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Re Times Consultants Pty Limited and Collector of Customs (Queensland) [1986] AATA 140 (26 May 1986)

ADMINISTRATIVE APPEALS TRIBUNAL

Re:  TIMES CONSULTANTS  PTY. LIMITED
And: COLLECTOR OF CUSTOMS (QUEENSLAND)
No. Q85/112
AAT No. 2688
Customs Tariff

COURT

ADMINISTRATIVE APPEALS TRIBUNAL
GENERAL ADMINISTRATIVE DIVISION
B.J. McMahon (Senior Member)
C.J. Stevens (Member)
G.R. Taylor (Member)

CATCHWORDS

Customs Tariff - goods reclassified as sets of cassettes/ magazines - duty paid under protest - whether subject goods put up as sets - applicability of interpretative rule 3 and the "sets rule" when constituents retain their own identities - determination of the "essential character" of a set.

Words and phrases: "sets", "essential character".

[Customs Tariff Act 1982 s. 17\(1\)](#); Schedule 2 (r. 2, 3), [3](#); [Ch. 62](#) 49. 02, 92. 12.

Re Impco Pty. Ltd. [2 ALD 843](#)

Re Toner Distributors of Australia Pty. Ltd. [3 ALD 234](#)

Candler v Crane, Christmas & Co. [\(1951\) 2 KB 164](#)

Re Constanzo Importing Company (N. V85/41, V85/413 decided on 19 December, 1985)

Re Gissing [1 ALD 144](#)

Re Tridon [4 ALD 615](#)

Re Koala Shoes Productions Pty. Ltd. [6 ALD 345](#)

Re O.E.S. Holdings Pty. Ltd. [5 ALD 58](#)

Re Phillips and House Group [2 ALD 704](#)

Re Renault (Wholesale) Pty. Ltd. [2 ALD 111](#)

Re Blackwood Hodge (Australia) Pty. Ltd. [3 ALD 22](#)

Re J.S. Levi Corporation Ltd. [1 ALN N38](#)

Re Toyland [7 ALD 67](#)

Re Companion Pty. Ltd. [1 ALD 84](#)

Re Scholle Industries [5 ALN N86](#)

Re Willis & Sons Pty. Ltd. [2 AAR 243](#)

Re Sterns Playland [4 ALD 562](#)

Re Pacific Film Laboratories Pty. Ltd. [2 ALD 144](#)

HEARING

CANBERRA

26:5:1986

ORDER

1. The decision under review is set aside.
2. The matter is remitted to the respondent 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.
3. Leave is reserved to the parties to apply to the Tribunal as to the calculation of the applicant's refund entitlement.

DECISION

Each of the relevant goods consists of a publication in magazine form to which is loosely attached a pre-recorded tape of music. The attachment is by adhesive tape to a cardboard matching panel, which in turn is attached to the magazine by one or two staples. The tape is a cassette housed in a plastic box and both are clearly intended to be detached from the panel and therefore from the magazine.

2. The magazine is described by the applicant as one of a series of a part work. Each part of the 52 part series is devoted to a particular classical composer. "Part works" were said to be the constituents of a series of publications which broke down an existing book into parts (the Dickensian origin of the publishing form) or built up a new work with a common theme from the parts.
3. The magazines and tapes in the form in which they were imported into Australia were previously sold in the United Kingdom through newsagents on a sale or return basis. After returns were received, it was the policy of the publisher to export the goods to other English speaking countries in turn, until the whole supply of the goods had been exhausted. If this could not ultimately be achieved, the balance of the goods were returned to the publisher who then bound the loose parts as a book. The publisher (Marshall Cavendish) is related to the applicant, each having the same parent company.
4. The magazines were composed, developed and launched after considerable research, writing and consultations. They were very expensive to produce. On the other hand the publisher obtained extremely good terms from the Polygram group of companies for the supply of pre-recorded tapes at a very low price. As a result of this it was able to declare the value of the magazine on importation

into Australia at around \$3.06 and the cassettes at either 0.54 cents or 0.67 cents.

5. The cassettes were produced independently of the magazine and without any thought of their association in the future. They were simply commercial recordings of popular classical works (some of them recorded quite a few years earlier) which the Polygram group had in stock and which the publishers decided to associate with their magazines.

6. There were many magazines that were imported into Australia unaccompanied by tapes. In that case the tapes were manufactured by the Australian subsidiary associated with the Polygram group and were supplied directly to the applicant in this country. In those circumstances the finished tapes were attached to the magazines in a sheltered workshop and to that extent the combination was produced locally. Those goods are not the subject of the present review.

7. Upon importation, the magazines were entered for home consumption under item 49.02 at a duty rate of free. The cassettes were entered separately under paragraph 92.12.29 of the tariff at a duty rate of 30%. Following a review of the relevant goods by the respondent, a decision was made that the subject goods represented sets of cassettes/magazines and that the proper tariff classification was 92.12.29, so that the combined value of the magazine and the cassette was subject to duty of 30%. Duty was paid under protest and the decision of the respondent now comes before us for review. The decision was reviewed internally and affirmed. However the basis of affirmation shifted slightly. Having identified the goods as sets consisting of a cassette and magazine, the Collector considered that interpretative [rule 3\(2\)](#) (to which reference will later be made) applied. He considered that the essential character of the goods could not be established and that therefore [rule 3\(1\)\(c\)](#) required him to classify the goods to the paragraph last occurring in Schedule 3. This led him to paragraph 92.12.29 referred to above. The two principal issues to be decided in this application therefore are whether the subject goods are put up as sets and if so whether an essential character can be determined so as to define the components of the sets or if not whether, accordingly, the "last occurring paragraph" rule will apply.

8. Each issue of the magazine is devoted to a separate composer. Within each magazine there are 3 sections. The first relates to the life of the composer and his friends, the second to a particular musical work, (and sometimes to a particular conductor or instrumentalist and his technique) and the third part relates to the historical background of the country and times in which the composer lived. There is also a continuing compendium of musical terms and a lavish illustration and simple explanation of various instruments of the orchestra.

9. For reasons that need not concern us here, magazines that are imported with associated records (rather than cassettes) are entered free of duty and are not subject to the present review. We are concerned only with those magazines that were imported with associated tapes or cassettes. There is a reference to these records or cassettes on the inside front cover of each magazine in the following terms.

"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.

Please note

Every care has been taken to ensure that all records and cassettes are of the highest quality. However, if you receive one that is faulty please return it to your newsagent. In case of difficulty, please send it to the Great Composers and their Music, Marshall Cavendish, 58 Old Compton Street, London W1V5PA and a replacement will be sent to you."

10. A further reference to the recordings or cassettes is made in an item headed "Guarantee" in the following words:

"In anticipation of the high demand for this series and by special arrangement with the record companies, we are able to offer the Great Composers and their Music at an exceptionally attractive price. This price will remain unchanged throughout the series unless there are changes to the rate of VAT."

11. The middle section of each magazine is referred to as the "Listener's Guide" and contains an analysis of a particular work of the composer. Themes from the work are illustrated in musical notation and a detailed analysis is made (in colourful and easily understood phrases) of the development and features of each particular movement. The same work that is analysed in the magazine is recorded in the attached cassettes. There is what might be called a mood picture on the front of each issue, which, no doubt, is intended to depict the feeling that listening to the particular work induces.

12. Illustrating Brahms, Symphony No. 1 is a rather mystical picture of birds, sea waves and rocks. Illustrating a piano recital of works by Chopin is a picture of young ladies performing a vigorous dance (perhaps a mazurka or a polonaise?) to the piano accompaniment of another young lady. Illustrating Schubert's Symphony No. 8 (the unfinished) is an unfinished oil sketch of a number of other young ladies gazing upon the Great Composer at the pianoforte.

13. In all these cases the same picture, or an extract from it, is reproduced on the sleeve of the cassette, which is housed in a clear plastic box. The cardboard panel to which the cassette is attached with adhesive tape, is of the same colour scheme as both the sleeve of the cassette and the cover of the magazine.

14. The applicant contended that the manufacturer's purpose and its view of the relevant products were important in their classification for tariff purposes. In support of that argument considerable evidence was presented.

15. The goods were sold exclusively through newsagents both in the United Kingdom, until a particular run was exhausted and in Australia, when the remainders had been imported into this country. Evidence was given by the secretary of the Newsagents' Association that cassettes or records were not normally sold in those shops, that there was no facility for testing them but that part works were commonly available for purchase. Evidence was also given that it was common practice in dealing through newsagents for goods to be consigned to them on a sale or return basis. In his view the subject goods would be regarded by a newsagency patron as one of a familiar range of part works with a bonus tape in addition.

16. The magazines were sold invariably in conjunction with either a record or cassette. The display box in which the goods were exhibited has endorsed on it; "Available with a high quality cassette or record". In view of the evidence that was given, it would appear that the underlining should have been under the word "or" instead of under the words "cassette" or "record". The word "available" (according to the evidence) did not indicate that the record or cassette was an optional extra. The only option available was whether one chose a record or a cassette.

17. Advertising associated the two objects. Statements such as "available with a high quality cassette or record" commonly appear in the advertising material tendered in evidence. Notwithstanding that, the advertising material undoubtedly tends to emphasize the magazine element of the package. For example in a leaflet apparently intended for newsagents, the following appears:

"Marshall Cavendish Ltd. present their latest part work "The Great Composers and their Music". Each issue tells the story of their lives, their friends and contemporaries, their contribution to music. Each issue also comes with a superbly produced high quality record or cassette."

18. The use of the word "also" relegates the part of the cassette to a supporting role.

19. The recommended retail price is \$6.95. In accordance with figures supplied by the applicant, the overwhelming bulk of that price represents the price of the magazine.

20. A radio advertisement had the following text:

"Introducing the Great Composers every fortnight a full colour magazine tells you about a composer, his life, his times, and one of his major works each issue comes with a complete record or cassette of that work produced to the highest standards The Great Composers builds into a balanced collection that helps you get the most from classical music The Great Composers - complete with record or cassette - only \$6.95 at your newsagent."

21. "Complete with cassette" continues the downgrading of the role of the cassette in the ensemble.

22. The script of a television commercial is in similar terms. The emphasis, in other words, was on the part works issue of the magazine. The applicant's case was that the cassette was merely supplementary to the part work and illustrated one aspect of it, as reproductions of great paintings have illustrated other aspects of other part works produced by Marshall Cavendish Ltd. One such series featured the works of Van Gogh, another those of Constable. Both part works were accompanied by a high quality reproduction of works of the painters in question. It was submitted that the cassettes under consideration were analogous to these reproductions.

23. The first question to be decided in this application is whether, even assuming that the relevant goods formed a set, [rule 3](#) of the interpretative rules had any application. This is in the nature of a threshold point and falls for consideration before either of the two issues referred to above. If we decide that it has no application, then that will determine the review.

24. [Section 17\(1\)](#) of the [Customs Tariff Act](#), provides that the rules for the interpretation of Schedule 3 set out in Schedule 2 have effect for the purpose of ascertaining within which item, sub-item, paragraph or sub-paragraph the goods fall and if the goods fall within two or more of such items, sub-items paragraphs or sub-paragraphs, which one applies to the goods. The interpretative rules in Schedule 2 are drawn from the rules for the interpretation of the nomenclature to the Brussels Convention and are intended to be part of Australia's fulfilment of its obligations as a contracting party to that Convention.

25. [Rule 3](#) of Schedule 2 in its application to the subject goods, received considerable attention during the hearing of this application. The terms of the rule are as follows:

"SCHEDULE 2
RULES FOR THE INTERPRETATION OF SCHEDULE 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 of 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 of kind of goods, as prescribed by by-law."

26. As counsel for the applicant pointed out, it followed that because the goods considered as separate products easily fell to different items, the collector's decision depended upon a finding that the goods as presented for customs entry "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" within the meaning of the opening words in rule 3(1).

27. He pointed out the logical and grammatical difficulties in reconciling these opening words with a rule that has evolved from decisions of this Tribunal and Rule 3(2), which is often referred to as the "sets rule". If goods are not mixtures, or do not form a new composite good (and thereby enter rule 3 through rules 2(2) and 2(3), together with rule 2(4)) they will retain their individual identities and therefore may not each fall within 2 or more items. Nevertheless, if they are put up in sets, they are now regarded as coming within the opening words of rule 3(1). Each part of the set may be clearly classifiable to a particular item or paragraph, yet by reason only of their coming together qua set, they are deemed to fall to multiple items or paragraphs.

28. What has evolved is an addition to the precipitating circumstances outlined in rule 3(1) which causes the subsequent sub-rules to come into operation.

29. This "sets rule" gloss on the opening words of interpretative rule 3 seems to have had its origin in *Re Impco Pty. Ltd* [2 ALD 843](#). The difficulties of applying the rule when sets took on an identity of their own was recognised. The view was therefore taken that the rule could usefully operate where ingredients of a set retained their own individual identities, in that case a brush, comb and mirror. At page 847 the Tribunal said:

"That rule appears to contemplate a type of set which, in addition to being put up in retail packings is one in which the constituents retain their independence and are grouped together for a specific purpose. In this case the goods, although put up in a set, retain their own individual identities. Accordingly it seems to us that the rules as amended require us in these circumstances to give effect to rule 3 and to regard the goods as "falling within two or more items". If the goods did not retain their individual identities, they would in fact fall within no item, and no occasion for the application of rule 3 could in our opinion arise. Nor could it of course arise were the goods to be regarded not as a set but simply as individual goods each falling within one item only."

30. The Tribunal took further comfort in its approach to this rule along an historical path in these terms:

"There is another feature of the problem which encourages us in the view which we take of the matter. As previously stated, rules 3(1)(b) and (c) were substituted, and a new rule 3(1A) inserted, with effect from 1 January 1978. Rule 3 (1A), and rule

3(1)(b)(ii)(C) as amended, were clearly intended, as appears from their terms, to provide for the introduction into rule 3 of the concept of goods being put up in sets, and for interpretation to proceed on that basis. An approach which ignores this (either by regarding the component goods as simply falling each within one individual item, or by regarding goods put up in a set as having in all circumstances one new and individual identity on its own), would make the 1978 amendments, which were deliberately made not only as an Australian enactment but also pursuant to international convention, entirely ineffective."

31. The reasoning in *Re Impco* (supra) was quoted and specifically approved in *Re Toner Distributors of Australia Pty. Ltd* (McGregor J. presiding) [3 ALD 234](#).

32. After quoting the above passages the Tribunal there went on at page 238:

"Adopting the Tribunal's reasoning in that case, we think that the reference to "goods" where first appearing in r 3(1) must be taken to include "goods put up in sets" notwithstanding that the first reference to such goods appears within r 3(1)(b) and that the definition in r 3(1A) is expressed to be "for the purposes of clause (C) of sub-paragraph (ii) of paragraph (b) of sub-rule (1)" of r 3. It follows therefore that each of the principles laid down in rules 3(1)(a), (b) and (c) must be applied to goods put up in sets, where the products or articles comprising the set fall within more than one item etc."

33. The present sets rule was inserted into interpretative Rule 3 by Customs Tariff Amendment Act No. 47 of 1978 (effective from 1 January 1978) and was still fresh in the mind of the Tribunal when these cases were decided in 1980. The rule postulates a dilemma.

34. As was argued by counsel for the applicant, if one accepts first that the reason for the classification of a set as a new entity or entirety is that there is a mutual interrelationship between its components in that they are grouped together to serve a function, then prima facie a set should only be classified by reference to its whole, rather than separately according to its components, if the function for which the goods were grouped together gives "essential character" to the combination.

35. If the goods which comprise the components of a set fall only to one item, then the opening

words of rule 3(1) will generally not apply to sets. It was submitted that the net effect of the two decisions in *Re Impco* (supra) and *Re Toner* (supra) was that the Tribunal had involved itself in unauthorised legislative reconstruction by inserting in the opening provision of rule 3(1) the words "or where the goods are put up as a set". It was submitted that this was erroneous and an invalid attempt at the exercise of legislative power by the Tribunal and that in fact those decisions should not be followed by this Tribunal.

36. It was submitted that a preferable interpretation of rule 3(1) was that it should not apply to sets unless one or more components of the set fell to two or more items.

37. Although we see the force of the applicant's argument in logic we consider now that the *Re Impco* (supra) interpretation is settled law. To depart from it would be as much an exercise of legislative power as that complained of in the decisions to which we have referred. Denning L.J. numbered himself among the "bold spirits" who would depart from established precedent and allow a new cause of action "if justice so required" (*Candler v Crane, Christmas & Co.* (1951) 2KB 164 at 178). In the present circumstances we find ourselves philosophically more in agreement with the majority view articulated by Asquith L.J. (ibid. at 195):

"I am not concerned with defending the existing state of the law or contending that it is strictly logical - it clearly is not. I am merely recording what I think it is. If this relegates me to the company of 'timorous souls' I must face that consequence with such fortitude as I can command."

38. We consider that we should follow these decisions for many reasons. They have been in place for some six years. They have formed the basis of many decisions of this Tribunal (one of the most recent being *Re Constanzo Importing Company* (V85/41, V85/413) 19 December 1985). Apart from decisions of the Tribunal they must have been the foundation of countless decisions of the respondent and his officers over the years. It would be inimical to good administration, to say nothing of fairness, justice and balanced practice among importers, to turn an important interpretative rule based on an international convention away from established understandings. It would not be appropriate for a Tribunal at first instance (as we are) to decline to follow these decisions and to shift the emphasis of interpretation in a different direction. Until a court of authority decides otherwise, we consider that the respondent will continue to be justified in looking to interpretative rule 3 for classification of sets where the constituents retain their independence.

39. The question then is whether the relevant goods are put up in sets. There was no question that they were put up in retail packings. There was also no real argument that the component parts had independent or complementary uses. In deciding whether or not the relevant goods constituted a set, the real argument was whether the components were grouped together for "meeting a specific need or carrying out a specific activity". If we decide that the goods constitute a set then it will be

necessary to determine whether one material or component gives to the set an essential character and if so the goods will then be "taken to consist of that material or component" which in turn will determine the tariff classification of the sets.

40. The applicant's primary contention was that the various components of the subject goods were correctly entered separately under their respective classifications. In other words it was submitted that they did not constitute a set within the meaning of rule 3(2). It was common ground between the parties that the subject goods were not composite goods nor were they mixtures. It was also common ground that they were put up in retail packings and generally agreed that the components had independent or complementary uses. What was denied by the applicant was that they were "grouped together for meeting a specific need or carrying out a specific activity". It seems to us a difficult position for the applicant to maintain. It was in fact the applicant's related company, the publisher and supplier, that physically grouped together the various components. It did not do this idly or without a great deal of research intended to identify the need or activity which could be satisfied by such grouping. We will consider whether it was successful. In identifying the goods and thus establishing whether they are put up in sets, we must of course examine them at the time when they are "on the Customs House floor". The well known words in *Re Gissing* [1 ALD 144](#) are always helpful and do not need to be repeated. Similarly the summary of principles relating to identification set out in *Re Tridon* [4 ALD 615](#) can always be relied upon for assistance. The Tribunal there observed:

"Composite goods, notwithstanding that they have components which are separately identifiable, may nevertheless be identifiable in combination as a new entity, if the identity of the separate units is subordinated to the identity of the combination."

41. Composite goods are, by the very terms of rule 3, different from sets. Principles for their recognition and identification are more commonly to be found in the decisions.

42. Whether or not goods are put up in sets has not been as frequently considered by this Tribunal. The most helpful test propounded for determining whether goods are in fact put up in sets is probably to be found in *Re Koala Shoes Productions Pty. Ltd.* [6 ALD 345](#). Although the Tribunal was there dealing with a concept found in a divisional note, the same observations would have relevance when considering a similar situation under Schedule 2.

43. At paragraphs 16 and 17 the Tribunal said:

"To justify a finding that the goods are put up in sets, within the meaning of divisional note 1, the goods said to constitute the constituents of that set must, we think, be presented, arranged, packaged or in some

readily identifiable way brought together or into association one with the other so as to make it apparent that the constituent items are intended to constitute an interrelated or complementary collection of articles for a particular end use

If regard is had to the provisions of note 1, the inference is inescapable, in our view, that for goods to be found to have been "put up in sets" their intended use together and their complementary functions must be readily identifiable from the way in which the goods are "put up".

44. The features of appearance and presentation already referred to (the way in which the subject goods are "presented, arranged, packaged") demonstrate, alone in our view, a sufficient degree of interrelation and complementary function to identify the goods to an informed observer as having been put up in sets. Other factors add to that conclusion.

45. It was common ground between the parties that the use of the word "for" in rule 3(2)(a) indicated that there must be a purposive approach. For that reason the applicant sought to give evidence of the manufacturer's intention.

46. Some intentions can be relevant but only when bearing on classification considerations. Certainly the intention must be tied in with the ultimate use or presentation of the subject goods and not for any irrelevant commercial purpose as was apparent in *Re O.E.S. Holdings Pty. Ltd* [5 ALD 58](#) (reported only as to jurisdiction).

47. In an unreported segment of the decision the Tribunal said:

"So far as the manufacturer's intentions are relevant, it seems that the composite goods were designed to meet a consumer demand for a brush to be available in combination with the aerosol dispenser. Whilst the manufacturer's main intention may have been to establish an additional market for its aerosol dispensers, that intention cannot control the classification of the goods. In the present case it is the product as imported which has to be evaluated, not the manufacturer's intentions."

48. We respectfully agree with the observations there made, but we cannot see however that the type of manufacturer's intention considered in that case can be of relevance in the present proceedings. It

is not inconsistent with the O.E.S. decision (supra) to hold that intentions related (for example) to widening the market or increasing turnover are not relevant to classification disputes (including the identification of sets) whereas intentions as to grouping, packaging or presentation may be.

49. There was also general agreement on both sides for the purpose of this argument that there was a specific need or a specific activity for which the goods might have been grouped together although they did not agree in identifying it. The applicant preferred to call that a need for musical education, the respondent a need for appreciation of music. Whichever basis was adopted for defining the purpose of the grouping would in our view perhaps have some effect on defining the essential character of the group. For the purpose of deciding whether or not the constituent goods formed a set we do not think it necessary to decide this question. The fact is that there was a specific need or a specific activity for which the goods were grouped together.

50. This is borne out by the very appearance of the goods. The matching covers, the reference to the cassette in the magazine and the reference to the musical work recorded on that cassette in the magazine, the fact that they are sold together and are evidently intended to be used together, all indicate that they are grouped for the purposes set out in the rule. Whether the cassette illustrated the magazine or vice versa is not really material to the determination of this preliminary question. The readily observable physical features and possible functions link the constituent parts into an illustration of the principles referred to in *Re Koala Shoes* (supra). We find accordingly that the components of the relevant goods were put up in sets.

51. As it was common ground between the parties that neither the cassette nor the magazine provided a more specific description of the goods and that accordingly paragraph A of rule 3(1) did not apply, it then falls in our inquiry to see whether it is possible to establish that one material or component gives to their goods their essential character. If that be so then the goods are taken to consist of that material or component and are to be classified accordingly.

52. The phrase "essential character" has been a troublesome one. As was pointed out in *Re Costanzo Importing Co.* (supra) "essential character" is a concept which is difficult to articulate. It has been considered in various contexts. *Re Phillips and House Group* [2 ALD 704](#) considered it in relation to certain by-laws. Its place in the construction of interpretative Rule 2(1)(a) was considered in *Re Renault (Wholesale) Pty. Ltd.* [2 ALD 111](#), *Re Blackwood Hodge (Australia) Pty. LTD.* [3 ALD 22](#) and *Re J.S. Levi Corporation Ltd.* [1 ALN N38](#). Its place in interpretative rule 2(1)(b) was considered in *Re Toyworld* [7 ALD 67](#).

53. Decisions of particular relevance to the present inquiry are those concerned with composite goods and sets. In relation to the former the meaning of essential character was discussed in *Re Companion Pty. Ltd.* [1 ALD 84](#), *Re Scholle Industries* [5 ALN N86](#), *Re O.E.S. Holdings Pty. Ltd.* [5 ALD 58](#), and *Re Willis & Sons Pty. Ltd.* [2 AAR 243](#). The three sets cases are *Re Impco* [2 ALD 843](#), *Re Toner Distributors* [3 ALD 234](#) and *Re Costanzo Importing Co.* (supra).

54. Some of the attempts to affirm standards to apply in arriving at the essential character have been expressed thus:

"The term points to the characteristics which distinguish the goods as belonging to a genus or sub-genus." *Re Renault (Wholesale) Pty. Ltd.* (supra).

55. *Smithers J. in Re Blackwood Hodge (Australia) Pty. Ltd.* (supra) said:

"A thing may be said to be essential to an entity if that entity would not be what it is to be, if the part in question was wanting."

56. In *Re Scholle Industries Pty. Ltd.* (supra) (Davies J. presiding) the following guidance was given:

"It is thus a term which may refer to a particular quality which distinguishes the subject from others or, on the other hand, to the aggregate of distinctive qualities of the subject. Thus the words "essential character" must be applied not in the abstract, but in the light of the issues which arise under the tariff."

57. 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.

58. 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.

59. In relation to the issue we are now considering, the applicant's principal submission was that the functional utility of the set was to provide easily assimilable musical education about particular composers. Evidence was relied upon to illustrate many aspects of this functional utility and the

capability of the set to perform that function and the consequent dominant role of the magazine in that set.

60. Evidence was led that the overwhelming bulk of the cost of the set was attributable to the magazine. There was some doubt as to whether the values attributed to the respective components (as distinct from the total value of the package) was accepted by the respondent. However with all allowances made for any possible anomalies or inconsistencies, it is very clear that the value of the magazine was at least three times that of the cassette (based on cost).

61. The applicant also relied on advertising and promotional material, all of which emphasised the magazine and treated the cassette almost as a bonus. The cassettes were in fact excellent value if one looks at it simply in that light. Although they were reproductions of old recordings and possibly were not in the current catalogues, they were nevertheless priced considerably below the going rate of retail prices for cassettes produced by Deutsche Grammophon, namely between \$12 and \$17. The respondent would rely upon this (as will be seen later). However the applicant's point was, that because the supplier had obtained such favourable terms, it diminished the costs involved in the production of the cassette in relation to the costs involved in working up the magazine from scratch.

62. Evidence was relied upon that the general business of the publisher was selling part works magazines. Evidence was given of many other series, of the publisher's catalogues, of its standing and sales turnover in other parts of the world, mostly in part works magazines. Evidence was given of market surveys and consumer reviews, which emphasized the magazine aspect. This emphasis was repeated in evidence concerning the retailing of the sets.

63. An actual purchaser gave evidence on the hearing of this application of the circumstances under which she bought a number of these sets, how the magazines were used for educational purposes both for herself and her musically talented daughters and how the magazine and cassette were filed away for future reference. She gave evidence that she would not buy sets simply for the sake of the cassette, nor would she decline to buy the set if she had another recording of the work recorded on the cassette. She wanted the two of them together. Whatever the bargain value of the cassette alone, the value to her of the combination was apparently more attractive.

64. Although the limitations referred to in *Re Sterns Playland* [4 ALD 562](#) were appreciated, nevertheless evidence of the way in which the goods were displayed, stored, packed and advertised was relied upon. All these, the applicant said, pointed to the dominance of one component, namely the magazine.

65. The respondent relied upon six factors to justify his submission that the essential character of the set should be taken to consist of the cassette.

66. Firstly it was argued that the magazine contains a substantial reference to the music on the cassette. One third of the magazine consists of an analysis of the work illustrated in cassette. The

cassette on the other hand contains no reference to the magazine.

67. Secondly it was argued that the cassette would be used by the consumer more often than the magazine. Having read the magazine once, twice or maybe three times, generally the consumer would have absorbed the information in the magazine and would not need to read the magazine in the future. It was said that the consumer would however listen to the cassette on a number of future occasions. We regard this purely as a speculative argument. There was no evidence adduced to support the proposition at all. We venture to suggest that it may well be not in accord with the common experience of those who enjoy reading and re-reading favorite printed works. It would be equally plausible to speculate that a purchaser may never use the cassette supplied with the magazine because he has another version he prefers. Furthermore a buyer may purchase the magazine, even though he has no interest in the music of the particular composer featured, so as to maintain a complete set and also have access to the historical and other information provided. Mere speculation does not assist greatly in resolving the issues before us.

68. The third argument was equally speculative. That is, that the only reason for appreciating a composer and being interested in the life and era of that composer is because of the composer's music and the cassette is an example of that music. In our view this is a very tenuous argument and quite arbitrary. In these terms it would be just as valid to say that the one third of the magazine devoted to, for example, European history in the late 19th century, is the dominant characteristic and the items referring to Brahms are merely supplementary or illustrative of the life led by people during that era. In any event the submission does not address the argument that whilst an interest in a composer's music may prompt a purchase of the set, the fact that a purchaser already has a recording of the featured work does not inhibit him from acquiring another example of it on the cassette.

69. The fourth submission was that as the magazine has reference to the music, it is necessary in production to decide what music is going to be put on to the cassette before writing the magazine. Whilst this is no doubt true, it seems to us that this is an argument based on manufacturer's intention of the type considered in *Re O.E.S. Holdings Pty. Ltd.* (supra) - the type of intention which has no bearing on the classification of the goods but which is based on commercial considerations irrelevant to that function.

70. The fifth submission was that the retail value of the cassette in the Australian market place, is considerably more than the value attributed to the cassette in this case and that adopting the applicant's argument of relevant value totals, the cassette ought to predominate. Unfortunately there was no evidence to support this contention as to the particular cassettes in question. There was no evidence that the particular recordings are still in the catalogue, that they have any value, that they have not been supplanted by more recent and better recordings in the commercial record market, or that the range of production of the cassettes in question was so wide as to have such a drastic adverse effect on their values.

71. Finally, the respondent submitted that the price of the magazine was too high in relation to the

cassette and ought to be lower. He readily conceded that again there was no evidence on that point. Such an assertion is pure speculation and is of no assistance in coming to a determination. There may be a relationship between the publisher and the applicant, there may be discrepancies in value attribution in invoices but that is not enough to sustain a speculative assertion of the nature outlined above.

72. 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.

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

74. 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.* (supra)). We accept the evidence that the term "part works" is widely understood (c.f. *Pacific Film Laboratories Pty. Ltd* [2 ALD 144](#)). What we have before us is a part work illustrated in a particular way - electronically rather than by steel engravings.

75. 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.

76. In our view the decision under review should be set aside and the matter be remitted to the respondent with a direction that the subject goods be so reclassified.

77. It follows from this decision that it will not be necessary for us to consider the application of Rule 3(1)(c) which formed the basis of the decision under review.

I have had the benefit of reading the majority reasons and agree with all the conclusions reached by the other members except their conclusion as to the essential character of the sets. My understanding of the evidence leads me to a different conclusion. I will shortly summarize the reasons for this

result.

2. I am conscious that the primary rule to be observed in classification is to look at the subject goods by way of an informed inspection at the time of importation. In my view two matters which were mentioned extensively in evidence are only of limited relevance in considering the essential character of the sets. Those matters are firstly the fact that the main business of the overseas supplier of the goods is the publishing of written material and secondly the fact that the subject goods were distributed through the normal businesses of newsagents.

3. Much evidence was presented by the applicant that the manufacturer's purpose and its view of the products were important for tariff classification. The evidence was presented in such a way as to support the contention that the magazine was the main element in the package, with the cassette in a supporting role. I believe that this conclusion is inconsistent with some of the evidence the applicant itself tendered. For example in the Marshall Cavendish catalogue, which was tendered in evidence, page 4, devoted to "The Great Composers and their Music" reads-

"A collection of the world's most celebrated classical music, this series of recordings and illustrated guides is presented in association with Deutsche Grammophon, Philips and Decca, and the recordings are selected from their extensive repertoire.

Each part focuses on a single composer and contains a full-length record or cassette of a complete work, plus an illustrated guide that explains and analyses the music and introduces the composer and the times in which he wrote.

The music is presented within the historic framework of the four great periods of classical music . . . 52 issues, plus a 13-part extension each 28 pp 298 x 229 mm."

The text of the above extract from the catalogue would be consistent with an intention that the cassette and not the magazine was seen as the major component.

4. As to the fact that the goods were distributed through newsagencies, I would simply observe that on that argument it is possible that the goods would have been classified differently if they had been brought into Australia by a company whose business it is to market classical recordings and to arrange for the distribution of the products through music stores.

5. I am also troubled by the fact that the set of goods will be perceived differently by different people and in fact the two different approaches were represented by the evidence of two people - Mrs

Mullineux and Mr Brouner. The former, who was called on behalf of the applicant and who saw the magazine as the component which gave a predominant flavour, was a particular consumer. No real evidence was given to indicate that she was representative of the group of consumers at large. Mr Brouner, who was called on behalf of the respondent and who saw the cassette as giving a predominant flavour, was not put forward as a typical consumer but he did claim to have marketing knowledge and expertise. I would give more weight than appears to have been given by the majority to the evidence of Mr Brouner.

6. I note in passing that, although on the evidence the cost of the cassette to the supplier represented a minor part of the supplier's total cost of the set, it would not be surprising if an observer not in possession of that information came to a view that at least one half of the "value" of the set was attributable to the cassette.

7. The majority dealt with the argument of the use to which the subject goods would be put. The respondent argued that the cassette was likely to be used more often than the magazine. I find this argument persuasive. After the magazine had been read once or twice it would be put away and its subsequent use would be very largely for reference as occasion arose. On the other hand, if the musical work was one which the owner enjoyed hearing, it would not be unreasonable to expect that the cassette would be played from time to time - with greater frequency than would the magazine be taken out for reference. It is true that no evidence was adduced to support the contention, but I would be concerned if it were dismissed as pure speculation.

8. 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. Having regard to the way in which the tariff would be applied if the goods were entered into Australia in their separate components, this is a result which would give me no cause for satisfaction. I am nevertheless led to it by the above considerations.

9. I would affirm the decision under review.

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