CUSTOMS DUTIES - Tariff classification - Whether Binding Tariff Information correct - Whether CN Code 9504 90 90 00 appropriate for Appellant's products - Whether Regulations No.981/98 and No.184/2000 applicable

VIRES - Whether Binding Tariff Information valid - Whether Appellant entitled to challenge the validity of Regulations 981/98 and 184/2000
LONDON TRIBUNAL CENTRE C00148

VTECH ELECTRONICS (UK) PLC Appellant

- and -

THE COMMISSIONERS OF CUSTOMS AND EXCISE Respondents

Tribunal: MISS J C GORT (Chairman)
MR S K DAS LLM, ACIS
MRS S SADEQUE MBCS

Sitting in public in London on 10, 11, 12 and 13 December 2001

Mr Giles Salmond of Garretts, solicitors, for the Appellant

Mr Owain Thomas, counsel, instructed by the Solicitor for the Customs and Excise, for the Respondents

DECISION

1. The disputed decisions of the Commissioners are decisions given upon review to revoke Binding Tariff Information decisions for electronic learning aids in letters dated 8 May 2000 and two letters dated 5 May 2000, and to issue Binding Tariff Information decisions in two letters dated 3 October 2000.

2. Two further decisions of the Commissioners are disputed, namely decisions given upon review to confirm Binding Tariff Information decisions for electronic learning aids given in two letters dated 13 January 2001.

3. The history of the matter is that the Appellant carries on business as an importer of electronic products from premises in Abingdon, Oxfordshire.

4. On 16 June 1997 the Commissioners issued to the Appellant a Binding Tariff Information (BTI) classifying the product "Pre-Computer Prestige" to Combined Nomenclature Code 9504 90 90 00. On the same date the Commissioners also issued BTIs which classified two products, the "Amazing Laptop Computer" and "My Little Talking Computer", to the same Combined Nomenclature Code.

5. Heading 9504 reads `Articles for fun fair, table or parlour games, including pin tables, billiards, special tables for casino games and automatic bowling alleyway equipment.'

6. In 1997 there had been a Tribunal decision in the case of a product called the "Smart Start Scholar" (Decision No. C00040). The Tribunal had considered that that product was a game, and determined its classification under Commodity Code 95 04 90 90 00. Prior to that Tribunal hearing, the Appellant had approached various other EC Member States asking for their determination of the classification of the product. A number of different opinions were expressed between the headings 95.03 and 95.04, and the issue was eventually raised before the Tariff and Statistical Nomenclature Section (Miscellaneous) of the Customer Code Committee, the purpose of the meeting being to determine the classification of a product called the "Smart Start Premier", which was similar to the Smart Start Scholar. Following the meeting Regulation (EC) No.981/98 was issued which classified the Smart Start Premier as a toy to heading 95.03.

7. Following much further discussion in the Commission, and a presentation by the Appellant, a second Regulation (EC) No.184/2000 was published on 27 January 2000. This Regulation was intended specifically to determine the classification of the Pre-Computer Prestige and it was classified to CN Code 9503 90 32.

8. Heading 9503 reads "Other toys; reduced-size (`scale') models and similar recreational models, working or not; puzzles of all kinds", with subheading 950390 reading "Other".

9. By a letter dated 15 February 2000 the Commissioners notified the Appellant of their decision to withdraw the BTI in respect of the Pre-Computer Prestige with immediate effect. By a further letter dated 13 March 2000, the Commissioners notified the Appellant of its decision to revoke the BTIs in respect of the "Amazing Laptop Computer" and "My Little Talking Computer" with immediate effect.

10. On 16 June 2000 the Appellant applied for BTIs in respect of two products the "Talking Whiz Kid Platinum" and "My Computer Pal" to Combined Nomenclature Code 9504 90 90 00. By a letter dated 6 July 2000, the Commissioners notified the Appellant of BTIs in respect of both these products to heading 9503.

11. On 18 August 2000 the Appellant made an application to the Commissioners for a BTI in respect of a product known as "Spooky Adventures", applying for classification to heading 9504.

12. On 21 August 2000 the Appellant made an application to the Commissioners in respect of a product known as the "Slimline MPE 342", applying for classification to heading 8471. Heading 8471 is described as "automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included."

13. On 21 September 2000 the Commissioners issued to the Appellant separate BTIs which classified both Spooky Adventures and the Slimline MPE 342 to Combine Nomenclature Code 9503903200.

14. All the above decisions were upheld on review, and are the subject of this appeal.

The products

A. The Pre-Computer Prestige

This is a laptop-style, battery-powered computer with an alphanumeric keyboard, 24,000 dot matrix screen, displaying seven lines of 39 characters, fully functioning mouse and mouse pad. There is a built-in cursor point button and children's work can be stored within the computer's own random access memory. There are 40 built-in activities designed to develop skills in antonyms, vocabulary, tenses, grammar functions, story problems and algebra. There is a built-in word processor, printing capability and 75,000 word spell-checker as well as a telephone directory, daily planner and 200-year calendar. Other features include 1000 trivia questions covering inventions, history, geography and important dates. It may be used by one or two players of age range 9 years and above, the number of correct answers given by the players are marked and a score given. The product is freely programmable.

B. The Amazing Laptop Computer

This is a talking laptop-style, battery-operated, learning aid, with hard key QWERTY keyboard displaying upper and lower case letters. A segmented LCD screen displays up to eight characters. There are twenty-five built-in activities designed to develop skills in English, maths, logic, etc. There are four levels of difficulty to add challenge to activity play. Other features include 200 spoken words and sound effects and a demonstration facility. The product may be used by one or two players of ages from 4 to 7 years. Correct/incorrect answers given by the player(s) are signified by built-in LED lights and a score is given.

C. My Little Talking Computer

This is a talking, laptop-style, battery-operated, electronic learning aid with an alphanumeric keyboard and a full dot matrix LCD screen which provides clear animated pictures. There are 14 built-in activities designed to develop skills in letters and spelling, word games, numbers, counting, maths, music, etc. There are two skill levels of difficulty adding challenge to activity play. The article may be used by players of ages ranging from 3-6 years. The number of correct answers given by the players are marked and a score given.

D. The Talking Whiz Kid Platinum

This is a laptop-style, toy computer, made of plastic. It has "Windows" style applications; 42 learning activities, including 8 word, 2 English, 11 mathematics, 5 trivia, 6 logic, 7 business/organiser functions and 2 music. It includes word processing, printing and a 75,000 word spell check. It includes a reading comprehension cartridge, a built-in calendar and memory storage. The graphics come up on a four-colour screen. The products talks with an English voice. There are six challenging levels.

E. My Computer Pal

This is a talking, desktop-style, toy computer in purple plastic with multi-coloured keys and a QWERTY keyboard. The computer has an LCS screen. There are 26 interactive activities including 10 languages, 8 mathematics, 2 music and 6 games. My Computer Pal can be used in one or two user mode. The product comes packed with four games cartridges, a mouse and a mouse mat.

F. Spooky Adventures

This is presented in the form of a laptop computer, and has a ghost theme. It is coloured mostly in green and black plastic. It has on/off buttons, and LEC screen; QWERTY keyboard; volume and contrast control; glowing globe; secret draw and AC adaptor jack; demo button and activity selector button. It has several activities themed into six categories in the form of haunted rooms within a house: 9 English, 9 mathematics, 5 logic and 2 music. It comes complete with a mouse, a mouse mat, glow-in-the-dark stickers and a book of instructions. It is battery operated and is designed for children aged 5 years and upwards.

G. Slimline MPE 342

This looks like a laptop computer and is coloured in blue and grey plastic. It has an LCD display screen, with a lock button, a contrast switch, a volume switch and power button. It has an LED lens, speed scroller and touch pads. It is fully programmable. There is a backlight button and cartridge door and a QWERTY keyboard. It is a bi-lingual product. There are sixty-five learning activities in five categories and two cartridges ("Foreign Languages" and "Typing Challenge"). There is a mouse, mouse mat and instruction manual. It is battery-operated and is designed for children aged 9 years and upwards.

The issues

15. The issues for the Tribunal's determination were as follows:

1. Whether the BTIs for products A-C were valid;

2. Whether the classifications given in the BTIs for the products D-G were correct

3. To determine the answer to question 1, the Tribunal had to consider whether Regulation 184/2000 was applicable to those products so as to invalidate the BTIs and secondly the Appellant raised the question of whether that Regulation was valid.

4. To determine the question of whether the Regulation was valid the Tribunal had first of all to consider the question whether or not the Appellant was entitled to raise that question before the Tribunal.

5. With regard to the products D-F the Tribunal was asked to consider whether they could properly be classified with CN Code 9504 90 90 00 (again) or whether Regulation 184/2000 and/or Regulation 981/98 applied so as to classify the products with CN Code 9503 90 32 (toy), and if either or both of these Regulations did so apply, whether either or both Regulations were valid.

6. So far as product G was concerned, the question for determination was whether it could properly be classified as a portable digital automatic data processing machine under CN Code 8471 30 00 00, or whether Regulation 184/2000 and/or Regulation 981/98 applied so as to classify the product under CN Code 9503 90 32 (a toy), and again if either of those Regulations did so apply, whether either or both of the regulations were valid.

7. Whether or not the Appellants is now able to challenge the validity of Regulation 184/2000.

The legislation

16. The principles established by the relevant legislation are clearly summarised at pages 7-10 of the decision of the Tribunal in the case of Brite Sparks Ltd (Decision No C-00011), to which we were referred and we do not set them out in full here. That summary refers to the relevant provisions in the Treaty of Rome and the European Communities Act 1972. It refers to the International Convention on the Harmonised Commodity Description and Coding System which established an internationally agreed system, containing chapters, headings and subheadings, for describing and coding commodities for trade purposes, the system being known as the Harmonised System of Nomenclature and being administered by the Customs Co-operation Council in Brussels; that Council issues and updates explanatory notes (HSENs) on the Nomenclature. The summary also refers to Council Regulation (EEC) No.2658/87 of 23 July 1987 whereby the European Community introduced the common customs tariff in its present form, based on the harmonised system of nomenclature with some additions, the whole being known as the Combined Nomenclature (CN). Articles 9 and 10 of Council Regulation 2658/87 adopt explanatory notes to the Combined Nomenclature (CNENs). Section 1 of Annex 1 contains six general rules for the interpretation of the Combined Nomenclature (see above) (the general interpretative rules or GIRs) which are used to ensure that only one code is right for each commodity.

17. With regard to the status of the HSENs the European Court of Justice in the case of Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart-West [1993] ECR 1-2655 commented on the status of the Explanatory Notes to the Harmonised System in the following way:

"21. … the Explanatory Notes to the nomenclature of the Customs Co-operation Council constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered a valid aid to the interpretation of the tariff. However, those notes do not have legally binding force so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions."

18. The legislation dealing with the BTIs is contained in article 12 of Council Regulations (EEC) 2913/92 (the "Code") and Title II (Articles 5-14) of Commission Regulation (EEC) No.2454/93 (the "Implementing Regulation").

19. Article 12(4) of the Code states:

"Binding information shall be valid for a period of six years in the case of tariffs and three years in the case of origin from the date of issue. By way of derogation from Article 8, it shall be annulled where it is based on inaccurate or incomplete information from the applicant."

20. Article 8 of the Code states:

1. A decision favourable to the person concerned shall be annulled if it was issued on the basis of incorrect or incomplete information and -

- the applicant knew or should reasonably have known that the information was incorrect or incomplete, and
- such decision could not have been taken on the basis of correct or complete information.

21. Article 12(5) of the Code states:

"Binding information shall cease to be valid -

(a) in the case of tariff information -

(i) where a regulation is adopted and the information no longer conforms to the law laid down thereby;
(ii) where it is no longer compatible with the interpretation of one of the nomenclatures referred to in Article 20(6):

- at Community level, by reason of amendments to the explanatory notes to the Combined Nomenclature or by judgment of the Court of Justice of the European Communities,

- at international level, by reason of a classification opinion or an amendment of the explanatory notes to the Nomenclature of the Harmonised Commodity Description and Coding System, adopted by the World Customs Organisation, established in 1952 under the name of "the Customs Co-operation Council";

(iii) where it is revoked or amended in accordance with Article 9 provided that the revocation or amendment is notified to the holder."

The date on which binding information ceases to be valid for the cases cited in (i) and (ii) shall be the date of publication of the said measure or, in the case of international measures, the date of the Commission communication in the `C' series of the Official Journal of the European Communities."

22. Article 20 of the Code lays down that the duties legally owed where a Customs debt is incurred shall be based on the Customs tariff of the European communities. At paragraph 3 of the Article it states what the Customs tariff of the European Community shall comprise and at paragraph 6 it states as follows:

"The tariff classification of goods shall be the determination, according to the rules in force, of -

(a) the subheading of the combined nomenclature or the subheading of any other nomenclature referred to in paragraph 3(b); or
(b) the subheading of any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by community provisions governing specific fields with a view to the application of measures other than tariff measures relating to trade in goods,

under which the aforesaid goods are to be classified.

23. Council Regulation (EC) No.2658/87 of 23 July 1987, on the tariff and statistical nomenclature and on the Common Customs Tariff, provides at article 1 for a goods nomenclature called the combined nomenclature.

24. According to the recitals in the preamble to Regulation 2658/87 the combined nomenclature "must be established on the basis of the harmonised system" which has been laid down by the International Convention. Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes "to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and

shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System".

25. Article 8 of the Regulation provides:

The committee [provided for in article 247 of the Community Customs Code] may examine any matter referred to it by its chairman, either on its own initiative or at the request of a representative of a Member State.

(a) concerning the combined nomenclature;
(b) concerning the Taric nomenclature and any other nomenclature which is wholly or partly based on the combined nomenclature or which adds any subdivisions to it, and which is established by specific Community provisions with a view to the application of tariffs or other measures relating to trade in goods.

26. Article 9 provides:

1. Measures relating to the matters set out below should be adopted in accordance with the procedure notified in Article 10 -

(a) application of the Combined Nomenclature and the Taric, concerning in particular -

- the classification of goods in the nomenclatures referred to in Article 8;
- explanatory notes;
- the creation, if necessary, and for the purpose of responding to the Community's own needs, of statistical subheadings in the Taric, when to do so appears more appropriate than in the CN; …

27. Article 10 provides:

1. The Commission shall be assisted by the Customs Code Committee set up by article 247 of regulation (EEC) No.2913/92.

28. The basic rules (GIRs) are contained in the General Rules for the Interpretation of the Combined Nomenclature. These rules are mandatory.

29. Rule 1 provides:

"The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification is to be determined according to the terms of the headings and any relative sectional chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions …"

30. Rule 2(b) provides:

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

31. Rule 3 provides:

"When by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description …
(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character insofar as this criterion is applicable;
(c) when goods cannot be classified by reference to 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

32. Rule 4 provides:

"Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin."

33. Rule 6 provides:

"For legal purposes, the classification of goods in the subheadings of the heading shall be determined according to the terms of those subheadings and any related subheading notes and mutatis mutandis to the above rules, on the understanding that only subheadings of the same level are comparable. For the purposes of this rule the relative section and chapter notes also apply, unless the context otherwise requires.

34. The explanatory notes and comments to the harmonised system of the World Trade Organisation (HSENs) provide useful guidance. They do not have legally binding force but they are a valid aid to interpretation where they do not alter the meaning of the Common Customs Tariff.

35. Article 230 of the Consolidated Version of the Treaty on European Union provides:

"The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties.

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Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in this Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff, or, in the

absence thereof, of the day on which it came to the knowledge of the latter, as the case may be."

The headings

36. Chapter 95 of the Common Customs Tariff is headed: "Toys, Games and Sports Requisites; Parts and Accessories thereof:

95.03 reads "Other toys; reduced-size (`scale') models and similar recreational models, working or not; puzzles of all kinds."

37. The HSEN states:

"This heading covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design shape or constituent material, are identifiable as intended exclusively for animals, e.g , pets, do not fall in this heading but are classified in their own appropriate heading. The heading includes:

(A) All toys not included in headings 95.01 and 95.02. Many of the toys of this heading are mechanically or electrically operated.

These include:

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(17) Educational toys (e.g., toy chemistry, printing, sewing and knitting sets).

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Certain toys (e.g., electric irons, sewing machines, musical instruments, etc) may be capable of a limited "use"; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.

38. Heading 95.04 reads:

"Articles for funfair, table or parlour games, including pin tables, billiards, special tables for casino games and automatic bowling alley equipment.

9504.10 - Video games of a kind used with a television receiver
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This heading includes:
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(2) Video games (used with a television receiver or having a self-contained screen) and other games of skill or chance with an electronic display."

9504 90 - Other

9504 90 90 - - Other

39. Heading 8471 applies to:

"Automatic data processing machines and unites thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not else where specified or included."

"8471 30 00 - Portable digital automatic data processing machines, weighing not more than 10 kgs, consisting of at least a central processing unit, a keyboard and a display …

"8471 30 00 - Other digital automatic data processing machines"

40. Section XVI is headed:

Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television imaging and sound recorders and reproducers, and parts and accessories of such articles

The notes to section XVI state:

1. This section does not cover:

.

(p) articles of chapter 95

Note 5(A) to Chapter 84 of the Combined Nomenclature states:

For the purposes of heading 8471, the expression `automatic data processing machines' means:

(a) digital machines, capable of

(1) Storing the processing program or program and at least the data immediately necessary for the execution of the program;

(2) being freely programmed in accordance with the requirements of the user;

(3) performing arithmetical computations specified by the user; and

(4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run.

The Regulations

41. The Annex to Regulation No 184/2000 states:

Description of Goods Classification
(CN) Code Reason
(1) (2) (3)
A device, in a laptop computer-type plastic case, comprising:

· An electronic processing unit
· a liquid crystal display (LCD)
· a keyboard, switches to control activity selection, sound volume and display

contrast,
· a loud speaker,
· connections for a mouse and a printer

The device is presented together with a mouse

The device does not have its own operation system

The device integrates the following programs:

· more than 40 fixed programs of learning languages, writing, reading and arithmetic, and for performing logic exercises
· office programs, e.g. word processing and a daily planner,
· creation and execution of programmes written in BASIC

The feature of the device may be expanded by using additional cartridges

The device is aimed at children from nine years upwards 9503 90 32 Classification is determined by the provision of General Rules 1 and 6 for the interpretation of the Combined Nomenclature Note (1p) to Section XVI and the wording of CN-codes 9503, 9503 90 and 9503 90 32.

Even though most programs are in a two player mode and the correct answers are scored, the device cannot be regarded as a parlour game, but as an education toy given the numerous in-built programs for learning.

42. The Annex to Regulation 981/98 states:-

Description of Goods Classification
(CN) Code Reason
(1) (2) (3)
1. …
2. A laptop computer-type device in a moulded coloured plastic case, approximately 20 cm long, 23 cm wide and 6 cm thick.

The device has the following components:

· a loudspeaker,
· an electronic processing unit (not freely programmable),
· a keyboard with switches under a sturdy plastic film,
· an LCD-display, approximately 6 x 3 cm,
· switches to regulate the loud-speaker and the contrast.

The device has 16 built-in programmes, which perform writing, arithmetic and logic exercises, as well as composing music.

The programmes are aimed at children between five and eight years old. 9503 90 32 Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature an the wording of CN codes 9503, 9503 90 and 9503 90 32.

Four of the 16 in-built programmes consist of written exercises, seven test arithmetic and two involve recognising musical notes/tunes etc.

Although 15 of the 16 programmes are in two player mode and the correct answers are scored, the product does not have the characteristics of a parlour game of heading 9504. The essential character of the product is that of an educational toy.

The evidence

43. An agreed bundle of documents was before the Tribunal, as were the examples of all the products in question.

44. We heard expert evidence from Alan Mayn, a consultant on information systems. It was his opinion that the Pre-Computer Prestige was freely programmable within the definition of an automatic data processing machine. Similarly it was his opinion that the Slimline MPE 342 was also freely programmable within the definition of an automatic data processing machine. He did not give evidence with respect to the other products which are the subject of this appeal.

45. The Tribunal heard from John Huyzing, who is the European operations director of VTech Europe BV. He gave the Tribunal a demonstration of all the relevant products.

46. Mrs L M Chandler, the reviewing officer in the case gave evidence on behalf of the Respondent Commissioners. She gave evidence inter alia of events surrounding the classification of the Pre-Computer Prestige under regulation 185/2000.

47. Mrs Chandler's decision letter of 8 May 2000 states inter alia as follows:

"The BTI for the Pre-Computer Prestige was revoked after publication of Regulation (EC) No.184/2000 dated 26 January 2000. This Regulation was published in Official Journal L22 on 27 January 2000. A description of goods on the Regulation reads:

"A device in a laptop computer-type plastic case, comprising:

- an electronic processing unit,
- a liquid crystal display (LCD),
- a keyboard,
- switches to control activities selection, sound volume and display contrast,
- a loudspeaker,
- connections for a mouse and a printer.

The device is presented together with a mouse.
The device does not have its own operating system.
The device integrates the following programmes;

- more than 46 fixed programmes for learning languages, writing, reading and arithmetic: and for performing logic exercises,
- office programmes, e.g., word processing and a daily planner,
- creation and execution of programmes written in BASIC.

The features of the device may be expanded by using additional cartridges. The device is aimed at children from 9 years upwards."

The Regulation classified the device to CN Code 9503 90 32, with the reasons given as:

"Classification is determined by the provisions of General Rules 1 and 6 for the interpretation of the Combined Nomenclature, Note 1p to section XVI and the wording of CN Codes 9503, 9503 90 and 9503 90 32.

Even though most of the programmes are in a two player mode and the correct answers are scored, the device cannot be regarded as a parlour game, but as an educational toy given the numerous in-built programmes for learning."

6. You are aware that the device described in the Regulation is VTech's Pre-Computer Prestige. You appeared before the Tariff and Statistical Nomenclature section (miscellaneous) of the Customs Code Committee on 23 March 1999 to give a presentation of the device on behalf of your client. Although you argued your case for classification as a game in Heading 95.04, the Committee later voted for classification as a toy in Heading 95.03, with Regulation 184/2000 being published as a result of that vote.

7. By letter dated 15 February 2000 (signed by Mr John Mitchell, Classification Manager) your client was informed that BTI 100488796, for the Pre-Computer Prestige, had been revoked with immediate effect ..."

48. It was Mrs Chandler's evidence that there were several meetings before the adoption of the Regulation. This was usual practice. Mrs Chandler produced a letter from Christopher P Fisher, the financial controller of VTech Electronics (UK) Plc, dated 23 October 1998, addressed to the European Commission. In that letter Mr Fisher states that, following a discussion whether there was an operating system within the Pre-Computer Prestige, "In fact there is no such operating system, as each function within the computer is programmed within its own right."

49. Mrs Chandler also produced a summary of the conclusions of the Customs Code Committee following the relevant meetings which it was stated that it was pointed out by VTech (NL) that the product covered by their BTI could be connected to a standard PC and to a printer and that referring to the programmability in BASIC they felt that Note 5A to Chapter 84 applied. The summary continued:

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"Because the Pre-Computer does not have an operation system, X (name blanked out) and Y (name blanked out) would classify it in Chapter 95. Z (named blanked out) agreed and felt that the Pre-Computer is not freely programmable because it lacks an operation system. It was mentioned that even some kind of pocket calculators is (sic)programmable. A (name blanked out) favoured classification of the product in Chapter 95 because the fixed learning/educational programmes gives, (sic) the Pre-Computer its essential character.

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"The Chairman concluded that the reporter (VTech) would be invited for a product presentation during the next meeting of the Committee in March."

50. It was Mrs Chandler's opinion that even though it was now known that the Pre-Computer Prestige did have an operating system it should still be classified to 9503 because it would otherwise exactly match the features of the Regulation. The operating system was not critical to the definition. Similarly with product G, the Slimline MPE 342, whilst it was now accepted that it was freely programmable, it was excluded from Chapter 84 on the grounds of Note 1p which excluded items within Chapter 95.

51. It was Mrs Chandler's surprising evidence that there could not be an overlap between games and toys. In her opinion she thought all the products were similar to toy chemistry and painting sets because they were teaching aids on how to spell and to do arithmetic. She thought that they were not like such products as Game Boy or Play Station because reading and writing were not games. The only game she could think of which could be educational was Chess. Whilst she accepted that there was some game element in some of the products, she considered that the fact that there were scored activities within the products did not make them games.

52. In the case of the Smart Start Scholar (Decision C00040), the Tribunal had considered whether the product was properly classifiable under either the toys or the games headings and had concluded that the product had the attributes of both a toy and a game, and the fact that it was educational did not assist in determining whether it was a game or a toy, both headings meriting equal consideration. They therefore were driven to General Rule 3(c) and on that basis determined the product's classification under the heading which occurred last in numerical order among those which equally merited consideration, and therefore it was considered to be a game under Commodity Code 95 04 90 90 00.

53. Following that decision of the Tribunal, Commission Regulation (EC) No.981/98 was made on 7 May 1998, in relation to the product Smart Start Premier (which was the successor to the Smart Start Scholar) and the product was classified as a toy. The Regulation set out a description of the object as follows:

"A laptop computer-type device in a moulded coloured plastic case, approximately 20cm long, 23cm wide and 6cm thick.

The device has the following components:

- a loudspeaker,
- an electronic processing unit (not freely programmable)
- a keyboard with switches under a sturdy plastic film,
- an LCD display, approximately 6 x3cm,
- switches to regulate the loudspeaker and the contrast.

The device has 16 built-in programmes, which perform writing, arithmetic and logic exercises, as well as composing music.

The programmes are aimed at children between 5 and 8 years old."

54. The reason given for the classification was as follows:

"Classification is determined by the provisions of General Rules 1 and 6 of the interpretation of the Combined Nomenclature and the wording of CN Codes 9503, 9503 90 and 9503 90 32.

Four of the 16 built-in programmes consist of written exercises, seven test arithmetic and two involve recognising musical note/tunes etc.

Although 15 of the 16 programmes are in two player mode and the correct answers are scored, the product does not have the characteristics of a parlour game of Heading 9504. The central character of the product is that of an educational toy."

The Appellant's case

55. It was submitted on behalf of the Appellant that regulation 184/2000 did not make specific reference to the Appellant nor to the Pre-Computer Prestige, and it purported to be of general application.

56. Regulation 184/2000 was said to be of questionable validity and the Appellant had a right to challenge that validity, notwithstanding that on the face of Article 230 of the European Treaty the Appellant was out of time, not having made the relevant challenge within two months of notification.

57. If the Tribunal were to accept that they did have such a right notwithstanding Article 230, then the Tribunal was bound to refer the matter back to the European Court. The Appellant did not have to show that they would succeed in any such action, that was not an issue for the Tribunal but solely a matter for the European Court of Justice. The Tribunal was referred to the cases of R v MAFF ex parte Fedesa [1988] 3 CMLR 661, Foto-Frost v Hauptzollamt Lubeck-Ost [1988] 3 CMLR 57, and the comments of A G Jacobs in Wiener SI GmbH v Hauptzollamt Emmerich [1997] I-6495 paragraph 24-25.

58. The Appellant contended that the validity of the Regulation was in question because the classification of the product described in the Regulation purported to be classified without proper regard to the GIRs.

59. The Regulation purported to classify the product in column 1 of the annexed schedule in a way which was inconsistent with the classification that would arise if the GIRs had been properly applied.

60. For classification purposes account must be taken first of the terms of the headings and then of section or chapter notes, before the remaining GIRs came into play. The Tribunal was referred to the GIR A1, and the case of Quelle Schickedanz AG und Co v Oberfianzdirektion Frankfurt am Main [1988] ECR I-123, the Attorney General's opinion at paragraph 15.

61. It was submitted that the objective characteristics and qualities of the product described in the Regulation, and the Pre-Computer Prestige itself, were that of a basic laptop computer or a portable digital automatic data-processing machine, weighing less than 10kgs, which was capable of fulfilling the criteria set down in Note 5(A)(a) to Chapter 84 of the Combined Nomenclature and was therefore properly classified with Combined Nomenclature Code 8471 30 00 00.

62. Note 1(p) to section XVI of the Combined Nomenclature stated that the section (which includes Chapter 84) does not include articles of Chapter 95 (which includes the headings for toys and games), this does not apply to the product described in column 1 of the annex to the Regulation, since it does not readily fit within the relevant headings or subheadings of that chapter. The fact that the product was expressed to be designed for children from 9 years upwards

was not relevant to the headings in the Combined Nomenclature that could be applicable in Chapter 95 (c.f. Heading 9501 - `wheeled toys designed to be ridden by children'). The European Court of Justice had consistently held that "Regard had to be had to the requirements of legal certainty, the decisive criteria to the tariff classification of goods must be sought generally in their objective characteristics and qualities, as defined in the headings of the common Customs tariffs" (the Appellant's emphasis). The test was to see if the product in question presented the objective characteristics and properties defined in the headings or subheadings (see Hamlyn Electronics GmbH v Hauptzollamt Darmstadt [1982] ECR I-233, and Bioforce GmbH v Oberfinanzdirektion München [1993] ECR 1-45. Therefore unless the product could properly be classified according to the terms of the headings or subheadings in Chapter 95, Note 1(p) was not relevant and it should not be excluded from Chapter 84.

63. The Pre-Computer Prestige offers programming in BASIC which enabled it to be freely programmed in accordance with the requirements of the user, as required by Note 5(A)(a)(2) to Chapter 84 of the Combined Nomenclature.

64. The objective characteristics of the product described are that of a "portable digital automatic data processing machine, weighing not more than 10kgs, consisting of at least a central processing unit, a keyboard and a display" within subheading 8471 30 00. The Commission in determining the classification of the product had failed to take proper regard to the terms of this heading and had exceeded their powers in classifying the product under a different heading. By so doing the Commission materially amended the Combined Nomenclature and thus acted ultra vires. Alternatively, if , which was denied, Note 1(p) did preclude the product described in the annex to the Regulation from being classified in section XVI, then the Commission clearly failed to apply the GIRs properly when classifying the product in Chapter 95. If the product fell to be classified within Chapter 95 of the Combined Nomenclature, then prima facie it was classifiable under two headings : 9503 (toy) and 9504 (game). In that case classification must be determined in accordance with GIR rule A3 which applies when goods prima facie fall under two or more headings.

65. From the minutes it appeared that the Member States Customs experts had not agreed on the proper classification of the product. A number of different opinions were expressed between headings 9503 and 9504. This led to the inevitable conclusion that prima facie the product was classifiable under two or more headings. This meant that the Commission ought to have applied rule 3. However, the reasons given in column 3 of the annex to the Regulation suggest that this rule was not considered. It was clear from the classification that was given in the Regulation that the Commission had not had proper regard to that rule.

66. Rule 3A could not apply since neither heading was more specific than the other so as to achieve the correct classification. Rule 3B applied only where classification was not possible under rule 3A, "that is to say where there is no specific heading taking precedence over more general headings" (Appellant's emphasis). (See Hauptzollamt Hannover v Telefunken Fernseh und Rundfunk GmbH [1985] ECR 3299). There was no material or component which gave the product described in the Regulation its essential character, save perhaps electronic components which enabled the user of the machine to play games. If that were its essential characteristic, then rule 3A would lead to classification under heading 9504. However, if neither rule 3A nor rule 3B applied, then one was driven to heading 9504 which applied in accordance with rule 3C.

67. For the above reasons the Commission had failed properly to apply the GIRs and had acted ultra vires.

68. One of the reasons given in column 3 to the annex to the Regulation was that "Even though most programmes are in two-player mode and the correct answers are scored, the device cannot be regarded as a parlour game, but as an educational toy given the numerous in-built programmes for learning". The product's educational qualities could not be a reason for being driven to the classification which was selected by the Commission when proper regard was had to the terms of the headings and subheadings and the application of the GIRs.

69. It was contended that there was therefore an arguable case that the validity of the measure was in question, since the Commission had clearly failed to have regard to the GIRs which they were bound to follow, and hence the matter must be referred to the European Court of Justice.

70. With regard to the Appellant's right to bring an action before the Court of First Instance to seek the annulment of Regulation 184/2000 under article 230, it was submitted that the Appellant did not have locus standi to bring an action because the contested Regulation was not a decision of direct and individual concern to the Appellant, but was a measure of general application which applied to all. (See Weber v Commission [1996] ECR II-609, 3 CMLR 963.)

71. If, which was denied, the Appellant could have argued that if any such action was admissible, it was not obvious that it would have been admissible. In their letter of 15 February 2000 the Respondents had informed the Appellant that its right of action was before the Tribunal and not before the Court of First Instance. The Appellant was therefore not shut out from raising the question of validity of regulation 184/2000 and inviting the Tribunal to refer the question of its validity to the European Court of Justice. (See the judgment of the Court of Justice in R v Intervention Board for Agricultural Produce, ex parte Accrington Beef Co Ltd & Others {1996] ECR I-6699, [1997] 1 CMLR 675).

72. With regard to products B and C, My Little Talking Computer and The Amazing Laptop Computer, again the issue was whether the classification (9504 90 90 00) given in the BTIs dated 13 June 1997 and 16 June 2000 respectively was still valid, or whether regulation 184/2000 served to invalidate either or both of them. It was submitted that the Regulation had no application to those products and could not therefore render the BTIs invalid or require them to be revoked. The products could not be described in the same way as the device described in column 1 of the table annexed to the Regulation. The description of goods in column 1 of the table was completely different from the descriptions given to products B and C. The products differed from the device described in column 1 in that they lacked nine of the characteristics of their device. (These are set out in the Appellant's skeleton argument at paragraph 61).

73. Furthermore, the products were stated to be different from the device described in column in that they had the following additional characteristics:

1. computer generated voices, which "talk" so as to assist with game activities;
2. for smaller LCD screen; and
3. in the case of the product C, flashing LED lights to indicate right and wrong answers.

74. It was submitted that if, which was denied, the products were of the description given in column 1 to the annex to the Regulation, then it was

contended that the Regulation was invalid for the reasons given in respect of product A.

75. With regard to product D, the Talking Whiz Kid Platinum, this product's essential characteristic was that of an electronic machine programmed for playing games, although it had other functions such as printing and word processing. The games were played either against the machine or with another player. Some of the games were educational, and some were not obviously educational in nature, but were nevertheless games. Nearly all of the forty-one activities had a system of scoring, and all save for nine of the activities had scoring or two player modes.

76. The correct classification within the Combined Nomenclature was 9504 90 90 00, `other parlour game', the essential characteristic of the product being that of a game.

77. If, which was denied, the terms of heading 9504 did not provide sufficient guidance, then prima facie the product could be said to be classified under heading 9503 (toy). This would mean that GIR rule 3 applied.

78. By application of rule 3A the most specific description of the goods was provided by the terms of heading 9504 (parlour game) rather than the more general description under the terms of heading 9503 (other toys). If rule 3A did not apply because of the heading providing the most specific description (games) could not be preferred to the heading providing the more general description (toys), then rule 3B operated to classify the product under the terms of heading 9504, since the material or component which gave its essential character was that which enabled the products to be operated as an electronic machine for playing games.

79. If this could not be said to apply, then rule 3C operated to classify the product to heading 9504, being the heading which occurred last in numerical order amongst those which equally merited consideration.

80. The Appellant also relied on the HSEN to heading 9504 which stated that the heading included "video games (used with a television receiver or having a self-contained screen) and other games of skill or chance with an electronic display". Since the product undeniably incorporated mainly games of skill and chance, and it had an electronic display, the explanatory note indicated that it should be classified under heading 9504. Either Regulation 184/2000 or Regulation 981/98 applied to determine the classification of the product D, as it did not fit the description of the products described in column 1 to either Regulation. The product did not have the ability to create and execute programmes in basic, and furthermore it had an electronic voice which interacted with the player or players, which was not part of the description given in either Regulation.

81. With regard to product E, My Computer Pal, the essential characteristic of the product was that of an electronic machine for playing games of skill, albeit the skill level of a five year old child.

82. It provided up to thirty different activities which could all be categorised as games of one form or another. Most of the activities had five questions per round, with a system for scoring depending upon the game which was played. Twenty-five of the thirty activities could be played with two players. The features indicated that the product had the essential characteristic of a game, and should therefore be classified under heading 9504. It was contended that if, which was denied, the product was also prima facie classifiable under heading 9503, then

GIR rule 3 applied, for the reasons already given above, and it operated to classify the product to heading 9504.

83. The Appellant relied on the approach of the Tribunal in the earlier VTech appeal, and the HSENs to heading 9504.

84. Neither Regulation 184/2000 nor regulation 981/98 applied to classify the product under heading 9503 (toys). Product E differed from the description given in column 1 of the annexes to the Regulations in six different respects.

85. Product F, Spooky Adventures, had the objective characteristics and qualities of an article for playing games as skill, albeit with the skill of a five year old child. All of its thirty-eight activities could be categorised as games of one form or another. Most activities had five questions per round with a system for scoring, and most of the games could be played with two players. For these reasons the product should be classified under heading 9504.

86. It was contended that if, which was denied, the product was also prima facie classifiable under heading 9503, then GIR rule 3 applied for the reasons already set out above, that that rule operated to classify the product under heading 9504. Again the Appellant relied on the Tribunal decisions in the earlier VTech appeal and the HSENs to heading 9504.

87. It was contended that neither Regulation 184/2000 Regulation 981/98 applied to classify the product under heading 9503 (toys). The products differed from the description given in column 1 of the annexes to the Regulations in that it did not have the ability to create and execute games in BASIC, and it was not in the form of a laptop computer.

88. With regard to product G, Slimline MPE 342, its objective characteristics and qualities were that of a basic laptop computer, or a portable digital automatic data processing machine, weighing less than 10kgs, which was capable of fulfilling the criteria set down in Note 5(A)(a) to chapter 84 of the Combined Nomenclature, and was therefore properly classified within Combined Nomenclature Code 8471 30 00 00.

89. The Tribunal was particularly referred to the fact that the LOGO programming language enabled the Slimline to be freely programmed in accordance with the requirements of the user, as required by Note 5A(a)(2) to Chapter 84 of the Combined Nomenclature.

90. The fact that the programme and language was not as sophisticated as more advanced machines did not preclude the product from being classified within Chapter 84. (See Casio Computer Co GmbH Duetschland v Oberfinanzdirektion München [1989] ECR 63.)

91. The product could not properly be classified within Chapter 95, and therefore Note 1(p) did not apply to exclude the product from Chapter 84.

92. In the alternative if, which was denied, the terms of heading 8471 did not provide sufficient guidance, classification of the Slimline should be determined in accordance with GIR rule 3 which applied when goods prima facie fell under two or more headings.

93. Rule 3A operated to classify the product under heading 8471, since a description under that heading was the more specific heading which properly applied to the classification of the product.

94. In the alternative rule 3B applied to classify the product under heading 8471 as the essential characteristic of the product which was that of a portable computer. Further or in the alternative, rule 3C applied to classify the product under heading 9504.

95. It was submitted that neither regulation 184/2000, nor regulation 981/98, applied to classify the product, as it did not fit the description of the goods given in the annexes to the regulations. If, which was denied, the Regulations did not apply, then the Appellant contended that they were invalid for the reasons already given.

The Respondents' case

96. At the time of the Tribunal decision in the case of the Smart Start Scholar, neither Regulation 981/98 nor Regulation 184/2000 were available. The Commission issued Regulation 981/98 because it disagreed with the conclusions of the Tribunal in that case and it classified the Smart Start Premier (the successor to the Smart Start Scholar) as a toy. The Smart Start Premier was classified as an "educational toy" in contrast to a game, and it was thereby taken out of heading 9504 and properly put in heading 9503. This was done by the Commission despite the features which the Appellant says point to it being a game.

97. The Tribunal is bound by the Regulation, which is binding on all Member States.

98. The Regulations were adopted pursuant to the Commission's powers set out in Articles 9 and 10 of Council Regulations (EEC) 2658/87. Both the Commissioners and the Tribunal are bound by the Regulation, and by the terms of the reasoning set out in the Regulation which justifies the legality of the decision.

99. The Tariff and Statistical Nomenclature Miscellaneous Section of the Customs Code Committee may examine any matter referred to it by the chairman, which may arise out of its own initiative or which is brought to its attention by Member States. The Committee is composed of experts in tariff and classification from all the Member States. The Commission conducts consultations and then brings the matter before the Committee for a full discussion. The Committee votes on the proposal and if it is approved, then the Commission may adopt the proposal and make it a Regulation. This procedure had been followed in the present case.

100. The representative of the Appellant had appeared before the Tariff and Statistical Nomenclature Section (Miscellaneous) of the Customs Code Committee on 23 March 1999 to give a presentation of the Pre-Computer Prestige on behalf of the Appellant. On that occasion it was put forward that the proper classification for the product was as a game under heading 9504. It was also put forward in the alternative that it should be classified under heading 8471 as a computer. The fact that the Committee voted against those submissions and in favour of classification as a toy in heading 9503, with Regulation 184/2000 being published as a result of that vote, is binding on the Tribunal.

101. The Commissioners' power to make Regulations arises under Article 249 of the Treaty establishing the European Union. That Article provides that the Regulation shall have general application. It should be binding in its entirety and directly applicable in all Member States.

102. The Recitals to Regulation 184/2000 provide:

"This Regulation shall be binding in its entirety and directly applicable in all Member States."

The Recitals set out the background and nature of the Regulations. Recital 4 deals with Binding Tariff Informations. It provides:

"It is accepted that a Binding Tariff Information issued by the Customs authorities of Member States in respect of the classification of goods in the Combined Nomenclature and which does not conform to the provisions of this Regulation can continue to be invoked under the provisions of Article 12(6) of the Council Regulation (EEC) No.2913/92 of 12 October 1992 establishing the Community Customs Code, as last amended by European Parliament and Council Regulation (EC) No.955/199, for a period of three months by the holder."

It was therefore implicit that after that date BTIs could not be relied upon if they did not conform to the provision of the Regulations.

103. It was submitted that it was also clear from the above that a Regulation was intended to apply more widely than to the specific article with which it was directly concerned. It was clearly intended to provide guidance in relation to other articles which were sufficiently similar.

104. While strictly a Regulation was binding only in relation to the particular item considered by the Committee, binding status existed whether the Regulation was adopted unanimously or by a majority of the Committee, and if it was approved by the Committee and then adopted by the Commission with the status of a Regulation, then it was of binding effect. Whilst strictly only binding in respect of the particular article it concerns (in the case of 184/2000 that was the Pre-Computer Prestige) it was highly persuasive in relation to other similar articles.

105. This was in order to achieve legal certainty for taxpayers in giving BTIs based on the Regulation itself. Difficulties would arise owing to the lack of certainty regarded classification of sufficiently similar products if the Commissioners did not adopt such an approach.

106. The Tribunal was therefore invited to consider all the products on the basis that unless there were features which existed in relation to all the products except product G, then the Tribunal was in effect bound by Regulation 184/2000.

107. It was acknowledged that some of the products were more sophisticated than those considered by the Committee, but there was no obligation for the CNs to be amended every time there was an advance in technology. The Tribunal was referred to the case of Casio Computer Co GmbH Deutchland v Oberfinanzdirektion München [1989] ECR 63.

108. In the present case the trader had given wrong information to the Committee in that it had told the Committee that the Pre-Computer Prestige did not have its own operating system, and it would therefore not be freely

programmable. The Appellant could not rely on his own inaccuracy having made a presentation to the Committee, it would be unjustified to allow legal procedures to be prolonged if a trader could say a Regulation was invalid because of the wrong information which he himself had given.

109. It was further submitted that the evidence from Mr Mayne was that there were four different types of operating system, and that the operating system in the Pre-Computer Prestige was a single user single task system. The Committee in its reasoning meant that the Pre-Computer Prestige did not have an operating system like the one in Windows, because the operating system was not multi-tasking. There is no reason for attributing to the phrase "operating system" a broad interpretation, the Tribunal must bear in mind the context. It was only by interpreting it in this way that sense could be made of what VTech itself had said at the presentation, and there could be no question but that the Regulation applied to the Pre-Computer Prestige and the revocation of the BTI was correct.

110. Alternatively, it was submitted that the Regulation may still apply even if the above analysis was not correct because the only mismatch with the Pre-Computer Prestige and the product in the Regulation was the lack of an operating system. The product was sufficiently similar to the product classified to come within that classification.

111. If the Tribunal does not accept this argument, then there still remains the question of whether the Pre-Computer Prestige can be classified to 9503. The reasoning of the Committee excludes it from being classified to that heading. The operating system is only important if it is indicative of a different heading. The presence of the operating system and BASIC do justify being classified in 8471, but that heading was specifically submitted to the Committee and the Committee excluded it by reference to Note 1(p).

112. The Computer Section Notes say that it should not be in this section if it is in another section. The Committee concluded that educational learning is a toy, so the item must be ruled out of 8471.

113. The only proper way that the classification of the Pre-Computer Prestige can be challenged by the Appellant is to say that the Regulation is invalid. The Tribunal can look at the Regulation and say whether or not it is satisfied that it is valid. The Committee in accordance with HSEN puts educational toys in 9503, and this accords with other sub-paragraphs of the HSEN, items of limited capacity are toys, so there is no manifest error such as ignoring a section note or the GIRs. The Tribunal itself does not have the power to declare a Regulation invalid, and before referring to the European Court it must be satisfied that the issue is one of real substance.

114. With regard to the question of whether the Appellant has sufficient standing to challenge the disputed Regulation under Article 230, the test is whether or not the Regulation is a decision of direct and individual concern to the Appellant. It was submitted that even though the form of the Regulation was such as to give it general applicability, it was settled law that such a measure can nevertheless be challenged by a party if that party is able to show that the contested provision is an individual and direct concern to it. The Tribunal was referred to the case of Cordoniu SA v Council of the European Union, Case C-309/89 [1994] ECR 1-1853. In the present case the contested provision was adopted on the basis of VTech's application, it was not applicable to toys in general. The Appellant's economic interest are directly affected by the Regulation, there is no evidence of

other importers of products after the Regulation was promulgated being affected by it.

115. The Tribunal was referred to the case of Extramet Industries SA v Council of the European Communities Case C/358/89 [1991] ECR 1-2501, for the proposition that where a trader is concerned with the preliminary measures, then its clearly of individual concern to him and he must have standing therefore. The Tribunal was also referred to the case of the Timex Corporation, Case 264/82, and Sinochem Heilongjiang Case T-161/94, and Plauman & Co Case 25/62 [1962] ECR 95. The Tribunal was also referred to the case of NV International Fruit Company v Commission of the European Communities [1971] ECR 411 in which it was stated as follows:

"A community measure, in relation to which the only duty of national authorities is to collect data in order that the community may adopt it, and subsequently to take the national measures needed to give effect to its legal system, is of direct and individual concern within the meaning of the second paragraph of Article 173 of the EEC Treaty to the parties in question."

116. The consequence to the Appellant is that the time limit for instituting proceedings laid down by Article 230 runs from 27 January 2000, with ten days extra allowed to UK applicants, leaving 22 April 2000 as the expiry date. The Appellant had not taken proceedings within that time and therefore he was time barred. It was not the responsibility of the Respondents to advise the Appellant as to his right in European law to make a direct challenge.

117. It was not accepted that the present case was comparable to that of Weber, relied on by the Appellant; that case should be distinguished in that in the present case the Regulation was of direct reference to the individual producer. There is no doubt in the present case that the Appellant has standing. Similarly the Appellant relied on the Intervention Board case but again that can be distinguished in that a reference under Article 230 (previously article 173) was available to the Appellant.

118. Furthermore, if the Tribunal concluded that the Regulation did apply to the Pre-Computer Prestige, then the Regulation would be binding against the Appellant and no reference could be made because it would be shown to be of direct and individual concern to the Appellant. By the same process of reasoning no reference is justified for the other products because of the lack of objection within the time limits.

119. For the other products to succeed it must be found that are material differences between them and the product in the Regulation. It must also be decided if it is proper to put them under another heading. Logically the reasons for them not going within this heading must be supportive of their going within another heading.

120. The case of Quelle Schickedanz was to be distinguished in that it was based entirely on its own facts. In that case on a plain reading of the note the ambit had been extended, whereas here the opposite was the case. Note 1(p) was not extended to cover articles it would not otherwise cover. In that case it was not disputed goods could come under two or more headings, whereas in the present case only the Chapter and Section notes were used so there was no need to go to Rule 3 because it was accepted that there was no overlap between the two headings. Furthermore there should be no reference because, unless it can be argued that the Regulation amends the text of the CN, the Committee has a

broad discretion to determine its content (see the case of France v the Commission [1995] ECR 1-4845).

121. It was not open to the Appellant to argue that the Regulation amended the CN on the basis that the Pre-Computer Prestige was a computer within 8471 because Section Note 1(p) specifically excludes computers from 8471 if they are also toys. It was not unlawful to say these products fall within Chapter 95. The reference in the Regulation to 8471 shows the Commission thought that was a possible heading. The Appellant in his skeleton argument has failed to explain why Note 1(p) is not applicable. The Appellant argued that the product falls within the definition in Note 5(A), so therefore it must be within 84. This analysis is wrong : one should only go to Note 1(p) if the product can fall in 84, but then Note 1(p) serves to exclude the product from 84 before of Chapter 95.

122. It was argued that the Commission was obliged to apply Rule 3 because it was plainly either a game or toy, and therefore both 9504 and 9503 are in contention, so one must then go to Rule 3. This analysis was wrong because only GIR 1 need be used to classify products, there is an HSEN classifying educational toys in 9503, which, whilst it is not legally binding, is a valuable aid to interpretation. The purpose of the HSEN is to help apply the GIR 1, to determine that the Article is within a particular heading.

123. The Appellant contended that the products are dissimilar to toy chemistry sets etc, the Respondents did not accept this. It was submitted that "toy" is used as a prefix to distinguish an item from the real thing, toys having limited use and limited capabilities. Toy sewing machines do share features with the "proper" version, as do the products here. It was recognised that "toy" and "game" in ordinary usage have an overlap, but this was not possible within the tariff system so the Notes are applied in order to direct products one way or the other. In the present case the Committee did not ignore the ENs but applied the relevant EN.

124. It was wrong for the Appellant to say that the Committee ignored both the scoring system and that the machine operated in a two-player mode. The Regulation specifically referred to the fact of scoring and a two-player mode, and to the product having game characteristics, but said nevertheless that the product was an educational toy. The Appellant submitted that the Committee, had it considered Rule 3, would have been driven to Rule 3(c) and therefore the product should be classified within 9504. The Respondents submitted that, if the Committee had thought it necessary to apply Rule 3, they would have been driven to Rule 3(b) and would have classified the product as a toy because they found the essential character was that of a toy not a game It was clear from the reasoning that the Committee's view was that the essential character of the product was that of a toy.

125. It was not appropriate for the Appellant to argue that because there were different opinions expressed it was wrong to classify the Pre-Computer Prestige to 9503. The purpose of the Committee was to resolve disputes, and those Member States arguing for another heading could be wrong.

126. Mr Thomas produced a chart for the Tribunal setting out the description of the products in Regulation 981/98 and Regulation 184/2000 with the characteristics or lack of them marked for the products B-G. It was submitted that none of the products was sufficiently different to take them outside the Regulation. The differences must be material for classification purposes. It was submitted that if the Tribunal took the view that the Committee had been too restrictive, then its only course was to refer the validity of the Regulation, it was

not right for the Tribunal itself to classify the products as a game. The only option was for the Tribunal to take issue with the Regulation on legal grounds.

127. Furthermore if the products are found to come within the reasoning of the Committee, then such differences as there are are not material.

128. Product G, the Slimline MPE 342, was programmable, but was excluded by virtue of Note 1(p).

129. Finally it was submitted that the Appellant's objectives were educational, their literature was redolent of this and Mr Evans had said the games and the scoring enhance the educational aspects of the toys.

130. With regard to products E and B, although the products are not in `laptop' style, both are in the style of a computer and it was not a material difference because they were model computers. Finally the mere fact that the games were games of skill and chance was not outside the Committee's reasoning, because if a skill is exercised in pursuit of a learning activity, it is still a toy under the Regulation. The mere fact that a game requires skill is not sufficient to take it out of 9503.

Reasons for decision

131. With regard to the question of the Appellant's ability to challenge Regulation 184/2000, we accept the arguments of the Respondents that the Appellant did have a direct and individual concern and could therefore have challenged the Regulation under Article 230. In this regard we do not consider it to be open to the Appellant to rely on any inaccuracy in the information which the Appellant itself supplied to the Commission. The very fact that it had provided inaccurate information made it all the more incumbent upon the Appellant to take the step which was open to it in a timely fashion.

132. The time limit for challenging the Regulation under Article 230 having expired, we find that it is not open to the Appellant to challenge the implementation of the Regulation in proceedings before this Tribunal. There would be no purpose in the time limits set out in Article 230 if persons with an individual concern are nonetheless able to question the lawfulness of the measure by taking proceedings before the national court.

133. Regulation 184/2000 does not refer specifically to the Pre-Computer Prestige. We do not accept the Respondents' argument that some different form of operating system was intended by the Commission when they made the Regulation. It is clear that the Commission was informed by the Appellant that there was no operating system in the Pre-Computer Prestige and that was the basis for them stating that there was none there was no detailed consideration of different types of operating system. We have taken careful note of the characteristics of the Pre-Computer Prestige and we find that by virtue of its having an operating system it is fundamentally different from the product described in Regulation 184/2000. Albeit the misdescription was occasioned by the Appellant himself, the Tribunal has no equitable jurisdiction such as would allow it to prevent the Appellant from relying upon its own error where consideration of a product's proper classification. We must take the description of the product in Regulation as it stands, consider the reasoning of the Commission and see whether the Pre-Computer Prestige is sufficiently similar to that description to come within the Regulation.

134. We consider that the fact of the Committee's being of the opinion that the Pre-Computer Prestige did not have an operating system was critical to the product being classified as an educational toy. We derive this from the summary of conclusions of the Committee set out at paragraph … above. It follows that that characteristic was a major element in the product described in Regulation 184/2000, and therefore we do not consider that the Pre-Computer Prestige can properly be classified to Regulation 184/2000.

135. Having determined that the Pre-Computer Prestige does not come within Regulation 184/2000, we now consider where it should be classified.

136. The Committee was considering whether or not the Pre-Computer Prestige could come within Chapter 84 because of the process of reasoning by which they excluded it from 84, namely its absence of an operating system and its not being freely programmable, classification within Chapter 95 was favoured, and in particular it was considered that the fixed learning/educational programmes gave the Pre-Computer Prestige its essential character.

137. We consider that the Pre-Computer Prestige should properly be classified to 8471 30 00. It is a digital machine capable of:

1. Storing the processing programme or programmes and at least the data immediately necessary for the execution of the programme;

2. Being freely programmed in accordance with the requirements of the user;

3. Performing arithmetical computations specified by the user; and

4. Executing, without human intervention, a processing programme which requires them to modify their execution, by logical decision during the processing run.

It is portable, weighing not more than ten kilograms, and it consists of at least a central processing unit, a keyboard and a display.

138. It is specifically stated in the Chapter Notes by Note 1(p) that articles of Chapter 95 are not covered in this heading. We do not consider it is appropriate to classify product A under Chapter 95 because we consider it inappropriate to classify such a sophisticated device as a toy for the following reasons.

139. We accept the reasoning set out by Mr Mayn in his report on page 70-76 showing that product A qualifies as a digital machine. In addition we were handed printouts of five programmes that illustrated how sophisticated programmes can be devolved by the user using the programming language BASIC, thus confirming that the Pre-Computer Prestige is a computer.

140. Furthermore, we find that the Pre-Computer Prestige cannot properly be classified within Chapter 95 as either a toy or a game because it has all the characteristics of a computer in that it is programmable, you can develop and run programmes on it using BASIC, it is possible to use a printer with it and also to use a modem. In other words it has all the functions of a computer and is too sophisticated to come within the "toy" category. The fact that children can use it does not in our view preclude it from being a computer, nor does the fact that it is marketed as being suitable for nine year olds and upwards. We find the basic

characteristic of the Pre-Computer Prestige is that it is a computer, and properly classifiable within Chapter 84.

141. We do not accept the Appellant's arguments that the Committee did not have proper regard to the GIRs. The lack of an operating system in our view in the description of the product in the Regulation properly excludes it from Chapter 84 of the Combined Nomenclature, which was the very reason given by the Committee for classifying the Pre-Computer Prestige (which at the time they thought did not have an operating system) within Chapter 95.

142. We consider that the product described in column 1 to the Regulation does properly fit within the relevant headings and sub-headings of Chapter 95. That product, unlike the Pre-Computer Prestige proper, is therefore excluded from Chapter 84 by Note 1(p) to Section XVI of the Combined Nomenclature.

143. We have looked at the objective characteristics of the products B, C, D and F and, although they have some features which are characteristic of games and others which are characteristic of toys, we do not consider that they are markedly different from the product described in Regulation 184/2000. They all contained the elements of learning which are the basis of the reasons given for the classification. Under the reason column it is stated:

"Even though most programmes are in a two-player mode and the correct answers are scored, the device cannot be regarded as a parlour game, but as an educational toy given the numerous in-house built programmes for learning."

Product B, My Little Talking Computer, is not in two-player mode and does not have a connection for a mouse. It does not have a facility for additional cartridges and in the absence of these items its more salient characteristic is that of a toy."

144. The Amazing Laptop Computer has facilities for arithmetic and language skills, albeit it lacks the reading and written exercises common to the other products, it nonetheless is described in the literature which accompanies it in the following terms:

"IQ Builders Electronic Learning Toys aim to help you take advantage of the early years of your child's development. During their crucial first activities, children develop physical, mental and emotional skills, and just as importantly an attitude to learning itself. Parents can help their children throughout this important phase by letting IQ Builders guide them from basic to more advanced skills in a relaxed self-driven play environment."

145. My Little Talking Computer is described in the literature as being "filled with fun learning for pre-school children … the friendly voiced, cheerful melodies, exciting animation and sound effects enhance learning value."

146. The Users' Manual for the Talking Whiz Kid Platinum describes it as "A talking, electronic learning aid … offers a wide range of exciting and educational activities for fun learning".

147. My Computer Pal is not a laptop computer style, however it has the appearance of a computer and the other characteristics, namely a keyboard and an LCD Display, and we therefore consider that the fact that it is in a different, fixed style, is not sufficient to take it out of the classification.

148. Spooky Adventures lacks the reading facility, but does contain written exercises and arithmetic, and the note in front of the manual states:

"VTech, the number one in electronic learning, is committed to providing superior educational learning products. All VTech products incorporate advanced technologies and age appropriate curriculum to encourage children of all ages with the necessary foundations for learning.

When it comes to providing interactive products which teach and entertain children, VTech is the answer."

149. All the products B to F have characteristics of a game as well as those of a toy, however we accept the Respondents' argument that the fundamental and overriding characteristic is that of an educational toy, as indeed is the clear intention of VTech in the

way they promote these articles. In the case of Venor SI GmbH v Hauptzollamt Emmerich [1997] 1-6415, a case which concerned classification of garments which were to be worn as nightwear, the court in its judgment at paragraph 21 stated as follows:

"Finally, it remains to point out that it is, in any event, for the national court, within the context of the dispute before it, to determine, in the light of the cut of the garments, their composition and presentation, and developments in fashion within the Member State concerned, whether these garments do have such objective characteristics or whether, on the contrary, they may be worn equally in bed and elsewhere."

150. In the present case we consider that we are entitled to take account of the presentation of these items which is clearly as educational toys.

151. With regard therefore to products B-F we find that, although they have some of the characteristics of games, their salient characteristic is that of educational toys, and they are properly classified within 9503.

152. With regard to product G, the Slimline MPE 342, we consider that, as with product A, the fact that it does have an operating system and is freely programmable makes its salient characteristic that of a computer. We consider that it is an ADP machine and is more properly to be classified under 84. On behalf of the Respondents the point was made that LOGO is restrictive, however we accept the Appellant's argument that it is possible to develop programmes in LOGO, which therefore mean that it is programmable. As with product A, we prefer Mr Mayne's evidence to that of Mr Walmsley.

153. It should be stated that we find that although all the machines presented to us have game - like facilities, we find in respect of products A and G that their main characteristic is that of a computer, and with products B-F that their main characteristic is that of an educational toy, and we do not find that any of the products could equally well be classified under 9504 on the basis of their objective characteristics, such that Rule 3 of the General Rules of Interpretation of the Combined Nomenclature apply.

154. However if we are wrong in this, then we do not find that heading 9504 provides a more specific description of any of the products concerned. As stated above, we find that the essential characteristics of products A and G are that of a

computer, and the essential characteristics of products B-F are that of educational toys.

155. The appeal is allowed in part. Appeal number LON/2000/7031 is allowed, appeal number LON/2001/7032 is allowed in part, and appeal numbers LON/2000/7054 and LON/2000/7077 are dismissed.

156. No order for costs.

157. Liberty to apply.

MISS J C GORT
CHAIRMAN

RELEASED:

LON/00/7031-VTEC.GORT