguments, and we refrain from doing so.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

63. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 03rd JULY 2024

APPENDIX: THE 2009 REGULATION

Description of the goods	Classification (CN code)	Reasons
1. Four-wheeled vehicle with an electric motor powered by two rechargeable 12 V batteries. It is approximately 48 cm wide, 99 cm long and 58 cm high (with the backrest folded down), with a total weight without batteries of approximately 34,5 kg. The maximum load is approximately 115 kg. The vehicle has the following characteristics: — a horizontal platform connecting the front and rear sections, — small wheels (approximately 2,5 × 19,0 cm) with anti-leak tyres, — an adjustable seat without armrests and grips whose height can be set in one of two positions, and — a steering column that can be folded down. The steering column has a small control unit including a contact switch, a horn, a battery output display and a button to set the maximum speed. The vehicle has two thumb-operated levers for accelerating, braking and reversing. There are anti-tip wheels at the back of the vehicle to prevent it from tipping over. It has an electronic dual braking system. When its batteries are fully charged it has a maximum range of approximately 16 kilometres and can reach a maximum speed of approximately 6,5 km/h. The vehicle can be disassembled into four light components. It is designed for use at home, on footpaths and in public spaces, for activities such as shopping trips. (1) See image 1.	8703 10 18	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8703, 8703 10 and 8703 10 18. The vehicle is a special type of a vehicle for the transport of persons. Classification under heading 8713 is excluded as the vehicle is not specially designed for the transport of disabled persons and it has no special features to alleviate a disability. (See also the Harmonised System Explanatory Notes to heading 8713 and the Combined Nomenclature Explanatory Notes to subheading 8713 90 00.) The vehicle is therefore to be classified under CN code 8703 10 18 as a motor vehicle principally designed for the transport of persons.
2. Three-wheeled vehicle with an electric motor powered by two rechargeable 12 V batteries. It is approximately 61 cm wide, 120 cm long and 76 cm high (with the backrest folded down), with a total weight without batteries of approximately 46 kg. The maximum load is approximately 160 kg. The vehicle has the following characteristics: — a horizontal platform connecting the front and rear sections, — small wheels (approximately 8,9 × 25,4 cm) with anti-leak tyres, — an adjustable seat with armrests and grips whose height can be set in one of three positions, and — a steering column that can be folded down. The steering column has a small control unit including a battery meter, a contact switch, buttons to activate lights, a horn and a button to set the maximum speed.	8703 10 18	Classification is determined by General Rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8703, 8703 10 and 8703 10 18. The vehicle is a special type of a vehicle for the transport of persons. Classification under heading 8713 is excluded as the vehicle is not specially designed for the transport of disabled persons and it has no special features to alleviate a disability. (See also the Harmonised System Explanatory Notes to heading 8713 and the Combined Nomenclature Explanatory Notes to subheading 8713 90 00.) The vehicle is therefore to be classified under CN code 8703 10 18 as a motor vehicle principally designed for the transport of persons.
The vehicle has two thumb-operated levers for accelerating, braking and reversing. There are anti-tip wheels at the back of the vehicle to prevent it from tipping over. It has an electronic dual braking system. When its batteries are fully charged it has a maximum range of approximately 40 kilometres and can reach a maximum speed of approximately 8 km/h. The vehicle can be disassembled into seven light components. It is designed for use at home, on footpaths and in public spaces, for activities such as shopping trips. (1) See image 2.	18	

Image 1:

Image 2: