Neutral Citation Number: [2020] EWCA Civ 243

Case No: A3/2018/2938

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL TAX AND CHANCERY CHAMBERS
Mr Justice Birss and Judge Roger Berner
[2018] UKUT 305 (TCC), 2018 WL 04685885

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 February 2020

Before :

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
LORD JUSTICE ARNOLD

- -

Between :

(1) INVAMED GROUP LIMITED
(2) INVACARE UK LIMITED
(3) DAYS HEALTHCARE LIMITED
(4) ELECTRIC MOBILITY EURO LIMITED
(5) MEDICARE TECHNOLOGY LIMITED
(6) SUNRISE MEDICAL LIMITED **Appellants**

- and -

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS **Respondents**

- -
- -

Andrew Hitchmough QC and **Jeremy White** (instructed by **Fieldfisher LLP**) for the **Appellants**
Kieron Beal QC and **Simon Pritchard** (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing dates : 21-22 January 2020

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Approved Judgment

Lord Justice Patten :

1. This appeal concerns the correct customs classification for a number of different models of electric mobility scooters which were imported into the UK between 2004 and 2007. A complete list of the different models is set out as Annex A to the decision of the Upper Tribunal Tax and Chancery Chamber ("Upper Tribunal") (Birss J and Judge Roger Berner) which was released on 29 September 2018 and which allowed an appeal by HM Revenue and Customs ("HMRC") against the earlier decision of the First-tier Tribunal ("FtT") (Judge Charles Hellier and Mrs Ruth Watts Davies) in favour of the importer companies: see [2016] UKFTT 0775 (TC), 2016 WL 07048508.

2. For the reasons which I will come to, the FtT issued two decisions in this case interrupted by a reference to the CJEU. In [45]-[53] of its first decision released on 13 November 2014 following a 10-day hearing in July 2014 (see: [2015] UKFTT 113 (TC)), the FtT set out a description of the electric scooters that are the subject of these appeals. These findings are not controversial and, for convenience, I set them out here:

> "45. The Appellants produced tables describing certain features of the scooters relevant to the appeals. We accept that the contents of those tables (which appeared at Tab 9 of the Authorities Bundle 4) were accurate.
>
> 46. The tables group the scooters into three broad classes: small, medium and large. The physical examples of the scooters we examined represented those classes.
>
> 47. The scooters were driven by battery powered electric motors. Each type of scooter had: a seat for one person (which was larger and more luxuriously padded in the larger scooters), a tiller with a wig wag, a platform connecting the front and back wheels on which to mount to the scooter and on which the feet could be kept during a journey, and either four wheels (two driven wheels at the back and two at the front) or three wheels (two at the back and one at the front). Most seats had moveable adjustable armrests and many seats could be raised and lowered and swivel through 360 degrees. Most of the smaller scooters could be disassembled into moderately light units for easier transport.
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> 48. At the back of almost all the scooters were two small freewheeling "anti-tipping" wheels, which, if the scooter tipped backwards engaged with the ground and would cause the scooter to roll backwards rather than to tip over backwards
>
> 49. Some of the typical ranges of measurement for the scooters in each class were:

	Small	**Medium**	**Large**
Length	90–105cm (~3'4")	110–130cm (~4 ft)	125–160cm (~4'8")

Width	50–55cm (~1'8")	53–60cm (1'9")	60–68cm (2'1")
Wheel diameter	20cm (~8")	25cm (~10")	30–40cm (~14")
Ground clearance	10cm (4")	12cm (~5")	15 -20 cm (~6'-7')
Range	8–12 miles	20–30 miles	20–40 miles
Turning Circle	90–110 cm(~3'3")	110–115 cm (~3'6")	120–180 cm (~5ft)

50. The scooters had devices which served to limit their maximum speeds. Such limitation was to 4 mph (6.43 km/h) for the small and medium scooters and 8 mph (12.87 km/h) for the larger scooters (with a control to change that limitation to 4 mph). These limitations appear to be incorporated to benefit from certain exemptions from the provisions of the UK Road Traffic Acts which applied when such a scooter was driven by a disabled person (as defined in the relevant provision) – see below. There was no evidence that they provided any other benefit or advantage to any possible user.

51. Independent use of a Scooter would be possible only if the user had some ability independently to get on and off the vehicle; the same is true of powered wheelchairs. A person without the ability to mount either independently could be helped to do so. Scooters may be used generally outside. Powered wheelchairs will, because of their even tighter turning circle, be easier to use inside and in more confined spaces. Powered wheelchairs on the other hand may, having smaller wheels, have difficulties with kerbs.

52. The physical characteristics of the scooters were such that we would have been able to use them to drive around the Courtroom, but there would have been some awkward corners; and no doubt we would have disturbed some papers — particularly had we been driving the larger scooters. It would have been faster and easier on foot. All were suitable for use outside or on pavements.

53. The comments in the preceding paragraph also apply to the powered wheelchair, but we would have felt more embarrassed using it."

3. The comparison in [51] between the scooters and what are described as powered wheelchairs is something which I shall return to when considering some of the explanatory notes relevant to the customs classification. But, for the moment, it is only necessary to observe that all of the scooters, although differing in size, have the same basic design features described by the FtT and it is common ground that they must all share whatever is the appropriate customs classification.

4. The customs classification for goods imported from outside the EC is based on the Combined Nomenclature ("CN") adopted under Article 1 of EC Regulation 2658/1987 ("the Tariff Regulation"). The CN is derived from the World Customs Organisation's harmonised system of commodity nomenclature as laid down by the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the EU is a party.

5. A convenient summary of the legal structure of these arrangements is set out in the judgment of Lawrence Collins J in *VTech Electronics (UK) plc v Customs and Excise Commissioners* [2003] EWHC 59 (Ch) at [6]-[12] as follows:

> "[6] The Common Customs Tariff came into existence in 1968. By art 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.
>
> [7] The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature ("CN") established by art 1 of Council reg 2658/1987. The CN is established on the basis of the World Customs Organisation's Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party.
>
> [8] 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". The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.
>
> [9] The CN, originally in Annex I to reg 2658/87, is re-issued annually: the version applicable to the present case is Annex I to reg 2204/99 (12.10.99 OJ L278). The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature ("CN subheadings"); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

> [10] The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are "00" and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.
>
> [11] There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System ("HSENs"). The Community has also adopted Explanatory Notes to the CN (pursuant to art 9(1)(a) of Council reg 2658/87), known as CNENs.
>
> [12] Binding Tariff Information is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council reg 2913/92/EEC) on request from a trader. They are called "BTIs", and such information is binding on the authorities in respect of the tariff classification of goods. The BTIs issued in this matter were the subject of the appeal to the Tribunal in the present case."

6. In the present case, the competing headings under the CN are:

> "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.
>
> 8713: carriages for disabled persons, whether or not motorised or otherwise mechanically propelled."

7. Each of 8703 and 8713 contains a number of sub-headings. These include 8703 10 which is:

> "vehicles specially designed for travelling on snow; golf carts and similar vehicles."

8. There are further sub-headings in 8703 which differentiate vehicles with internal combustion engines from those which use other means of propulsion and the latter sub-heading (8703 90) contains a further sub-division between vehicles with electric motors and those which use other forms of power.

9. Heading 8713 is divided into 8713 10 (those not mechanically propelled) and 8713 90 (other) but contains no further sub-divisions.

10. These headings and sub-headings in the CN and the provisions of the Tariff Regulation form the basis of what is described in Article 2 of the Regulation as an Integrated Tariff of the European Communities (referred to as "the Taric") which must be applied by the Commission and Member States to the importation of goods from outside the EC. The Commission is obliged to update the Taric and is required by means of a regulation

passed each year to produce a revised version of the complete CN together with the relevant rates of duty: see Article 12. The version applicable as at 1 January 2004 was Commission Regulation (EC) No. 1789/2003 of 11 September 2003 under which the rate of duty applicable to vehicles falling within most of the sub-headings under 8703 was 10 per cent. By contrast, vehicles within 8713 may be imported free of duty.

11. Section 1 of the Annex to the Tariff Regulation contains some general rules for the interpretation of the CN ("GIRs"). For present purposes, I need refer only to Rules 1, 3 and 6 which state as follows:

> "1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
>
> …
>
> 3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
>
> (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;
>
> (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far 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.
>
> …
>
> 6. For legal purposes, the classification of goods in the subheadings of a 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 at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

12. Some further guidance as to the interpretation of the relevant headings is, however, provided by explanatory notes produced by the Harmonised System Committee of the World Customs Organisation ("WCO") which conducts a rolling review of the Harmonised System and makes proposals for amendments by its Council. These are referred to as "HSENs". Explanatory notes ("CNENs") are also produced and adopted by the EU pursuant to Article 9(1)(a) of the Tariff Regulation. The CJEU has held that explanatory notes are an "important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force": see *Invamed Group Ltd v Revenue and Customs Commissioners* (Case C-198/15) (2016) ECLI:EU:C:2016:362 ("*Invamed*"). It follows from this that such explanatory notes must also be consistent with the provisions of the CN and cannot alter their scope: see *Intermodal Transports BV v Staatssecretaris van Financiën* Case C-495/03: [2005] ECRI- 08151.

13. The HSEN for heading 8703 (in its 2007 edition) states that the heading includes lightweight, three-wheeled vehicles 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."

14. Heading 8713 is stated in the HSEN to cover carriages, wheelchairs or similar vehicles "specially designed for the transport of disabled persons" but does not include normal vehicles (such as a motorcar) adapted for use by the disabled.

15. The focus on vehicles within 8703 having a centrally located steering column or tiller reflects what is said in the most recent CNEN relating to heading 8713. This was issued with effect from 4 January 2005 in the following terms:

> "Motorised vehicles specifically designed for disabled persons are distinguishable from vehicles of heading 8703 mainly because they have:
>
> – a maximum speed of 10 km per hour, i.e. a fast walking pace;
>
> – a maximum width of 80 cm;
>
> – 2 sets of wheels touching the ground;
>
> – special features to alleviate the disability (for example, footrests for stabilising the legs).
>
> Such vehicles may have:

– an additional set of wheels (anti-tips);

– steering and other controls (for example, a joystick) that are easy to manipulate; such controls are usually attached to one of the armrests; they are never in the form of a separate, adjustable steering column.

This subheading includes electrically-driven vehicles similar to wheelchairs which are only for the transport of disabled people. They can have the following appearance:

However, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this subheading. They can have the following appearance and are classified in heading 8703:

,"

16. The mobility scooters under consideration on this appeal are all fitted with a separate, adjustable, steering column or tiller similar to the one illustrated in the second photograph. By way of contrast, the electrically-driven wheelchairs illustrated by the first of the two photographs have different controls usually consisting of a joystick or something similar attached to an armrest. They are therefore suitable and intended for use by persons whose disabilities are not limited to an inability to walk but may include difficulties manipulating a more traditional form of steering column.

17. The 2005 CNEN resulted from a request made by the German delegation at a meeting of the Customs Code Committee Tariff and Statistical Nomenclature Sector in September 2003 that clarification should be provided by way of explanatory notes to resolve difficulties that had arisen in relation to the classification of electric mobility scooters. There is some indication of different views as to whether mobility scooters of the kind we are concerned with should be classified with electric wheelchairs under

heading 8713 or treated as falling under heading 8703 along with vehicles such as golf carts. Mobility scooters and golf carts were said to have the common feature of a centrally located, separate steering column unlike the controls of an electric wheelchair described earlier.

18. In January 2004 the Committee received a presentation from Pride Mobility Products Corp ("Pride Mobility") (a manufacturer of mobility scooters) which included a detailed description of scooters and their intended use which Pride Mobility said formed a valid criterion for the tariff classification of the scooters under heading 8713:

> "From the above-mentioned Heading 8713, it is clear that the very wording of this Heading refers to a criterion of intended use. Indeed, the Heading refers to "carriages for disabled persons". Moreover, this is confirmed by the first paragraph of the HSEN to Heading 8713, which explicitly states that the Heading applied to "carriages specially designed for the transport of disabled persons".
>
> Furthermore, the mere circumstance that the scooters may also be used for other purposes (i.e. such as recreational purposes), does not exclude their classification under Heading 8713. First, when a product has different uses, classification should take place according to its main intended use[1]. Secondly, the use for recreational purposes is not incompatible with the scooters' intended use by disabled people. On the contrary, the use of the scooter will allow disabled people to participate in recreational activities that would be otherwise denied to them. Therefore, the aim of these scooters is to allow disabled people to participate in daily life activities, such as for example fishing or use of recreational paths."

19. At their meeting held in February 2004 these submissions were rejected. The note of the meeting records that the Committee considered that "having a mobility problem is not the same as being 'disabled'" and that the scooters could not therefore be said to have "special features for disabled people". They proposed that the criteria for inclusion under heading 8713 should include "steering and other controls for easy manipulation": an indication that in their view the disabled persons contemplated by heading 8713 were those who would have difficulty not only in moving about but also in the manual control of the vehicle.

20. The provisions of the Tariff Regulation are supplemented by Council Regulation (EEC) No. 2913/92 of 12 October 1992 which established the Community Customs Code ("CCC"). Article 12 empowers customs authorities in the member states to issue binding tariff information ("BTI") classifying particular goods as within one of the specific headings. A BTI will, however, cease to be valid if it is no longer compatible with the interpretation of one of the CN headings produced by an amendment to a relevant CNEN or by a judgment of the CJEU. This confirms the function of an explanatory note such as a CNEN as an aid to construction, although it does not, of course, impinge on the general principle that the function of explanatory notes is to

[1] See Case C-395/93 *Neckermann Versand*, [1994] ECR I-4027, at paras. 13-15

assist in the construction of a CN heading but cannot be used to expand its scope or meaning.

21. In the present case there are no relevant UK BTIs to consider but in August 2009 the EU Commission produced a regulation (EC No 718/2009) which classified mobility scooters of the type under consideration on this appeal under CN heading 8703. The regulation explains the reason for the classification of the scooters under 8703 rather than 8713 in the following terms:

> "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."

22. This adopts the approach taken in the HSEN and CNEN relating to 8713 which I set out earlier. The Commission's power under Article 9 of the Tariff Regulation to promulgate measures of this kind is exercised when the correct customs classification of particular goods has been the subject of dispute or possible difference in interpretation as between the customs authorities of different member states. 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. But Mr Beal QC for HMRC contends that it remains relevant as confirmation of a general and consistent treatment of mobility scooters as vehicles falling within heading 8703.

23. The immediate background to the making of the regulation was a decision by the Customs Chamber of the Court of Appeal in Amsterdam that mobility scooters manufactured by Pride Mobility should be classified under heading 8713. All of the relevant mobility scooters incorporated an adjustable steering column of the same type and design as that referred to in Pride Mobility's submissions to the Customs Code Committee prior to the issue of the 2005 CNEN and this and the 2007 HSEN were referred to at the hearing in the Court of Appeal.

24. Pride Mobility contended that the word "disabled" in heading 8713 should be interpreted in a broad sense and that judged by their objective characteristics, the scooters were specifically designed for the transport of disabled persons in the sense of those who had difficulty walking. Neither the CNEN nor the HSEN should, they submitted, be applied to the goods concerned because the effect of the explanatory notes, in particular the CNEN, was to modify the scope of headings 8713 and 8703. The focus of Pride Mobility's challenge was therefore on who should be regarded as disabled for the purposes of heading 8713.

25. The Customs Chamber held that the scooters did have "the objective characteristic to be used specifically by disabled persons" and satisfied the criteria set out for classification under heading 8713. The explanatory notes could not on established principles, the Court said, be used to impair the wording of the heading.

26. Faced therefore with a potential divergence of views between member states about the correct classification of the scooters, the Customs Code Committee met in July 2009 and approved the regulation and two illustrative photographs similar to those which appear in the CNEN. The regulation was published on 4 August 2009.

27. Against this background I can now turn to the two decisions of the CJEU which have considered the correct customs classification of electric mobility scooters of the type in question. The first is *Lecson Elextromobile*, C-12/10, EU:C:2010:823 ("*Lecson*").

28. This was a reference by the Finanzgericht Düsseldorf for a preliminary ruling about the interpretation of headings 8703 and 8713 in relation to both three and four wheeled electric mobility scooters designed (as in this case) for the transport of a single person. The customs declarations for the goods described the scooters as "wheelchairs and other vehicles for the disabled, electric mobility scooters" and classified them under heading 8713.

29. The description of the scooters in the order for reference by the Düsseldorf court indicated that they had a centrally mounted steering column equipped with components for driving and braking and were otherwise similar to the mobility scooters illustrated in the second photograph in the 2005 CNEN. They were treated by the customs authorities as falling within heading 8703 (and not 8713) on the basis that they could not be said to have been specially designed or built for the transportation of handicapped people. The position of the customs authorities (as summarised in the reference) was that:

> "… it is required in the notes on item 8713 01.1 for classification under 8713 that by their nature the vehicles should be specially designed for the transportation of handicapped people. In this interpretation it is assumed that there is fitted a special provision specifically designed for handicapped people which is lacking in the imported vehicles.
>
> When special fittings have to be provided, in terms of the concept of handicapped people on which item 8713 is based, reference has to be made to a handicap that extends somewhat beyond the problems of mobility."

30. The German customs authorities had therefore adopted both the test under heading 8713 that vehicles should be specifically designed for the transport of disabled persons and its application in conformity with the approach set out in the relevant HSEN and CNEN. For this purpose reliance was placed on Regulation No. 718/2009/EC as confirming the correctness of this approach although, as in this case, the regulation post-dated the imports. The referring court took account of the fact that the mobility scooters were predominately but not exclusively used by disabled people but was inclined to the view that, consistently with the explanatory notes and the regulation, the scooters could not be said to have been specifically designed for such users. In the light, however, of the

different view taken by the Court of Appeal in Amsterdam the matter was referred to the CJEU. The sole question for the CJEU was whether the scooters were included in heading 8713 or 8703.

31. The CJEU produced a judgment without an Opinion from the Advocate General. The judgment sets out the provisions of the relevant CN headings; the text of the CNEN; and the difference in view between the referring court and the Court of Appeal in Amsterdam. It then recites what is described as the settled case law, namely that 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"; and that the explanatory notes are an important aid to interpretation but do not have legally binding force. The court then says:

> "18. Here, it is apparent from the wording of headings 8703 and 8713 of the CN themselves that the difference between them results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons.
>
> 19. Furthermore, it is clear from the explanatory note to the CN relating to heading 8713 that the decisive criterion for classification under that heading is the special design of the vehicle to help disabled persons. Accordingly, that heading covers electrically-driven vehicles similar to 'electric wheelchairs' ('Elektrorollstühle'), specifically designed for the transport of disabled persons and with characteristics such as, in particular, a maximum speed of 10 km/h (which may correspond to a fast walking pace), special features to alleviate the disability (for example, footrests for stabilising the legs) and steering and other controls (such as a joystick) which are easy to reach and manipulate and therefore are usually attached to one of the armrests.
>
> 20. That explanatory note states in the last paragraph that, conversely, motor-driven scooters (mobility scooters) fitted with a separate, adjustable steering column are excluded from this heading and come under heading 8703 of the CN.
>
> 21. The electric mobility scooters on the classification of which the referring court must rule all have a separate, adjustable steering column, to which the steering and other controls for driving and braking and, as the case may be, a metal basket are attached.
>
> 22. Furthermore, those electric mobility scooters are equipped with a platform on which the driver can place his feet, but this does not constitute a support to stabilise the legs. The anti-tipping system of the electric mobility scooters also contributes to user comfort, but it does not include any specific feature which is aimed at aiding disabled persons' use of the scooters.

> 23. Lastly, as the information supplied by the referring court shows, the electric mobility scooters at issue in the main proceedings can reach a speed exceeding 10 km/h, being able to go at up to 15 km/h.
>
> 24. Consequently, in view of those characteristics as a whole, the electric mobility scooters at issue must be considered to be means of transport of persons falling within heading 8703 of the CN, and not vehicles for disabled persons for the purposes of heading 8713 of the CN.
>
> 25. Finally, it should be added that the mere fact that those electric mobility scooters may be used, where appropriate, by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who for one reason or another prefer to travel short distances other than on foot, like, as the referring court indicates, golfers or persons going shopping."

32. It might have been thought that the decision in *Lecson* effectively resolved the dispute in favour of an 8703 classification for electric mobility scooters of the kind under consideration and harmonised the customs treatment of such vehicles by affirming the approach set out in both the 2009 regulation and the explanatory notes. But during the hearing of the appeals in the FtT in the present case a considerable volume of evidence was received from both the importers and an occupational therapist about the design of the scooters and their intended use and the FtT was persuaded that the judgment in *Lecson* gave rise to uncertainties about the proper classification of the scooters which required to be resolved by a further reference to the CJEU.

33. The factual findings of the FtT are set out in some detail at [57]-[60] of its first decision but, in summary, the tribunal found:

(1) both mobility scooters and powered wheelchairs enabled people to overcome limitations on their ability to move around although, for some more seriously disabled patients, a wheelchair would be the only option. The choice as to which was preferable depended on the particular disabilities of the individual concerned;

(2) scooters were regarded as preferable to powered wheelchairs, particularly by younger people, because a wheelchair gave the appearance of its user being more disabled;

(3) both scooters and powered wheelchairs were used and recommended for those who had some walking ability but for whom walking was painful, slow or uncertain. A person without such limitations on their ability to move around would be unlikely to use either a scooter or a powered wheelchair;

(4) the particular features of a scooter which enabled persons with limitations on their ability to walk to use a scooter more easily were:

(a) the ability to swivel at the seat

(b) lifting armrests

(c) the two-handed tiller

(d) the ability to adjust and tilt the tiller

(e) the smoothness of the ride,

(f) the tight turning circle,

(g) the footrest platform for protection against a user's feet falling off and dragging along the ground (unlike a powered wheelchair)

(h) dead stop brakes, and

(i) thumb/finger/hand operated wig wag (accelerator and brake control).

(5) the scooters complied with the Medical Services Directive EC 92/42 and with the other relevant regulatory codes;

(6) most scooters were sold through dealers to customers who made VAT declarations indicating that they were disabled and most were bought for someone with a mobility impediment;

(7) the brochures and sales material for the scooters did not in terms refer to disability but this was because customers were thought not to like being reminded that they were disabled or had limited physical capacity;

(8) most purchasers were elderly;

(9) in the mind of their users there was a greater stigma attached to using a powered wheelchair rather than a mobility scooter;

(10) scooters could be and were sometimes used by those who were simply lazy or overweight. They were capable of use by someone who was not in any way disabled but were in fact rarely used by such persons in part because of the stigma which some people attach to being disabled;

(11) a small or mid-range scooter would not make a good golf cart. They did not work well on soft ground and were too low slung. The larger scooters were able to travel across soft ground but had narrower tyres than the "grass tyres" used on golf carts; and

(12) golf buggies usually had steering columns rather than sweeping (bent) tillers and a twist grip accelerator rather than a wig wag.

34. The FtT reviewed the explanatory notes and the other background material I have referred to. It then turned to consider the decision in *Lecson*. Mr Beal had submitted to them that *Lecson* was binding authority that the scooters should be classified under heading 8703. The scooters, he said, were not specially designed for disabled people.

At best they were intended for use by those who are elderly or less able to walk rather than by the disabled. Although they had advantages over powered wheelchairs in terms of perception and presentation because they made the user look less disabled, this was irrelevant to their classification. Features which addressed the consequences of a disability did not, he had submitted, alleviate the disability.

35. The FtT explained at [113] of its first decision that, but for the judgment of the CJEU in *Lecson*, it would have classified the scooters under heading 8713. The scooters, it reasoned, were plainly motor vehicles designed for the transport of persons. But the classification headings were not mutually exclusive so that if the scooters were also reasonably to be regarded as "carriages for disabled persons" then by the operation of either GIR 3(a) (the most specific) or GIR 3(c) (the last numerically) they must fall to be classified under heading 8713. The only question therefore was whether they could properly be classified under that heading.

36. The FtT rejected the argument that "for" required the vehicle to be capable of use only by a disabled person. "For", it said, did not mean "exclusively for". It merely indicated that the vehicles have features "which make them particularly suitable for or attractive to persons with a disability where those features do not carry the same benefit to persons without that disability": see [125].

37. Similarly the references in the HSEN to the vehicles being "specially designed" and in the CNEN to their being "specifically designed" for the transport of disabled people should be read as requiring an assessment or investigation of the features of the product rather than an inquiry into the purpose of the design or the designer:

> "131. What is important, however, is that the features alleviate or compensate in such a way as to make the vehicle attractive to (and available) for use by a person with the relevant disability because of the nature of their disability when without those features the vehicle would not be so attractive or available, This seems to us to express the nature of the necessary link between an identifiable feature and a disability for it to be described as something which is designed for, or has the effect of, alleviating the disability.
>
> 132. Thus we conclude that to qualify under 8713 the vehicle must have features which (i) are not common to the generality of passenger vehicles, (ii) which alleviate or compensate for the effect of a disability and (iii) which, with or without other such special features, make the vehicle attractive to such persons because of their disability, but which do not make the vehicle more attractive to people without a relevant disability."

38. The FtT was also concerned about was meant in heading 8713 by "disabled":

> "134. Whatever precise meaning of disability is intended by the heading, it cannot be doubted that there will be some conditions which will be disabilities for the purposes of the heading. A person who is totally blind, someone without arms, and someone who does not have, or does not have the use of, a leg will all be

> disabled on any definition. It cannot be the case that "for disabled persons" requires that the vehicles would have features which aid, assist or attract all of those people because of their disabilities for then no vehicle would qualify: a person whose only disability was total blindness would not find any vehicle (save perhaps a self driving robot google car) attractive in view of their blindness. Thus it must be accepted that a vehicle can fall within the heading even if there are disabled persons for whom it would have no benefit, attraction or use. And correspondingly the heading must therefore mean that a vehicle may qualify if there is a disabled person whose disability is such that the special features of the vehicle make it beneficial for or attractive to that person because of their particular disability."

39. The order for a reference to the CJEU sets out the FtT's description of the mobility scooters (see [2] above) and the findings of fact which I have summarised. In the section dealing with the reasons for the reference it identifies the questions arising from what is meant by "disabled persons" in heading 8713 both in relation to whether "for" means "exclusively for" and as to the effect of the references in the explanatory notes to the vehicles being specially or specifically designed for disabled users. It then sets out the issues about the meaning of "disabled".

40. The order ends with an analysis of the judgment in *Lecson*. It is not necessary to set it out in full. But in relation to [25] of the judgment, it states:

> "86. In this paragraph the ECJ puts the proposition that just because the vehicles can be used by disabled persons, that does not make them vehicles for the disabled since they can be used by those who are not disabled. The tribunal does not understand this as meaning that any possibility of use by the nondisabled will take a vehicle out of 8713. That is because: (1) a powered wheelchair may be used by a non-disabled person, and the court appears to accept that it is a vehicle for the disabled, and (2) at no point in the Court's judgement does it say that vehicles for the disabled means vehicles only for the disabled.
>
> 87. The first part of this statement, the fact that scooters may be used by the disabled does not mean that they are for the disabled, appears to reflect the case law of the Court that actual use or the possibility of a particular use is not determinative. Thus the first three lines do not appear to need further explanation. But then the Court adds a different explanation "since …". The tribunal found some difficulty in reconciling this later part of this part paragraph with the 'decisive criterion' earlier accepted by the ECJ. The part of the paragraph beginning "since" suggest that suitability for use by the nondisabled may mean that something more is needed for classification under 8713 than that decisive criterion, and suggests that that something is non-suitability for the able-bodied.

> 88. If that is the case what is meant by "suitable" is important. The Court speaks of vehicles as "suitable" for use by non-disabled persons. It was not clear to us what criteria were relevant to determine suitability: was it the possibility of mere physical use – so that as was suggested at the hearing a catheter might be said to be suitable for use as a drinking straw? Did suitability encompass speed and flexibility of motion – the fact that in a shop it is easier to be on foot than on a scooter? And could subjective features factors be relevant such as the stigma a non-disabled person might feel using a mobility scooter?"

41. The FtT referred the following five questions to the CJEU:

    1. Is the Tribunal correct in construing the words "for disabled persons" as not meaning "only for" disabled persons?

    2. What is the meaning of disabled person for the purposes of 8713? In particular:

        (1) Is its meaning confined to a person who has a disability in addition to a limitation on his or her ability to walk or to walk easily or does it include a person whose only limitation is on his or her ability to walk or to walk easily?

        (2) Does "disabled" connote more than a marginal limitation on some ability?

        (3) Is a temporary limitation such as results from a broken leg capable of being a disability?

    3. Does the CNEN, in excluding scooters fitted with separate steering columns, alter the meaning of heading 8713?

    4. Does the possibility of the use of a vehicle by a person without a disability affect the tariff classification if it can be said that the vehicles have special features which alleviate the effects of a disability?

    5. If suitability for use by non-disabled persons is a relevant consideration, to what extent should the disadvantages of such use also be a relevant consideration in determining such suitability?

42. Written observations were then filed by the EU Commission, the UK and Italy. Both the Commission and the UK submitted that the correct tariff classification for the scooters under consideration had already been addressed by the CJEU in *Lecson* and that the decision on that reference should be treated as determinative. The Commission contended that heading 8713 was not intended to cover all means of transport for disabled persons but was limited to "special carriages whose function is to compensate the disability of their user…". The function of the carriage is to compensate the inability or not insignificant impairment of the user to walk, limiting their speed, and not to serve as a means of transport in general. As to the meaning of "disabled persons", the Commission saw no need for further elaboration but noted that there was no generally accepted definition of "disabled persons" for the purposes of tariff classification.

43. Italy, by contrast, suggested that mobility scooters such as of the type in question should be classified under heading 8713. The decisive criterion for classification was to be found in their objective features in terms of design and construction. Based on those features, the scooters were specifically designed to assist the mobility of the disabled and not generally for the transport of persons. The possibility that such a vehicle could be used by a non-disabled person did not, they suggested, affect its classification.

44. As in *Lecson* the CJEU decided to proceed to judgment without first obtaining an Opinion from the Advocate General. The judgment sets out the terms of the relevant classification headings and the 2005 CNEN and then proceeds to consider questions 1, 3 and 4 in combination on the basis that what they are asking is whether "for disabled persons" means the products are intended only for disabled persons and whether their possible use by non-disabled persons affects their classification.

45. In [18]-[20] the Court recites the settled law about the decisive criteria for classification being found in the objective characteristics and properties of the goods as defined in the wording of the relevant heading and about the explanatory notes not being used to alter the meaning of the heading. It then comes to the decision in *Lecson* which, as I mentioned above, was relied on both by the Commission and the UK as having already determined the issue of classification:

> "21. That being said, it is important to note that, as regards headings 8703 and 8713 of the CN, the Court has already held that it is apparent from the wording of those headings themselves that the difference between them results from the fact that the first covers means of transport for persons in general, whereas the second applies specifically to means of transport for disabled persons (see, judgment of 22 December 2010 in *Lecson Elektromobile*, C-12/10, EU:C:2010:823, paragraph 18).
>
> 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 (see, to that effect, judgments of 1 June 1995 in *Thyssen Haniel Logistic*, C-459/93, EU:C:1995:160, paragraph 13; 5 April 2001 in *Deutsche Nichimen*, C-201/99, EU:C:2001:199, paragraph 20; and 18 July 2007 in *Olicom*, C-142/06, EU:C:2007:449, paragraph 18).
>
> 23. In the light of that case-law, it is for the referring court, in the case in the main proceedings, to determine whether the vehicle at issue is intended, with regard to its characteristics and objective properties, to be used specifically by disabled persons, in which case such use must be classified as 'the main or logical use' of that type of vehicle.
>
> 24. As the Commission noted, the tariff classification does not take account of the possible use, but only of the intended use, determined on the basis of characteristics and objective properties of the product at the date of its import.

> 25. Furthermore, it should be added that the Court has already held, in relation to the interpretation of heading 8703 of the CN, that the fact that electric mobility scooters may be used, where appropriate, by disabled persons or even may be adapted for use by disabled persons does not affect the tariff classification of such vehicles, since they are suitable for being used for a number of other activities by persons who do not suffer from any disability, but who for one reason or another prefer to travel short distances other than on foot, like golfers or persons going shopping (judgment of 22 December 2010 in *Lecson Elextromobile*, C-12/10, EU:C:2010:823, paragraph 25).
>
> 26. That reasoning confirms, *a contrario*, that the fact that the vehicles at issue in the main proceedings may, in some circumstances, be used by non-disabled persons is irrelevant to the tariff classification of such vehicles under heading 8713 of the CN, since by reason of their original purpose, those vehicles are unsuitable for other persons who do not suffer disabilities.
>
> 27. In the light of the foregoing, the answer to the first and second questions is that heading 8713 of the CN must be interpreted as meaning that:
>
> – the words 'for disabled persons' mean that the product is designed solely for disabled persons;
>
> – the fact that a vehicle may be used by non-disabled persons is irrelevant to the classification under heading 8713 of the CN;
>
> – the Explanatory Notes to the CN are not capable of amending the scope of the tariff headings of the CN."

46. The Court then turned to question 2 which seeks guidance on the meaning of "disabled". The issues raised by the FtT were whether "disabled" could include persons whose only disability was a limitation on their ability to walk and, if so, whether it could extend to those whose inability to walk might be only temporary. The Court answered both questions in the affirmative:

> "28. By the second question, the referring court asks essentially whether the words 'disabled person' under heading 8713 of the CN, must be interpreted as meaning that they designate exclusively persons affected not only by a limitation on their ability to walk, but also other limitations, and whether that limitation on ability may be marginal or temporary.
>
> …
>
> 32. Thus, the words 'disabled persons' used in heading 8713 of the CN must have a more specific scope which follows a uniform interpretation of EU law taking account of the context of the

> provision and the purpose of the relevant regulations (see, to that effect, judgments of 18 January 1984 in *Ekro*, 327/82, EU:C:1984:11, paragraph 11, and 9 March 2006 in *Commission* v *Spain*, C-323/03, EU:C:2006:159, paragraph 32).
>
> 33. In that connection, it is common ground that the vehicles mentioned in heading 8713 of the CN are designed in order to be used to assist persons affected by a limitation on their ability to walk which may be classified, by its nature, as 'non-marginal'. As the Commission observed in its submissions, the intended use of those vehicles is not dependent on other limiting factors, such as the presence of certain physical or mental attributes of persons for whom those vehicles have been designed. Likewise, the duration of that limit on capacity is not specified and must, therefore, be regarded as being irrelevant. Furthermore, a teleological interpretation of a walking aid necessarily implies that that aid may be for a limited period.
>
> 34. Having regard to the foregoing considerations, the answer to the second question is that the words 'disabled persons' under heading 8713 of the CN must be interpreted as meaning that they designate persons affected by a non-marginal limit on their ability to walk, the duration of that limitation and the existence of other limitations relating to the capacities of those persons being irrelevant."

47. With the benefit of further submissions from the parties but with no further hearing, the FtT produced a second decision on 22 November 2016 allowing the importers' appeals. As the CJEU had stated in [23] of its judgment in *Invamed*, the question for the referring court to decide was whether the vehicles at issue are "intended with regard to [their] characteristics and objective properties to be used specifically by disabled persons". What the CJEU has made clear in its judgment is that actual or possible use by non-disabled persons is irrelevant in itself to the tariff classification which is governed by their "original purpose" as determined by the design features of the products. This makes those vehicles "unsuitable" for use by other non-disabled persons even if such use is physically possible: see *Invamed* at [26].

48. The FtT therefore interpreted the references to "suitable" and "unsuitable" in [25] and [26] of *Invamed* not as a measure of what use was possible but as indicating that such use conferred an advantage on the user:

> "18. In the First Decision we said that, having regard to the ENs and the words of the CN, we understood specially designed to mean that that the vehicle must have features not common under the generality of passenger vehicles which alleviated or compensated for the effects of a disability and which made the vehicle attractive to such persons because of their disability, but did not make the vehicle more attractive to (helpful or beneficial for) a person without a relevant disability [120–132]. The CJEU's response indicates that the last of these reflects non "suitability" for use by the non disabled."

49. HMRC's position was that the statements about use in [25] and [26] of *Invamed* had to be read in the context of [24] so that what governs classification is the intended use of the vehicle judged by its design characteristics. Actual use is irrelevant to the process of classification so far as inconsistent with the design purpose of the vehicle. Mr Beal contended, as he does on this appeal, that the CJEU has essentially confirmed what it said in *Lecson* when it of course indicated that the proper classification for scooters of this type was under heading 8703.

50. The FtT rejected that conclusion. It accepted that the judgment in *Invamed* does not derogate from the basic principles set out in *Lecson* but does seek to correct any misunderstanding as to the relevance of possible as opposed to the intended use of the vehicle. The central question therefore was whether, judged or confirmed by the inherent design features of the vehicles, they were intended for use not only by disabled persons and so were "suitable" for use by anyone who chose to do so in preference to walking.

51. The FtT then proceeded to apply these principles to the vehicles in the present case. Many of the points made are not controversial but, in order to understand the different approach taken by the UT, I set out the relevant passage in full:

> "56. We apply the following principles:
>
> (1) if a scooter falls prima facie within 8703 and 8713, then it is to be classified under 8713 (for the reasons in the First Decision [116 — 119]);
>
> (2) classification falls to be made by the national court applying the guidance given by the CJEU (*Invamed* [16]);
>
> (3) the suggested classification under 8703 in the *Lecson* judgement is not binding on this tribunal for the reasons set out above;
>
> (4) the HSEN, CNEN and the Committee Opinions are valuable aids but are not binding on us. In particular while we find that the HSEN statements that 8713 vehicles be "specially" designed for disabled persons, and the CNEN statement that they be "specifically" so designed coincide with the guidance of the CJEU that respectively the decisive criterion is "special design" for disabled persons (*Lecson* [19]), and that the design must be solely for the disabled (*Invamed* [27]), and that the features which are not normal described in the CNEN are helpful indicators of differentiation, we do not find the conclusion of the CNEN or the Committee Opinion in relation to scooters persuasive.
>
> (5) 8703 covers means of transport in general whereas 8713 applies to means of transport for disabled persons (*Lecson* [18] and *Invamed* [21]);

(6) a vehicle can fall within 8713 only if it is designed solely for disabled persons (*Invamed* [27]);

(7) no enquiry is required into the subjective purpose of the designer (the First Decision [126]);

(8) the condition that a vehicle be designed solely for disabled persons may also be expressed as a requirement for a conclusion that:

(a) its design satisfies the criterion and that it is a special design to help disabled persons (the "decisive criterion" per *Lecson* [19] and see also the HSEN and CNEN (see the First Decision [126]));

(b) the vehicle is intended, having regard to its characteristics and objective properties to be used specifically by disabled persons (*Invamed* [23]); and

(c) that use for disabled persons is the main or logical use of the vehicle (*Invamed* [23]).

(9) if a vehicle is "suitable for" use by a non disabled person it is not specially designed for disabled persons, but "suitable for" use does not mean that such use is merely possible, it requires that the design means that such use is advantageous to such a person (see [17] above);

(10) a design feature helps disabled persons if it makes the vehicle attractive to, and available for use by, a person with a disability because of the nature of that disability when without that feature it would not be so attractive or available. (We said this in [131] of the First Decision after a discussion in which we erroneously concluded that "for" did not mean "only for". However this description of what is meant by helping disabled persons is not dependent on that conclusion. The *Invamed* Judgement shows that need for the additional condition that the vehicle be not "suitable" for use by non disabled persons);

(11) the possible use of a vehicle by disabled or non-disabled person is irrelevant to the process of classifying it (*Invamed* [24 – 26]);

(12) whether or not a vehicle is designed solely for disabled persons is to be assessed from the characteristics and properties of the vehicle. The intended use may be a criterion if it is inherent in the vehicle and can be assessed from its objective characteristics and properties (*Invamed* [22]);

(13) in assessing whether a vehicle is designed solely for disabled persons, "disabled persons" means persons affected by a non-marginal limitation on their ability to walk, the duration of that limitation and the existence of other limitations on their capacities being irrelevant (*Invamed* : Disposition). The design must therefore be assessed by reference to such a limitation only.

(4) The application of those principles

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.

62. We conclude that the scooters may be classified under 8713. They are also clearly prima facie classifiable under 8703. As a result of GIR3 8713 must prevail.

63. The scooters are thus to be classified under 8713.

(5) Electric Wheelchairs

64. As we noted in the First Decision, the CNEN and the Committee Opinion (and their reflection in the *Lecson* judgement) differentiate between powered wheelchairs and mobility scooters. We are unable to follow this distinction. Neither of these types of vehicle is a normal vehicle –being small and for one person only. Both offer design features which alleviate the effect of a non marginal limitation on the ability to walk by permitting independent travel which would otherwise be impossible or unduly difficult for such a person. The design of each type of vehicle does not afford any advantage to those without such a limitation on the ability to walk: in particular the limitation on to maximum the speed and the possibility of occupancy by one person only make the use of the vehicle less advantageous than walking for a person without such a disability. Both types of vehicles may thus be said to be specifically designed for such disabled persons and as having use by them as their main or logical use. The additional features of a scooter – such as a tiller which may help those who have had a stroke or a wig wag which is easy to use with the thumbs – or of a powered chair – such as a joystick which is easy to use if one's arms or fingers are weak, may help those with difficulties other than limitations on walking, but are irrelevant to the question of whether the vehicle is designed solely for those with a non marginal walking disability, and thus to classification. Seeing no difference in the relevant objective characteristics of each type of vehicle, each should be classified under 8713."

52. This brings me to the judgment under appeal. In the Upper Tribunal HMRC raised what can be summarised as six grounds of appeal:

(1) that the FtT was wrong to treat headings 8703 and 8713 as not being mutually exclusive. A finding that the scooters were classifiable as vehicles for the transport of persons under 8703 necessarily excluded their classification under 8713;

(2) that the FtT was wrong to conclude in [29] of its second decision that the CJEU in *Invamed* had not confirmed the classification of the scooters under heading 8703;

(3) that the FtT was bound by the classification in *Lecson*;

(4) that the FtT had misapplied the test set out in *Invamed*;

(5) that the FtT had given insufficient weight to the non-binding guides to tariff classification, in particular the CNEN; and

(6) that the FtT's conclusion that the scooters were properly to be classified under 8713 was not reasonably open to it on the facts of the case.

53. The first of these points is to some extent self-contained and, if correct, goes only to determine which of the GIRs is relevant to the determination of the tariff classification in this case. As the FtT explained in [113] of its first decision, it was minded to classify the scooters under 8713 were it simply a matter of deciding which of the two rival headings was in terms the most appropriate so that if the headings 8703 and 8713 are to be read as mutually exclusive then its decision would still have been the same. But in order to operate GIR 3(a) as the FtT did it is still necessary to decide whether the scooters do fall within the words of heading 8713. The Court is therefore inevitably faced with an application of GIR 1. I am not therefore convinced that this ground of appeal really goes anywhere, although it has been relied upon as part of the respondents' notice on this appeal.

54. In any case the Upper Tribunal was right in my view to reject it. The very existence of GIR 3 indicates that its purpose is to act as a tie-breaker in cases where classification under two headings is possible. Some reliance was placed on what Henderson J (as he then was) said in *Revenue and Customs Commissioners v Flir Systems AB* [2009] EWHC 82 (Ch) about the GIRs being a hierarchical set of principles under which if the correct classification can be ascertained at a given stage it is unnecessary to proceed further. But that does not exclude the possibility that, on the application of GIR 1 alone, more than one heading may apply.

55. Grounds (2)-(5) are all different aspects of a single question which is what the CJEU has decided in *Invamed*. HMRC's position is that the decision was essentially a confirmation of the guidance given in *Lecson* and did no more than to remove the doubts expressed by the FtT as to the effect of that decision. Mr Beal has submitted that if what the CJEU intended to do in *Invamed* was in effect to reverse its decision in *Lecson* as to the correct classification of these vehicles then it would have said so. As it is, the Court has merely confirmed its already established approach to tariff classification with the wording of the headings read in the light of the objective characteristics of the goods in question and has emphasised (so far as not already clear) that actual rather than intended use of the scooters is irrelevant to their classification. The identification of what the Court refers to as their intended use is therefore determinative because that is the only use which the wording of the CN headings is intended to comprehend or take account of: see *Invamed* at [24].

56. The Upper Tribunal rejected a submission by Mr Beal that the effect of the decision in *Lecson* was actually to classify the vehicles in that case under heading 8703. It said in its judgment at [56] that the CJEU was merely concerned to give guidance to the national court on the principles to be applied. It seems to me that Mr Beal was justified in making that submission given the terms of the question referred to the CJEU in *Lecson* and the way in which it was answered. As I explained earlier, the context of the reference was the difference of view between the referring court and the Commission on the one hand and the Amsterdam Court of Appeal on the other as to whether mobility scooters of the type under consideration fell to be classified under 8703 or 8713. The CJEU in *Lecson* was therefore asked a single and very direct

question as to whether scooters of this kind fell within heading 8703 or heading 8713 and the answer which it gave was that scooters "such as those at issue in the main proceedings" which were "designed for the transport of one person who is not necessarily a disabled person" were covered by heading 8703. In both *Lecson* (at [15]) and *Invamed* (at [16]) the CJEU emphasised that its task on a reference was merely to give the national court guidance on the criteria which should be applied rather than to make the classification itself. But it acknowledged that it may, as it put it, in a spirit of co-operation give the national court all the guidance that it needs. In *Lecson* this came very close to saying that the scooters in issue, as analysed in relation to their intended use, should be classified under heading 8703. But in *Invamed* the Court was not asked how the national court should answer the ultimate question of classification. Instead, it was asked for clarification about the test or criteria to be applied and how the intended class of users ("disabled") under heading 8713 should be identified.

57. It seems to me that the debate about whether the CJEU in *Lecson* actually decided the classification of this type of scooter is of little real value in determining the outcome of these appeals. Whatever the status and effect of the decision in *Lecson* may be, it must clearly now be read in the light of the reference decision in the present case. The CJEU does not operate a strict system of precedent and is equally discreet (some might say obscure) about the extent to which its earlier judgments may have come to be modified by its more recent decisions. *Lecson* can therefore only be applied as it has been interpreted in *Invamed*. For the same reason the 2005 CNEN remains relevant only if and insofar as the guidance it contains has not been modified by the decision in *Invamed*.

58. It is clear that in *Lecson* the CJEU (consistently with the CNEN) considered that the key design features of the scooters, in particular their separate, adjustable steering columns, could not be regarded as "specific features … aimed at aiding disabled persons": see [22]. Consequently the vehicles were treated as a means of transport for persons generally and fell within heading 8703: see [24]. Having identified this as their intended use, the Court was therefore only concerned to emphasise that the fact that they might be used by some disabled persons did not affect their classification: see [25].

59. In *Invamed* the CJEU has, as I have said, confirmed this principle of intended use based on the objective characteristics of the vehicles as the correct starting point. Consequently other forms of use, including by those for whom the vehicles were not intended, will be irrelevant. Where, however, the judgment differs from *Lecson* is in the treatment of the vehicles in issue in the examples of non-intended use which are given. In *Lecson*, having identified the intended use of the vehicles as the transport of persons generally, the CJEU was concerned in [25] only to discount possible use by disabled persons as relevant to their tariff classification. Paragraph [25] of *Lecson* is referred to in [25] of the judgment in *Invamed* as being directed to "the interpretation of heading 8703" and is repeated in much the same terms but with one difference. Paragraph [25] of *Invamed* refers in general terms to the "fact that electric mobility scooters may be used … by disabled persons" whereas in [25] of *Lecson* the reference is to the fact that "those electric mobility scooters" may be used by such persons. "Those" is a reference back to "the electric mobility scooters at issue": see [24].

60. In *Invamed* this emphasis on the vehicles at issue in the proceedings comes in [26] which does not appear in any form in *Lecson* and states the *a contrario* position in relation to use by non-disabled persons of scooters intended for use by the disabled.

Although this is simply the application of the principle of intended use to the converse case where that intended use is for disabled persons, it is significant in my view that the Court refers in [26] to the "fact that the vehicles at issue in the main proceedings" may be used by non-disabled persons as being irrelevant to their tariff classification under heading 8713 "since by reason of their original purpose those vehicles [my emphasis] are unsuitable for other persons who do not suffer disabilities". I read this as a strong indication that in *Invamed* the CJEU has either changed its provisional view about the intended purpose of this type of mobility scooter or, at the very least, has accepted that their classification under heading 8713 is a conclusion open to the national court. Were it otherwise then the addition of [26] to the intended purpose analysis makes no sense. Although therefore I agree with the view of the FtT expressed in [29] of its second decision that *Invamed* (like *Lecson* before it) was primarily concerned to elaborate and explain the relevant classification principles, the change in emphasis is significant.

61. If one is looking in *Invamed* for an explanation or indication of the reasons for this shift of position then it can be found, in my view, in the CJEU's response to the second question concerning the meaning of "disabled person". The guidance on the 8713 heading contained in the 2005 CNEN states that vehicles specifically designed for disabled persons are distinguishable in terms of their design features from vehicles under heading 8703 because they have a maximum speed of 10 km per hour, a maximum width of 80m, two sets of wheels touching the ground and special features to alleviate the disability. Those may include steering and other controls that are easy to manipulate and are usually attached to the armrests. The scooters we are concerned with have all of these design features except for the special steering controls. They each have a centrally located adjustable steering column or tiller which is not designed for use by someone with significant manual disabilities.

62. In *Invamed*, however, the CJEU has accepted that the words "disabled persons" in heading 8713 includes persons affected by a non-marginal limit on their ability to walk and is not restricted to those who also suffer from other limiting factors whether mental or physical: see [33]-[34]. 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.

63. The Upper Tribunal was therefore right to conclude that the decision in *Invamed* represents an important development in the law in relation to what is meant in heading 8713 by "disabled persons": see [61]. From this they reasoned:

> "65. In our judgment, given the meaning of disability described by the CJEU in *Invamed* CJEU, the creation of a one-person scooter, capable of travelling only at around walking pace, or a brisk walking pace, that is of a small enough size to enable use on pavements and indoors, in other words to replicate mechanically a pedestrian must of its nature, or objective characteristics, be designed in order to assist persons with a non-marginal limit on their ability to walk."

64. The Upper Tribunal then went on to consider whether the scooters could be said to be designed solely for disabled persons of that kind:

> "66. … In order to fall within the heading it must also be found that the vehicles in question are designed solely for those with such a limitation. In circumstances where such vehicles are equally capable of being used by persons generally, including by persons without any limit, or with only a marginal limit, on their ability to walk, the real question for a national court is whether the vehicles are also, by reference to their objective characteristics, designed for the use of such persons as well as for those who are disabled in that sense.
>
> 67. In our judgment, the question to be addressed is one of design, and it is unhelpful to attempt to paraphrase that test. In particular, although the CJEU itself has used suitability for use, or unsuitability for use, by persons with particular characteristics as a way of expressing its reasoning as to products to be included in one or other of headings 8703 and 8713 (see *Lecson*, at [25] and *Invamed* CJEU at [25] – [26]), that must in our respectful view be taken to show factors which might be considered in order to ascertain if a particular vehicle is "designed for use by" a particular group and not to introduce a different test or any gloss on the true test."

65. Consistently with "disabled persons" in 8713 including those whose only disability is a non-marginal limitation on their ability to walk, the Upper Tribunal rejected the need for the vehicle to include other special features to alleviate other disabilities in order to demonstrate that it had been designed "solely" for use by the disabled. But in order to satisfy this test other criteria had to be identified, it said, which would allow the national court to ascertain whether the vehicle was designed for transport generally (8703) or solely for use by the disabled (8713):

> "70. The approach in such a case will be to determine whether there are characteristics of the vehicle which, although they do not detract from the prospective use by persons with a mobility limitation (because they do not outweigh the objectively identifiable benefits to such persons), do detract from use by able-bodied persons because they do – viewed objectively – outweigh the benefits to those persons of using a scooter as an alternative to walking (even if some people might still choose to use the scooters notwithstanding the perceived disadvantages)."

66. I agree with the analysis in [67] of the decision of the Upper Tribunal as to the relevance of "suitability" to the test of intended use. The references in [25]-[26] of *Invamed* to the vehicles being suitable for use by those for whom they were designed are no more than expressions of the likely consequence of their design. They are not a separate or different test. But as both the FtT and the Upper Tribunal recognised, the physical advantages (or disadvantages) of the design for potential types of users will obviously be a relevant factor in any objective assessment of their intended use.

67. The FtT, it will be recalled, had interpreted the references in *Lecson* and *Invamed* to a vehicle being "suitable for" or intended for use either by persons in general or by disabled persons as capable of being determined by whether its design made its use

advantageous to its intended users. It said that the design of the scooters helps or confers an advantage on disabled persons by allowing them to overcome their walking difficulties. Conversely the design features do not confer any advantages on the able bodied because their use is more cumbersome than walking: see [56] and [59] quoted at [51] above.

68. In the view of the Upper Tribunal this was a misdirection:

> "72. We do not demur from that principle, which we consider to be a useful approach to the question of design, but we do not consider the FTT was right to conclude at [59] that, because the design of the vehicle and those features which benefitted those with a non-marginal limitation on their ability to walk, did not benefit those without such a limitation when compared to walking, the scooters could not be said to have been designed for such able-bodied persons. That in our judgment is the wrong approach. Furthermore, we consider that the FTT was wrong, in its First Decision, at [178], to seek to identify whether particular features of the scooter afforded an extra ability or facility to able-bodied persons. In our judgment, where the core structure of the vehicle affords to an able-bodied person the same facility for mechanised travel as a disabled person, that fact without more would result in classification under heading 8703, because there could be no design distinction ascertainable from those objective characteristics between intended use by disabled persons as against able-bodied persons who may choose to use a scooter in preference to walking. It is not necessary to find something in addition to the ability to use the scooter instead of walking which aids or is an advantage to an able-bodied person in order to conclude that the scooter is designed for able-bodied persons as well as for disabled persons and so is not designed solely for disabled persons. In seeking to identify such additional advantages, we consider that the FTT adopted the wrong approach.
>
> …
>
> 74. In our judgment, the true question in these circumstances is whether there are characteristics that detract sufficiently from use by able-bodied persons as to allow it to be concluded that the vehicles were not designed for use by such persons but were designed solely for persons with at least a non-marginal limitation on the ability to walk. The FTT identified three potential disadvantages:
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> (1) The vehicles were slow (the FTT found, in its Second Decision, at [59], that an able-bodied person would be able to move faster on his/her own two feet).
>
> (2) The vehicles were not as flexible as being on two feet and/or were cumbersome when in a shop or a house or on

a pavement (Second Decision, at [59]; First Decision, at [52]).

(3) There was some stigma or embarrassment in the use of such a vehicle (First Decision, at [60](12)).

75. However, considering these disadvantages more closely, we do not consider they are sufficient either individually or together to support the FTT's conclusion:

(1) We do not consider that a finding that the speed of the scooters was a disadvantage to an able-bodied person was one that was open to the FTT. The relatively slow speed of the scooter could not be a disadvantage of a vehicle intended to move only at a brisk walking pace. It is not in our view appropriate to make a comparison with any faster speed at which a person might be able to walk or run.

(2) As regards flexibility, we take the view that such a reduction in flexibility is not a significant or material disadvantage as compared with the benefits of being able to sit on a vehicle as opposed to having to walk. It is open to a user to sit on the vehicle when it is suitable to do so, but to get off if and when it becomes more cumbersome. That is a matter of choice. There is no real disadvantage that there might be occasions when it would be preferable to be on foot. There is no finding that the cumbersome or inflexible nature of the vehicle would at all times have made the use of it materially disadvantageous. Set against the advantage of having motorised transport of this nature, even for the able-bodied, we do not consider that the inflexibility and cumbersome nature of the vehicle as found by the FTT can outweigh that advantage.

(3) As for the stigma or embarrassment in the use of the mobility scooter, the burden of the evidence was that, whilst stigma was a particular consideration in the case of the powered wheelchairs, this was less so in the case of the scooters (First Decision, at [60](9)). Indeed, scooters were regarded by persons with limited mobility, especially by the young, as more acceptable from this perspective than powered wheelchairs (First Decision, at [57(7)]). We do not consider that the degree of stigma attached to the use of a mobility scooter, which is – and is intended to be – materially less than it might be in the case of use for example of a powered wheelchair, could outweigh the ability for an able-bodied person who so chooses to be transported at walking pace without the physical effort of walking.

> 76. In those circumstances we conclude that there are no material countervailing disadvantages in the use by an able-bodied person of a mobility scooter, and that since the basic objective characteristics of such a scooter provide the same facility of mechanised movement to disabled and able-bodied persons alike, it must follow that viewed by reference to their objective characteristics the scooters are not designed solely for use by disabled persons and are not classifiable under heading 8713. They are motor vehicles principally designed for the transport of persons and fall as such to be classified under heading 8703.

69. In essence, the difference between the FtT and the Upper Tribunal on this issue is simply one of degree. Both tribunals accepted that, in order to determine whether the scooters' intended use was a means of transport for persons generally or solely by the disabled, some consideration needed to be given to the objective disadvantages which the non-disabled (as opposed to the disabled) would experience were they to use them as an alternative to walking. But the Upper Tribunal said that their design features needed to "detract sufficiently" from use by able-bodied persons so as to establish that this was not their intended use. And it regarded the disadvantages identified by the FtT as insufficient to satisfy this test.

70. The difficulty, however, with much of this analysis is not only the imprecision of the test in [74] but also the danger of glossing or over-complicating both the language of heading 8713 and the test of intended use as explained by the CJEU in *Invamed*. The CJEU has confirmed in that reference that the phrase "for disabled persons" in heading 8713 means that the vehicle "is designed solely for disabled persons". The French text uses the word "uniquement" which perhaps better conveys the sense of purpose involved. However, the Court's answer to question 2 must be read and understood in the light of its earlier explanation of the proper approach to classification.

71. The vehicle must be found to have been designed solely for disabled persons in contrast to other vehicles which are "principally designed for the transport of persons" under heading 8703. What differentiates the two classes is the restriction or not of their intended use to disabled persons. What the judgment in *Invamed* tells us is that their intended use is to be determined by their objective characteristics and properties and the application of this principle is spelt out in a number of different ways. So the intended use of the product is to be determined according to its "inherent character" judged by its objective characteristics and, having regard to that, the national court must decide whether the vehicle at issue is intended "to be used specifically" by disabled persons. If so, then this must be classified as "the main or logical use" of the vehicles and use by non-disabled persons, whilst possible, is legally irrelevant. Vehicles (see [25] and [26] of *Invamed*) are suitable for use by disabled persons (and therefore unsuitable for use by non-disabled persons) only if this test is satisfied. Suitability is therefore no more than a description of use within or without the intended use of the vehicles.

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*. 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. Unless it can be shown to have misdirected itself about the legal test to be applied or to have reached a decision which on the correct application of the test was not open to it on the facts then the Upper Tribunal had no jurisdiction to interfere: see Tribunals, Courts and Enforcement Act 2007 ss. 11 and 12.

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* 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* 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.

75. I would therefore allow the appeal and restore the decision of the FtT.

Lord Justice Floyd :

76. I agree.

Lord Justice Arnold :

77. I also agree.