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# Federal Court of Australia

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## Re Times Consultants Pty Limited v Collector of Customs (Queensland) [1987] FCA 311 (11 September 1987)

### FEDERAL COURT OF AUSTRALIA

Re:  TIMES CONSULTANTS  PTY. LIMITED  
And: COLLECTOR OF CUSTOMS (QUEENSLAND)  
No. NSW G607 of 1986  
Customs Tariff

### COURT

IN THE FEDERAL COURT OF AUSTRALIA  
NEW SOUTH WALES DISTRICT REGISTRY  
GENERAL DIVISION  
Fox(1), Morling(2) and Wilcox(2) JJ.

### CATCHWORDS

Customs Tariff - Classification of goods for tariff purposes - Goods in sets - Magazine and cassette - Determination of essential character of goods - Relevance of consideration of comparative costs of goods and of the purposes intended to be served by the manufacturer in producing the goods and by purchasers in acquiring the goods - Proper approach to classification of goods in sets.

[Customs Tariff Act 1982](#) Schedule 2 r.3.

### HEARING

SYDNEY

11:9:1987

Counsel for the Appellant: Dr G A Flick with Mr B O'Sullivan

Solicitors for the Appellant: Freehill Hollingdale and Page

Counsel for the Respondent: Mr G I O Rowling

Solicitor for the Respondent: Australian Government Solicitor

## **ORDER**

The appeal be dismissed.

The appellant pay to the respondent his costs of the appeal.

Note: Settlement and entry of orders is dealt with in Order 36 of the [Federal Court Rules](#).

## **DECISION**

The appellant imported goods comprising a magazine explanatory of musical pieces, orchestras, musicians and composers and an attached cassette of high quality recording of a musical piece or pieces discussed, in general or specific terms, in the magazine. They were one part of a 52 part series intended for sale on a fortnightly basis.

2. The dispute in this case is as to the classification of the goods for the purposes of the tariff contained in Schedule 3 of the [Customs Tariff Act 1982](#) ("the [Act](#)").
3. The goods were entered separately for home consumption, the magazines being shown under Item 49.02 of the tariff as free and the cassettes under para.92.12.29 at a rate of 30 per cent of value.
4. In applying the Rules for the Interpretation of the tariff, which were set out in Schedule 2 of the [Act](#), the Senior Tariff Officer decided that [rule 3\(1\)\(c\)](#) applied to the goods (as "sets") and that the whole was dutiable at the rate stated in para. 92.12.29 of the tariff, being the classification last appearing in the tariff. The Senior Tariff officer stated his reasons in summary as follows:

"10. The subject goods were identified as sets consisting of a record and magazine or a cassette and magazine.

11. Having adopted this identification the goods are

considered to comply with Interpretative [Rule 3\(2\)](#) of the [Customs Tariff Act](#).

12. The essential character of the subject goods could not be established vide Interpretative [Rule 3\(1\)\(b\)](#).

13. Accordingly, the subject goods were classified vide Interpretative [Rule 3\(1\)\(c\)](#), being the classification which occurred last within Schedule 3 as follows:

- record/magazine sets - sub-item 92.12.9
- cassette/magazine set - paragraph 92.12.29."

On review of this decision, the Assistant Comptroller-General was of the view that [rule 3\(1\)\(b\)](#) of the interpretative rules applied, and that the essential character of the goods, regarded as "sets", was provided by the cassette. This also resulted in the rate in para.92.12.29 being applied. The reasons given were as follows:

"However it is now considered that the adoption of these classifications should be in accordance with Interpretative [Rule 3\(1\)\(b\)](#) of the [Customs Tariff Act](#), in that the record/cassette gives the essential character to the set.

It is considered that the music recorded on the record or cassette is the main feature of the set and the magazine merely complements the record or cassette."

There is now no dispute that the goods were "sets". The phrase "essential character" is found in rule (3)(1)(b)(iii), which I will set out. If it had been decided that the essential character of the goods was provided by the magazine, Item 49.02 would have applied and no duty would have been payable on the "set".

5. The amount of duty thus levied was paid under protest. It is illustrative of the haphazard and arbitrary operation of the relevant part of the tariff that sets imported at the same time by the appellant which comprised records (not cassettes) and similar magazines were treated as duty free.

6. It is useful to set out the items, sub-items and paragraphs to which the Senior Tariff Officer and the Assistant Comptroller-General had reference, together with the related rules.

"Column 1 Column 2 Column 3 Column 4

Reference Goods General Special  
no. rate rate

49.02 NEWSPAPERS, JOURNALS AND  
PERIODICALS, WHETHER OR NOT  
ILLUSTRATED Free ...

...

92.12 GRAMOPHONE RECORDS AND OTHER  
SOUND OR SIMILAR RECORDINGS;  
MATRICES FOR THE PRODUCTION  
OF RECORDS, PREPARED RECORD  
BLANKS, FILM FOR MECHANICAL  
SOUND RECORDING, PREPARED  
TAPES, WIRES, STRIPS AND LIKE  
GOODS OF A KIND COMMONLY USED  
FOR SOUND OR SIMILAR RECORDING:

92.12.1 PREPARED TAPES, WIRES, STRIPS  
AND LIKE GOODS OF A KIND  
COMMONLY USED FOR MAGNETIC  
RECORDING OF SOUND OR SIMILAR  
RECORDING, RECORDED WITH COMPUTER  
SOFTWARE

- in respect of the carrying medium,  
being rigid disc packs or rigid  
disc cartridges 20% FI:Free  
DC:10%

- in respect of the carrying medium,  
not being rigid disc packs or  
rigid disc cartridges

To 5 July 1985 30% FI:Free  
DC:20%

From 6 July 1985 to 5 July 1986 25% FI:Free  
DC:15%

From 6 July 1986 20% FI:Free  
DC:10%

- in respect of remainder Free ...

92.12.2 - PREPARED TAPES, WIRES, STRIPS  
AND LIKE GOODS OF A KIND  
COMMONLY USED FOR MAGNETIC  
RECORDING OR BLANK, NSA:

92.12.21 - - Rigid disc packs or rigid disc  
cartridges 20% FI:Free  
DC:10%

92.12.29 - - Other  
To 5 July 1985 30% FI:Free  
DC:20%

From 6 July 1985 to 5 July 1986 25% FI:Free  
DC:15%

From 6 July 1986 20% FI:Free  
DC:10%

...

92.12.9 - Other Free .."

7. The Rules are as follows:

### RULES FOR THE INTERPRETATION OF SCHEDULE 3

1.(1) The titles of Divisions, Chapters and Sub-chapters in Schedule 3 are provided for reference only, and shall not be used for the purpose of interpreting that Schedule.

(2) For the purpose of ascertaining whether goods fall within an item, sub-item, paragraph of sub-paragraph or whether an item, sub-item, paragraph or sub-paragraph applies to goods, regard

shall, subject to sub-rules (3), (4) and (5), be had to the terms of items (including sub-items, paragraphs and sub-paragraphs) and of notes to Divisions and Chapters and, except where those terms otherwise require, to rules 2, 3 and 4.

(3) For the purpose of ascertaining whether goods fall within an item or whether an item applies to goods, regard shall not be had to the terms of any sub-item.

(4) For the purpose of ascertaining whether goods fall within a sub-item or whether a sub-item applies to goods, regard shall not be had to the terms of any paragraph.

(5) For the purpose of ascertaining whether goods fall within a paragraph or whether a paragraph applies to goods, regard shall not be had to the terms of any sub-paragraph.

2.(1) A reference in an item (including a reference in a sub-item, paragraph or sub-paragraph) to goods of a particular kind shall be read as including a reference to -

(a) goods that are imported in an incomplete or in an unfinished state but have the essential character of goods of that kind; and

(b) goods that are imported in an unassembled or in a disassembled state but, if assembled, would be goods of that kind or would be goods to which paragraph (a) applies.

(2) A reference in an item (including a reference in a sub-item, paragraph or sub-paragraph) to a material or substance shall be read as including a reference to a mixture or combination of that material or substance with another material or substance or with other materials or substances.

(3) A reference in an item (including a reference in a sub-item, paragraph or sub-paragraph) to goods consisting of a specified material or substance shall be read as a reference to goods consisting wholly or partly of that material or substance.

(4) For the purpose of ascertaining whether an item, sub-item, paragraph or sub-paragraph applies to goods that consist of more than one material or substance, regard shall be had to the principles set out in rule 3.

3.(1) Where, for any reason, goods fall within 2 or more items, 2 or more sub-items of an item, 2 or more paragraphs of a sub-item or 2 or more sub-paragraphs of a paragraph, the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods shall, subject to sub-rule (3), be ascertained in accordance with the following principles:

(a) If one of the items, sub-items, paragraphs or sub-paragraphs, as the case may be, provides a more specific description of the goods than any other of the items, sub-items, paragraphs or sub-paragraphs, that first-mentioned item, sub-item, paragraph or sub-paragraph, as the case may be, applies to the goods.

(b) If -

(i) the item, sub-item, paragraph or sub-paragraph that applies to the goods cannot be ascertained in accordance with paragraph (a);

(ii) the goods are -

(A) mixtures;

(B) composite goods consisting of different materials or made up of

different components; or

(C) put up in sets; and

(iii) one material or component gives to the goods their essential character,

the goods shall be taken to consist of that material or component.

(c) If the item, sub-item, paragraph or sub-paragraph that applies to the goods cannot be ascertained in accordance with paragraph (a) or paragraph (b) the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods is that item, sub-item, paragraph or sub-paragraph that occurs last in Schedule 3 among those items, sub-items, paragraphs or sub-paragraphs, which equally merit consideration when determining the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods.

(2) For the purpose of sub-paragraph (1)(b)(ii), goods put up in sets shall be taken to mean goods which

(a) consist of products or articles having independent or complementary uses, grouped together for meeting a specific need or carrying out a specific activity; and

(b) are put up in retail packings.

(3) Where -

(a) for any reason, goods fall within 2 or more sub-items or an item, 2 or more paragraphs of a sub-item or 2 or more sub-paragraphs of a paragraph; and

(b) there is included in the sub-items, paragraphs



or sub-paragraphs within which the goods fall  
any by-law sub-item, by-law paragraph or  
by-law sub-paragraph,

the sub-item, paragraph or sub-paragraph, as the  
case may be, that applies to the goods is that  
under which no duty, or the least amount of duty,  
is payable in respect of the goods or, if there are  
2 or more sub-items, paragraphs or sub-paragraphs  
under which no duty, or the least amount of duty,  
as the case may be, is payable, that one of those  
sub-items, paragraphs or sub-paragraphs that occurs  
first in Schedule 3.

(4) For the purposes of sub-rule (3) a sub-item shall  
be deemed to be a by-law sub-item, a paragraph  
shall be deemed to be a by-law paragraph, and a  
sub-paragraph shall be deemed to be a by-law  
sub-paragraph, if it is expressed to apply to  
goods, or to a class or kind of goods, as  
prescribed by by-law.

4. Where goods do not fall within any item, the item  
that applies to the goods is the item that applies  
to the goods that are most akin to those goods.

(In connection with the rules reference can also be had to [s17](#) of the [Act](#)).

8. On review the Administrative Appeals Tribunal decided by majority to remit the matter to the respondent Collector "with the direction that the subject goods are put up in sets, that the component that gives the sets their essential character is the magazine or part-work, and that therefore the combination falls to be classified to item 49.02 of the Tariff free of duty."

9. On application to the Court by the present respondent Davies J. allowed the application and ordered that the decision of the Tribunal be set aside and the matter remitted to it for re-hearing with or without further evidence. His Honour pointed to the fact that the Tribunal in its majority decision had said that the magazine was the "dominant" factor in the sets, whereas the issue was the "essential character" of the goods, adding that "dominance may be relevant to but is not determinative of the issue". The learned judge stated his conclusion as follows:

"For these reasons, therefore, I am of the view that the  
majority of the Tribunal made an error of law in its

conception of "essential character", took into account as significant evidence as to the publisher's aims and views which were not in fact significant to the issue of essential character, drew conclusions as to a purchaser's view of the goods based on Mrs Mullineux' evidence without giving attention to Mr Brouner's evidence and other material before the Tribunal and failed to turn its attention adequately to the goods themselves, to their nature, composition and their function."

10. The sole matter debated before us and a principal matter argued before Davies J. is whether, if any error was made by the Tribunal, it was an error of law, so that that an appeal (so-called) lay from it to this Court. His Honour was of the opinion that there was.

11. There are several aspects to the question whether the use or understanding of the words "essential character" involve a question of law. They are, in the first place, words of ordinary usage with meanings which are well enough known. It has not been held otherwise. Doubtless different people will understand them with slightly different shades of meaning. The fact that they appear in a statute means that on occasion their meaning or application will be involved in deciding a question of law, but, in general, their use and application will not involve such a question. This is well enough recognised, but it is worth repeating some relevant statements of authority:

The Australian Gas Light Co. v. The Valuer-General (1940) 40 SR 126, at 137-8 (per Jordan C.J.):

"Before proceeding to the questions which have been submitted, it is necessary to keep in mind that this Court has jurisdiction to determine only questions of law and only such questions of law as are submitted to it. In cases in which an appellate tribunal has jurisdiction to determine only questions of law, the following rules appear to be established by the authorities.

(1) The question what is the meaning of an ordinary English word or phrase as used in the Statute is one of fact not of law: *Girls' Public Day School Trust v. Ereaut*; *Life Insurance Co. of Australia Ltd. v. Phillips*; *McQuaker v. Goddard*. This question is to be resolved by the relevant tribunal itself, by considering the word in its context with the assistance of dictionaries and other books, and not by expert evidence: *Camden v. Inland Revenue Commissioners*; *In re Ripon (Highfield) Housing*

Confirmation Order, 1938. *White and Collins v. Minister of Health*; although evidence is received as to the meaning of technical terms: *Caledonian Railway v. Glenboig Union Fireclay Co.*; *Attorney-General for the Isle of Man v. Moore*; and the meaning of a technical legal term is a question of law: *Commissioners for Special Purposes of Income Tax v. Pemsel*.

(2) The question whether a particular set of facts comes within the description of such a word or phrase is one of fact: *Girls' Public Day School Trust v. Ereaut*; *Attorney-General for the Isle of Man v. Moore*.

(3) A finding of fact by a tribunal of fact cannot be disturbed if the facts inferred by the tribunal, upon which the finding is based, are capable of supporting its finding, and there is evidence capable of supporting its inferences: *Farmer v. Cotton's Trustees*; *Currie v. Inland Revenue Commissioners*; *Inland Revenue Commissioners v. Lysaght*.

(4) Such a finding can be disturbed only (a) if there is no evidence to support its inferences, or (b) if the facts inferred by it and supported by evidence are incapable of justifying the finding of fact based upon those inferences: *In re Ripon (Highfield) Housing Confirmation Order, 1938*. *White & Collins v. Minister of Health* or (c) if it has misdirected itself in law: *Farmer v. Cottons's Trustees*; *Colonial Mutual Life Assurance Society Ltd. v. Federal Commissioner of Taxation*. Thus, if the facts inferred by the tribunal from the evidence before it are necessarily within the description of a word or phrase in a statute or necessarily outside that description, a contrary decision is wrong in law: *Farmer v. Cottons's Trustees*; *Currie v. Inland Revenue Commissioners*; *Inland Revenue Commissioners v. Lysaght*; *Mersey Docks and Harbour Board v. West Derby Assessment Committee and Bottomley*, etc."

(I have omitted the footnote references).

Cozens v. Brutus [\[1972\] UKHL 6](#); [\(1973\) AC 854](#), at 861 (per Lord Reid):-

"The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision then there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

Hope v. Bathurst City Council [\[1980\] HCA 16](#); [\(1980\) 144 CLR 1](#) at 7 (per Mason J.):-

"Many authorities can be found to sustain the proposition that the question whether facts fully found fall within the provisions of a statutory enactment properly construed is a question of law. One example is the judgment of Fullagar J. in Hayes v. Federal Commissioner of Taxation ((1956) [\[1956\] HCA 21](#); [96 CLR 47](#) at p51) where his Honour quoted the comment of Lord Parker of Waddington in Farmer v. Cotton's Trustees ((1915) AC 922, at p932), which was adopted by Latham C.J. in Commissioner of Taxation v. Miller ((1946) [\[1946\] HCA 23](#); [73 CLR 93](#) at p97, that where all the material facts are fully found, and the only question is whether the facts are such as to bring the case within the provisions properly construed of some statutory enactment, the question is one of law only."

12. N.S.W. Associated Blue-Metal Quarries Limited v. Federal Commissioner of Taxation [\[1956\]](#)

[HCA 80](#); [\(1955-56\) 94 CLR 509](#) was a case about the ordinary meaning of words, - it was held that a blue-metal quarry was not a mine, because that was not in accordance with the ordinary meaning of the latter term.

13. In the Commissioner of Taxation v. Miller [\[1946\] HCA 23](#); [\(1946\) 73 CLR 93](#), the High Court held that whether a person was a resident was a question of fact, and by majority (Rich and Dixon JJ.) that an appeal therefore did not lie in that case from the Board of Review. Dixon J. indicated that had an appeal lay he would probably have reached a conclusion different from that of the Board.

14. Questions of law will arise where the facts are fully found (a dubious task in many cases) and there is a question as to whether they come within a statutory provision, or where it is put that words could not reasonably be understood to extend to a certain situation (or particular goods). The fact that there are limitations which will be legally enforced does not however mean that meaning or application are matters of law. Nor does the fact that ordinary words are judicially discussed mean that this meaning has become a matter of law.

15. In the present case, the words "essential" and "character" are par excellence words which have an ordinary meaning, and the combined phrase "essential character" cannot be regarded otherwise. It is not a term of art. The concept of "essential character", as his Honour's reasons disclose, is not precise, or clean-cut. Although perhaps not always easy to apply to goods, the words have an ordinary meaning, which is not limited by the [Act](#) or the Schedule. A number of factors are naturally involved in its application to particular goods. Those factors may well vary from one type of goods to another. They may be quite numerous, or few. They do not necessarily, or, perhaps, generally, involve a choice between the descriptions which would naturally be accorded to any of the parts of the goods. The officers are confined by the fact that they are, at least in a case such as the present, offered a few alternatives, - do the goods have an "essential character" satisfying one description or another, or neither.

16. The phrase in question is set out in a statute which is very much one of practical application, and is itself required to be used in their daily duties by many customs officers. It would be very detrimental to the operation of the customs service if the words were to become the subject of legal refinements of meaning. A customs officer is expected to examine the entry, and time permitting to examine the goods. He then has to apply what on his understanding of the English language to the appropriate item. There are departmental checks on the correctness of his decision and legal checks which keep decisions within proper limits.

17. In the present case the reasons of the majority of the Tribunal were highly analytical, but in a practical sense, and they did not apply any special construction to the words used, or debate different possible constructions. They did not tackle their task as if deciding a question of law.

18. The criticisms made by his Honour go to matters which in the ordinary course would be regarded as questions of fact, - involving degree and judgment. Taken in their totality they remain questions of

fact. A reading of the Tribunal's decision does not, in my opinion, disclose a misunderstanding of the task set by a determination of "essential character". If weight is given more to one circumstance than another, or, indeed, there is omission of a factual element (such as the absence of a reference to Mr Brouner's evidence) it does not at all follow that there has been an error of law, if indeed there was error at all. At the most there was a view taken of the facts with which one could disagree.

19. I should add that in my view the Court, and the Tribunal, should be careful not, by repeated findings of what is presented as law but is actually fact, to turn the application of the tariff into a legal nightmare.

20. A matter which has been seized upon is the reference by the Tribunal to a "dominant" component ("the magazine"). It is submitted that by using this word in the course of considering the matter the Tribunal showed that it was misdirecting itself in law. In my view the rest of what the Tribunal said shows that this was plainly not so. The closing words of the Tribunal were: "We find that the subject goods are put up in sets and that the component that gives the goods their essential character is the magazine or part work and that the combination falls to be classified to item 49.02 free of duty".

21. For my [part I](#) find it hard to understand how the concept of "essential character" could be applied at all in relation to the goods in question, but the Tribunal was set on its course by the parties. The goods were just too diverse in "character" for any "essential character" to be apparent, except possibly for a wide generic term which finds no place in the Schedule. It is not to the point so far as concerns the disposal of this case, but I feel myself in sympathy with the Senior Tariff Officer, who reported that the essential character of the goods (taken as a "set") could not be established (his conclusion has been set out), and with Mr Stevens, the dissenting member of the Tribunal. He said:-

"All the above reservations lead me to the conclusion that I am convinced neither with the submissions of the applicant, nor with those of the respondent, as to the essential character of the set. This throws me back upon [Rule 3\(1\)\(c\)](#) of the interpretative rules. There are two disparate articles which equally merit consideration and the application of this provision of the rule would result in the goods being dutiable as cassettes."

22. The result in my view is that this Court does not have, and did not have, jurisdiction to deal with the application to it.

23. This appeal should therefore be allowed with costs, the order of Davies J. set aside, and in lieu thereof it be ordered that the application be dismissed with costs.

This is an appeal from a decision of a judge of the Court allowing an appeal from a decision of the

Administrative Appeals Tribunal. The primary judge held that errors of law had been made by the Tribunal in determining an appeal brought to it under the [Customs Tariff Act 1982](#) ("the [Act](#)").

2. The issue before the Tribunal was the classification for tariff purposes of certain goods imported by the appellant. The goods consisted of a publication in magazine form to which was loosely attached a cassette tape of music. The attachment was achieved by inserting the cassette into a cardboard sleeve or pocket which was in turn attached by staples to the magazine. The cassette was housed in a plastic box and was clearly intended to be detached from the magazine. The magazine was one of a series of part works. Each part of the 52 part series featured a particular composer. The cassettes were produced independently of the magazine. They were commercial recordings of popular classical works which Polygram, a leading manufacturer, had in stock and which the publishers decided to associate with their magazine.

3. Each issue of the magazine was devoted to a separate composer. In each magazine there were three sections. The first related to the life of the composer, the second to one of his musical works and the third to the historical background to the country and times in which the composer lived. The magazines contained a compendium of musical terms and illustrations and photographs, some black and white and some in colour. They also contained explanations of various musical instruments. Themes of the particular work referred to in the magazine were illustrated in musical notation and a detailed analysis was made of the development and features of each movement in it. The work so analysed was recorded on the attached cassette.

4. Parts of the magazine were intended to be issued every fortnight or so. The Polygram group encompasses such brands as Decca, Philips and Deutsche Grammophon and the music recorded on the tapes was of high quality. However, the cassettes had been superseded by later productions of the same works and were no longer sold in music shops, though this fact was not stated on the cassettes. The whole work was entitled "The Great Composers and Their Music". One of the parts was devoted to Johannes Brahms. In that part (which appears to have been typical of other parts in the whole work) the following description appeared inside the cover:

"The Great Composers and their Music is published every fortnight in 52 parts. Parts [1-20](#) feature composers of the Romantic Era; [parts 21-32](#) cover Baroque and Classical Music; the Age of Nationalism forms [parts 33-42](#); and Twentieth Century Music is discussed in parts [43-52](#).

To help you understand the background to the music, the beginning of each section - parts [1](#), [21](#), [33](#) and [43](#) - contains an introductory chapter to the period, which extends the issue

to 32 pages. All other parts have 24 pages, not including the interim and final indexes.

An additional 13-part volume on opera will be available after the publication of [part 52](#).

The index

To enable you to use The Great Composers and their Music as a permanent work of reference, an index will be included at the end of each section, in [parts 20](#), [32](#), [42](#), and [52](#). In addition, [part 52](#) will contain a complete index to the whole work.

Sound Quality

The finest recordings from Deutsche Grammophon, Philips and Decca have been used in The Great Composers and their Music. To maintain good sound reproduction from the records and cassettes please make sure that you read the instructions on the care of records and cassettes enclosed in early issues of this publication."

5. The matter which fell to be determined by the Tribunal was the proper classification of the goods for the purposes of the [Act](#). Schedule 2 to the [Act](#) sets out Rules for the interpretation of the tariff contained in Schedule 3. [Rule 3](#) of Schedule 2 provides (in part) as follows:

"3. (1) Where, for any reason, goods fall within 2 or more items, 2 or more sub-items of an item, 2 or more paragraphs of a sub-item or 2 or more sub-paragraphs of a paragraph, the item, sub-item, paragraph or sub-paragraph, as the case may be, that applies to the goods shall, subject to sub-rule (3), be ascertained in accordance with the following principles:

(a) If one of the items, sub-items, paragraphs or sub-paragraphs, as the case may be, provides a more specific



description of the goods than any other of the items, sub-items, paragraphs or sub-paragraphs, that first-mentioned item, sub-item, paragraph or sub-paragraph, as the case may be, applies to the goods.

(b) If -

(i) the item, sub-item, paragraph or sub-paragraph that applies to the goods cannot be ascertained in accordance with paragraph (a);

(ii) the goods are -

(A) mixtures;

(B) composite goods consisting of different materials or made up of different components; or

(C) put up in sets; and

(iii) one material or component gives to the goods their essential character,

the goods shall be taken to consist of that material or component.

...

(2) For the purpose of sub-paragraph (1)(b)(ii), goods put in sets shall be taken to mean goods which -

(a) consist of products or articles having independent or complementary uses, grouped together for meeting a specific need or carrying out a specific activity; and

(b) are put up in retail packings.

..."

6. It was the appellant's contention before the Tribunal that the goods did not fall within [Rule 3\(1\)](#). In the alternative, it contended that if the goods did fall within [Rule 3\(1\)](#) then their classification could not be ascertained in accordance with para.(a); that, if they should be regarded as being put up in sets, one material or component gave them their essential character, and that that material or component was the magazine. The Collector contended that the goods did fall within [Rule 3\(1\)](#). He accepted that the classification of the goods could not be ascertained in accordance with para.(a). He argued that they were put up in sets, and that the cassette gave them their essential character.

7. The Tribunal held that the goods fell within [Rule 3\(1\)](#). It further held that they were put up in sets. The majority of the Tribunal made a further finding that the magazine component of the goods gave them their essential character. After referring to some of the authorities in which the phrase "essential character" has been considered the majority said:

"In an attempt to arrive at the essential character of the subject goods under consideration in particular cases, the Tribunal has from time to time had regard to bulk, quantity, weight, value, role, utility, visual impact, visual character and ready useability. All these characteristics must be of some relevance, the weight to be given to any one of them and the probative value of any other of them is to be assessed in the light of the circumstances under consideration and the nature of the subject goods. If there were one obvious material or component there would be no dispute as to the essential character. In commerce however, as in life, there is rarely one unadulterated element of reasoning or presentation. It would be a traverse of the words of the Schedule to say that essential character means dominant character. It is not enough, in our view, to say that in arriving at essential character one is entitled to take into account the character of any component that tends to dominate.

We agree with counsel for the applicant that

the issue in each case is whether after considering all these factors the cumulation of these factors gives dominance to one component. One of the principal factors pointing to the dominant component will be the use or function which the consumer or end user of the set will make of the combination. In looking at that use, the parties will be assisted in deciding whether one component is dominant in achieving that function or use."

8. The majority then referred to some of the evidence tendered by the parties. There was evidence to the effect that the bulk of the cost of the goods was attributable to the magazine. There was evidence as to the way in which the goods were advertised and promoted and sold through newsagencies, and as to the general nature and extent of the business conducted by the English company which produced the goods. Reference was also made to the evidence of a purchaser of the goods, Mrs Mullineux. She said that she purchased them because she wished to acquire both the magazine and the cassette and that she would not have bought the goods simply to acquire the cassette. There was other evidence before the Tribunal from a person with much experience in the music publishing and retailing industry, Mr Brouner, that, in his opinion, the cassette would be of greater value than the magazine to the vast majority of purchasers with whom he dealt.

9. The majority then considered the submissions put to it by the parties. Counsel for the appellant argued that the advertising of the goods emphasized the magazine section and treated the cassette as something in the nature of a bonus to the purchaser. Counsel for the respondent relied upon a number of factors to justify his submission that the essential character of the goods should be taken to consist of the cassette. One factor was that about one-third of the magazine consisted of an analysis of the work illustrated in the musical recording on the cassette; whereas there was nothing on the cassette referring to the magazine. Another factor, so it was contended, was that the cassette would be used by the purchaser more often than the magazine. It was further submitted that the only reason for appreciating a composer was because of his music and the cassette was an example of that music. Yet another factor relied upon was that the retail value of the cassette on the Australian market was considerably more than the value attributed to the cassette in the appellant's costing.

10. The majority then expressed its conclusion in the following terms:

"Having considered all these factors, we have come to the conclusion that the magazine is the dominant component in the sets, both from the point of view of the publisher and the point of view of the consumer. The magazine we find is by far the most important factor in the creation of the product (from the

publisher's point of view) and in its purchase (from the purchaser's point of view). From the publisher's point of view the series of 'Great Composers' is yet another series of printed part works which it has devised and produced along with a large range of other printed part works. The nature of the subject matter means that the most effective illustration to the ordinary purchaser of the material, the subject of the magazine articles, is not so much the themes illustrated by musical notation (although there is some of this) as a recording. The possibility of relatively cheap illustrations that can be sold as part of the principal product is a happy accident, leading to the preparation of a set, which when examined at the time of importation by a reasonably informed observer illustrates this purpose and intention.

The observations of the reasonably informed observer would be shared by the most likely purchaser who was envisaged in *Re Constanzo Importing Co.* (unreported 19 December 1985) and who was represented on the hearing of this application by Mrs Mullineux, an actual purchaser.

The perception of all three parties coincided. It is based not only on objective identification but having regard to the characteristics which the goods on informed inspection present (*Re Sterns Playland Pty. Ltd.* ((1982) [4 ALD 562](#)). We accept the evidence that the term 'part works' is widely understood (cf *Pacific Film Laboratories Pty. Ltd.* ((1979) [2 ALD 144](#)). What we have before us is a part work illustrated in a particular way - electronically rather than by steel engravings.

We find that the subject goods are put up in sets and that the component that gives the goods their essential character is the magazine or part work and that the combination falls to be classified to item 49.02 free of duty."

11. The only substantial question argued on the appeal before the primary judge was the legal correctness of the Tribunal's decision under [Rule 3\(1\)\(b\)\(iii\)](#) that the magazine gave to the goods their essential character and that therefore the goods should be taken to consist of that component.

12. In our opinion it was a question of fact whether one material or component gave to the goods their essential character. Accordingly, in order to succeed on his appeal to the Court, it was necessary for the Collector of Customs to show that the majority of the Tribunal misdirected themselves in deciding that question of fact, since an appeal to the Court from the Tribunal lies only on a question of law - see [s.44](#) of the [Administrative Appeals Tribunal Act 1975](#). The learned primary judge was of the view that the majority erred in their approach to the question of fact which they had to decide, because they looked to the function intended to be served by the grouping of the magazine and the cassette together rather than looking to the goods themselves.

13. The authorities make it clear that in determining what is the essential character of goods it is the state or condition of the goods at the time of importation that is the determining factor and that it is wrong to classify goods or to determine their essential character by reference to the purpose of the importer or of the purchaser. Regard must be had to the characteristics of the goods themselves, as they would present themselves to an informed observer: see *Chandler & Co. v. Collector of Customs* [\[1907\] HCA 81](#); [\(1907\) 4 CLR 1719](#) at p1729; *Whitton v. Falkiner* [\[1915\] HCA 38](#); [\(1915\) 20 CLR 118](#) at p131; and *Blackwood Hodge (Australia) Pty. Ltd. v. Collector of Customs* [\[1980\] FCA 96](#); [\(1980\) 47 FLR 131](#) at 155.

14. The learned primary judge was of the opinion that it could be discerned from the majority's reasons that they arrived at their conclusion, not by considering the goods themselves, but by considering the "function" served by the grouping of the magazine with the cassette. By "function" his Honour meant the purposes intended to be served; by the manufacturer in putting up the goods in sets and by purchasers in buying goods so put up. He was of the opinion that, as a result of looking principally at the function (in this sense) intended to be served by the goods, the majority turned their attention away from the goods themselves, which were a magazine and a cassette. After referring to the statement in the majority's reasons that the magazine was the dominant component in the sets, his Honour said:

"It will be noted that the majority referred to the 'dominant component', which was not the issue. The essential character of the goods

was the issue. Dominance may be relevant to but is not determinative of the issue."

His Honour then referred to other passages in the majority's reasons which he thought indicated that they erred in law in determining the essential character of the goods.

15. Counsel for the appellant submitted that the primary judge erred in concluding that the majority of the Tribunal made an error of law in reaching their decision. He submitted that the Tribunal's finding as to the essential character of the goods was a finding of fact and that therefore the decision was not open to review in this Court. We see the force of this submission, but we have come to the conclusion that the primary judge was correct in his analysis of the majority's reasons. That analysis demonstrates that the majority arrived at their decision that the magazine gave to the goods their essential character by having regard to such matters as the reasons why the goods were put up in sets, the manufacturer's purposes in taking that course, and the likely reactions of purchasers. His Honour was correct in his view that the majority misdirected themselves by turning their attention away from the goods themselves and deciding the question posed for their consideration by reference to such matters. The statement in the majority's reasons that one of the principal factors pointing to the dominant component in goods "will be the use or function which the consumer or end user of the set will make of the combination" is an indication of the approach which they adopted. It is true that they referred to the relevance of matters such as bulk, quantity, weight, value, utility, visual impact, visual character and ready useability of goods in determining their essential character, and that they observed that "essential character" did not mean "dominant character". However, the statement in their reasons that "the issue in each case is whether after considering all these factors the cumulation of these factors gives dominance to one component" leads us to conclude that they did, as his Honour found, adopt an incorrect approach to the resolution of the question under consideration. It was not the dominance of one component of the goods which was the critical issue, but their essential character.

16. It must always be remembered that the classification of goods for tariff purposes is a practical "wharfside" task. Upon some occasions it will be necessary for the classifier to obtain information to enable identification of the goods but it is entirely inappropriate that he or she should enter into enquiries upon matters such as cost, commercial advantage and purchaser preference which the Tribunal undertook. It ought normally be possible to classify goods merely by looking at them and by considering their nature and the function which they were designed to serve. In the case of goods made up in sets, it may be that there is no single essential character; in which case [Rule 3\(1\)\(b\)](#) will be inapplicable and reference will need to be made to the arbitrary rule contained in [Rule 3\(1\)\(c\)](#).

17. The primary judge was also of the opinion that the majority erred in law in failing to take into account the evidence of Mr Brouner. It is true that his evidence is not referred to in the majority's reasons, but we do not think that this circumstance of itself demonstrates that they fell into error in considering what weight, if any, should be given to his evidence. See *Steed v. Minister for Immigration and Ethnic Affairs* ([1981](#) 4 ALD 126 - also reported at [1981](#) 37 ALR 620 at p632.

18. The Tribunal is an administrative body and, whilst errors of law made by it are susceptible to correction by this Court, its decisions should not be too closely scrutinized for the purpose of searching for errors of law in what may be imprecise language: see *Blackwood Hodge* (supra) at pp143 and 145 per Fisher J. However, this is not to say that if errors of law are discernible in the Tribunal's decisions they should not be corrected. In the present case, although the Tribunal was deciding a question of fact, the majority erred in law in deciding that question. The primary judge's decision was therefore correct. The appeal should be dismissed with costs.

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