



Appeal number: LON/2009/7069

CUSTOMS DUTIES – 23 motor cars – whether within CN heading 87.03 or CN heading 97.05 as collectors’ pieces – only points in issue on the application of the CNEN were whether the cars individually possessed “a certain scarcity value” and “illustrated a significant step in the evolution of human achievements, or a period of that evolution” – Erika Daiber v Hauptzollamt Reutlingen (Case 200/84), Uwe Clees v Hauptzollamt Wuppertal (Case 259/97) considered — held the correct comparison to evaluate scarcity is between the motor car and other cars of the same type which are generally obtainable – held that the Respondents had failed to rebut the presumption that the motor cars in question “illustrated a significant step in the evolution of human achievements, or a period of that evolution” – Barnfinds Limited v HMRC not followed – findings made that the motor cars were all relatively scarce and that they all “illustrated a significant step in the evolution of human achievements, or a period of that evolution” – the motor cars were therefore properly classified within CN heading 97.05 as collectors’ pieces – appeal allowed

FIRST-TIER TRIBUNAL
TAX

JD CLASSICS HOLDINGS LIMITED

Appellant

-and-

THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS (*Customs Duty*)

Respondents

TRIBUNAL: JOHN WALTERS QC (TRIBUNAL JUDGE)
MRS. L. M. SALISBURY

Sitting in public at 45 Bedford Square, London WC1 on 10 and 11 March 2010

Matthew Collings QC, instructed by Goodman Derrick LLP, for the Appellant
Owain Thomas, Counsel, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents

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DECISION

- 5 1. On 28 October 2008, the Respondents (HMRC) issued a decision letter to the Appellant, JD Classic Holdings Limited regarding reclassification for Commodity Code purposes of consignments of motor cars imported by the Appellant. This was followed by the issue on 7 November 2008 by HMRC of a C18 Post Clearance Demand Note to the Appellant, alleging an underpayment of £269,390.48 in respect
10 of VAT and customs duty due on the importation of certain motor cars and demanding payment. The point taken by HMRC was that the cars ought to be reclassified to Commodity Code 8703 24 9000, which attracts a 10% duty rate and the standard rate of VAT. This classification covers "Motor cars and other motor vehicles principally designed for the transport of persons ...". The Appellant
15 contended (and still contends in relation to most of the cars) that the correct classification is Commodity Code 9705 which covers "Collections and collector's pieces of ... historical interest". Items within this code are imported duty free and attract effectively a reduced rate of VAT.
- 20 2. Submissions were made, and a review of the decision was requested, by the Appellant's solicitors in their letter to HMRC dated 27 November 2008. HMRC's reviewing officer sent a decision letter dated 12 January 2009, in which it was accepted by HMRC that one car was correctly classified within Commodity Code 9705 but otherwise confirmed the original decision. The Appellant's solicitors indicated that they would wish to appeal against the reviewing officer's decision but
25 they also sent further submissions and asked for the decision to be reconsidered. This request was made in a letter dated 26 January 2009.
- 30 3. The review officer replied by a letter dated 9 March 2009, conceding that one vehicle was correctly classified within Commodity Code 9705 and that another vehicle was otherwise not disputed. The Appellant also conceded in relation to two other cars. As a result of this further review decision there remain 23 cars in dispute
35 and this appeal is brought by the Appellant in relation to them. The cars were entered on importation on dates (according to HMRC's Statement of Case) between 26 October 2005 and 5 May 2008. The appeal is brought (in relation to customs duty) under section 16 Finance Act 1994 (FA 1994) as an appeal with respect to the review
40 decisions (made under section 15 FA 1994) and the Tribunal has the full appellate powers in relation to the appeal which are set out at section 16(5) FA 1994. The direct subject matter of the appeal is solely whether or not the cars are liable to customs duty. However the decision will have indirect VAT consequences as indicated. The review decisions caused the C18 demand to be reduced to £209,484.89 (comprising £85,532.52 duty and £123,952.37 VAT).
4. Since the 23 cars in dispute are undoubtedly motor cars principally designed for the transport of persons, the issue before the Tribunal is whether instead of Community Code 8703, they, or any of them, should be classified under Community Code 9705 as being collectors' pieces of historical interest.

5. The explanatory notes drawn up by the Commission in relation to Commodity Code classification 9705 in force at the time(s) – the CNEN – relevant to the appeal are as follows:

5 **“Collections and collectors’ pieces of zoological, botanical, mineralogical, anatomical, historical, archaeological, palaeontological, ethnographic or numismatic interest**

1. This heading includes motor vehicles as collectors’ pieces of historical interest if they meet the criteria set out in the judgment of the Court of Justice of the European Communities in case No C 200/84 [*Erika Daiber v Hauptzollamt Reutlingen*], and therefore:

- possess a certain scarcity value,
- 10 • are not normally used for their original purpose,
- are the subject of special transactions outside the normal trade in similar utility articles,
- are of high value, and
- 15 • illustrate a significant step in the evolution of human achievement or a period of that evolution.

In view of the fact that a motor vehicle is basically a utility article with a relatively short life, and subject to constant technical development, then the foregoing preconditions underlying the above judgments [*sic*], in so far as they are not obviously contradicted by the facts, can be taken to apply in respect of:

- 20 • vehicles in their original state, without substantial changes to the chassis, steering or braking system, engine, etc. at least 30 years old and of a model or type which is no longer in production,
- all vehicles manufactured before 1950, even if not in running order.

2. It also includes, as collectors’ pieces of historical interest:

25 (a) motor vehicles, irrespective of their date of manufacture, which can be proved to have been used in the course of an historic event;

(b) motor racing vehicles, which can be proved to be designed, built and used solely for competition and have scored significant sporting success at prestigious national or international events.

30 Proof can be supplied by appropriate documentation, for example, reference books or specialised literature, or by opinions from recognised experts.

3. The above Explanatory notes apply, *mutatis mutandis*, to motorcycles.

4. Replicas which do not fulfil the abovementioned criteria are excluded.”

6. It is not suggested that any of paragraphs 2, 3 and 4 above is relevant.

35 7. Although Mr. Thomas, for HMRC, warned us that the Court of Justice has sounded a cautionary note against reliance on the explanatory notes as if they had legally

binding force (by reference to *Holz Geene GmbH v Oberfinanzdirection München* (Case C-309/98) at [14] and *Mövenpick Deutschland v Hauptzollamt Bremen* (Case C-405/97) at [18]), we note that the CNEN set out above makes express reference to the decision of the Court of Justice in *Erika Daiber*, which was a decision on the interpretation of Commodity Code 9905 (now 9705) with reference to a second-hand Daimler-Benz 300 SL-coupé motor car manufactured in 1955.

8. We were also referred to the decision of the Court of Justice in *Uwe Clees v Hauptzollamt Wuppertal* (Case C-259/97) which establishes in relation to the second sub-paragraph of paragraph 1 of the CNEN that:

10 “motor vehicles which are:

- in their original state, without substantial changes to the chassis, steering or braking system, engine, etc.;
- at least 30 years old and
- of a model or type which is no longer in production

15 are presumed to be of historical or ethnographic interest.

However, motor vehicles which satisfy those conditions are not of historical or ethnographic interest where the competent authority establishes that they are not liable to evidence a significant step in the evolution of human achievements or illustrate a period of that evolution.

20 In addition, the criteria laid down by the case-law of the Court concerning the characteristics required in order for a vehicle to be included in a collection must be met.”

9. In relation to the conditions contained in the CEN, HMRC accept that all the motor cars in dispute satisfy the requirements that they are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value.

25 10. This leaves two conditions in dispute – namely whether each of the motor cars (a) possesses a certain scarcity value; and (b) illustrates a significant step in the evolution of human achievements, or a period of that evolution.

30 11. In relation to (b), if the Appellant can show of any car that it is in its original state, without substantial changes to the chassis, steering or braking system, engine, etc., is at least 30 years old and is of a model or type which is no longer in production, then a presumption that the car is of historical or ethnographic interest will be raised. This presumption can only be rebutted by HMRC establishing, in relation to it, that the car does not evidence a significant step in the evolution of human achievements or illustrate a period of that evolution. Mr. Thomas, for HMRC, accepted that this was the position and that the presumption was raised in relation to all the cars in issue
35 except one (number 14 – see below) which was not, in HMRC’s submission in its original state.

12. The Tribunal received witness statements and heard oral evidence from two witnesses, Jeremy Noel Barker, a director of Cars United Kingdom Ltd., who was not cross-examined by Mr. Thomas, and Derek Thomas Hood, a director of the Appellant.

13. There was also a significant amount of documentary evidence.

5 14. From the evidence, we find the following facts:

15. A description of the cars in issue, indicating whether left hand drive (LHD) or right hand drive (RHD) and with their respective dates of manufacture is given as follows (the non-consecutive numbering adopted was used at the hearing)

3. Jaguar XK120 Roadster (LHD), 1954
- 10 4. Jaguar XK140 SE Drophead Coupé (LHD), 1954
5. Jaguar XK120 SE Roadster (LHD), 1954
6. Jaguar XK140 SE Roadster (LHD), 1955
7. Jaguar XK140 SE Drophead Coupé (LHD), 1955
8. Jaguar XK140 SE, Roadster (LHD), 1956
- 15 9. Jaguar XK140 SE, Drophead Coupé (LHD), 1956
10. Jaguar XK140 SE, Roadster (LHD), 1956
11. Jaguar XK140, Roadster (RHD), 1956
12. Jaguar XK140 SE, Roadster (LHD), 1957
13. Jaguar XK150 SE, Drophead Coupé (LHD), 1958
- 20 14. Jaguar XK150 SE, Drophead Coupé (RHD), 1959
15. Jaguar MK1 SE, Saloon (LHD), 1959
16. Jaguar XK150 SE, Drophead Coupé (LHD), 1960
17. Jaguar XK150 SE, Drophead Coupé (LHD), 1960
19. Lotus Elite Series 2, Coupé (LHD), 1963
- 25 20. Jaguar E-Type, Coupé (LHD), 1964
22. Jaguar E-Type, Roadster (LHD), 1965
23. Austin Healey 3000 Mk III Phase II, Drophead Coupé (LHD), 1967

- 24. Jaguar E-Type, Fixed Head (LHD), 1967
- 25. Jaguar XK140 SE, Drophead Coupé (LHD), 1955
- 26. Jaguar XK140 SE, Roadster (LHD), 1955
- 27. AC Cobra, Roadster (LHD), 1965

- 5 16. The Appellant has dealt for 25 years in classic cars and Mr. Hood claims it now has “probably the largest stock of any classic car dealer or specialist in the UK”. At any time it has around 300 cars at its premises in Maldon, Essex, about 180 of which are for sale. The other cars are customers’ cars being serviced, restored or prepared to race.
- 10 17. The Appellant regularly advertises cars for sale in specialist magazines and maintains a website. Its customers are UK and foreign persons; it rarely sells to other dealers. Likewise the Appellant usually buys from private sellers and very rarely from the trade. The cars in dispute were all bought by the Appellant from private sellers, and all were in original condition.
- 15 18. Mr. Hood’s evidence (which we accept) was that the Appellant would normally have in stock: 7 to 10 Jaguar XK120s, 5 to 8 Jaguar XK140s, 6 to 12 Jaguar XK 150s, 10 to 12 Jaguar MK IIs and 7 to 10 E-Type Jaguars. The Appellant would normally buy in a typical year 4 to 10 XK120s, 5 to 10 XK 140s, 5 to 10 XK 150s, 5 to 15 MK IIs and 10 to 15 E-Types. The MK IIs and E-Types are easier to obtain.
- 20 19. There is in evidence an email from Anders Ditlev Clausager, the Chief Archivist of the Jaguar Daimler Heritage Trust. Mr. Clausager gives figures (which we accept) for the number of models of the various types of XK120, XK140 and XK 150 actually made, and the numbers of survivors of those types which have been reported to the Trust which he represents.
- 25 20. The numbers of models of the various types actually made vary from 74 in the case of the Jaguar XK140 Roadster (RHD) (of which 25 are reported to survive, the lowest number for any model on the list) to 6,438 in the case of the Jaguar XK120 Roadster (LHD) (of which 1,037 are reported to survive, the highest number for any model on the list). The number of survivors is generally correlative to the number of
- 30 models originally made.
- 35 21. We also had in evidence a letter dated 19 April 2009 from a Mr. Karl Ludvigsen, a partner of the Ludvigsen Library, which he describes as “a globally recognised repository of information about the motor industry and its products”. Mr. Ludvigsen gives statistics on total car production (not including commercial vehicles) in the years 1954, 1957, 1963 and 1967, both for the world, and for the UK. According to these statistics, car production grew from 1954 (when it was 7,964,360, of which the UK contributed 769,165) to 1967 (when it was 18,574,476 worldwide, of which the UK contributed 1,552,013).

22. Car no. 3, the Jaguar XK120 Roadster (LHD), 1954, was specially built for the Thiessen family, for use on their estate in California. The Jaguar XK120 was the first road-going sports car freshly designed and launched (in 1948) by a major manufacturer after the Second World War., using the first mass-produced engine to feature twin overhead camshafts. The XK120 was the first road car capable of exceeding 120 mph (hence its description). The model, and specifically the Roadster version, launched Jaguar Cars as a major British exporter, particularly to the USA, and enjoyed huge success in club and national racing. This particular car has a modified body (the modification was made on original construction) making it a unique car. Mr. Thomas, for HMRC, asserts that it is not relatively rare by reference to Mr. Clausager's production figures for the XK120 Roadster, namely, 2,206 produced and 1,103 surviving.
23. Car no. 4, the Jaguar XK140 SE Drophead Coupé (LHD), 1954, was a replacement for the XK120, with improvements in the form of better electrics, steering by rack and pinion, and a more powerful engine, which was moved forward in the chassis to improve passenger legroom. The result was a more comfortable and useable car than the XK120. The designation "SE" signifies Special Equipment. These are modifications providing enhanced engine performance, wire wheels etc. They were on the car originally. Again, Mr. Thomas asserts that the vehicle is not relatively rare and also that it does not illustrate a significant step in the evolution of human achievement, or a period of that evolution.
24. Car no. 5, the Jaguar XK120 SE Drophead Coupé (LHD), 1954, has a low mileage (14,000 miles) in one ownership from new, before being acquired by the Appellant. The SE package included modifications enhancing performance.
25. Car no. 6, the Jaguar XK140 SE Roadster (LHD), 1955, was fitted with all of the available factory options. Mr. Thomas asserts that the car is not relatively rare, having regard to the figures cited in relation to car no. 3, above. Mr. Thomas contends that this car also has no feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.
26. Car no. 7, the Jaguar XK140 SE Drophead Coupé (LHD), 1955, also had full factory options. Mr. Thomas argues that this vehicle is not relatively rare, by reference to the evidence that 1,488 were produced of which 744 (50%) survive. Again, he submits that the car has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.
27. Car no.8, the Jaguar XK140 SE, Roadster (LHD), 1956, was a "barn find" – that is, it was found in its original state after being neglected. It had all factory options, including overdrive, as Special Equipment. Mr. Thomas submitted that it was not relatively rare and that it had no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.
28. Car no. 9, the Jaguar XK140 SE, Drophead Coupé (LHD), 1956, was in fact shipped back to the person in the USA from whom the Appellant had acquired it on rescission of the contract and a full refund of the price. Mr. Thomas contends that it

is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

29. Car no. 10, the Jaguar XK140 SE, Roadster (LHD), 1956, is another special equipment one owner car in unrestored condition. Again, Mr. Thomas contends that
5 it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

30. Car no. 11, the Jaguar XK140, Roadster (RHD), 1956, being a right-hand drive vehicle is, in the Appellant's submission, extremely rare, being one of 49 survivors, where only 74 were produced. Mr. Thomas contends that the question of relative
10 rarity should be determined not by reference to the statistics for right hand drive models, but to the statistics for the production of XK140 Roadsters as a whole. He submits that on either basis the car is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

31. Car no. 12, the Jaguar XK140 SE, Roadster (LHD), 1957, was fitted with all the factory options and was a restoration project when imported, but retained its original chassis, engine, steering and brakes. Again, Mr. Thomas contends that it is not
15 relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

32. Car no. 13, the Jaguar XK150 SE, Drophead Coupé (LHD), 1958, is an example of the XK150 which replaced the XK140 in 1957. It was the first mass-produced road car to be fitted with 4 wheel disc brakes as standard. Mr. Thomas argues that the relative rarity of the vehicle should be judged by reference to the figures: 1,389 produced and 695 surviving, which do not establish that the car is relatively rare. Mr.
20 Thomas also contends that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

33. Car no. 14, the Jaguar XK150 SE, Drophead Coupé (RHD), 1959, was, the Appellant contends, particularly rare because it was a right hand drive model. The car had been turned into a racing car with various modifications (one being the removal
30 of the original engine) and was imported by the Appellant from Australia in unrestored condition. The car retained its original chassis, steering and brakes, but not its engine, which was a 3.8 litre modified version. The original engine was, however, imported with the car. Mr. Thomas contended that because the engine had been replaced it was not a collector's piece.

34. Car no. 15, the Jaguar MK1 SE, Saloon (LHD), 1959, is an example of the first in the line of medium-sized Jaguar sports saloons. It is a 3.4 litre Special Equipment model with automatic transmission. It was a car of unitary construction, with no separate chassis. This car was in particularly good condition and had been owned by a Jaguar main dealer in Idaho from new. Mr. Thomas argues that the relative rarity of
40 the vehicle should be judged by reference to the figures: 8,460 produced and 4,230 surviving, which do not establish that the car is relatively rare. Mr. Thomas also

contends that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

5 35. Car nos.16 and 17, the two Jaguar XK150 SE, Drophead Coupés (LHD), 1960, were examples of the X150 model fitted with 4 wheel disc brakes. They were both fitted with 3.8 litre engines and were imported in unrestored condition. Again, Mr. Thomas contends that they are not relatively rare and that they have no special features which illustrate a significant step in the evolution of human achievement or a period of that evolution.

10 36. Car no. 19, the Lotus Elite Series 2, Coupé (LHD), 1963, is an example of the first closed coupé produced by Lotus and the first series of mass-produced car designed with a "*monocoque*" chassis-body unit in fibreglass. It was imported in unrestored condition. Lotus Elite Series 2, Coupé (LHD), 1963 Again, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

15 37. Car no. 20, the Jaguar E-Type, Coupé (LHD), 1964, was imported in "as new" condition, being a one-owner from new, original, unrestored car. The E-Type on its introduction in 1961 was a novel and innovative design. However, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

20 38. Car no. 22, the Jaguar E-Type, Roadster (LHD), 1965, was also a one-owner from new, original, unrestored car. As above, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

25 39. Car no. 23, the Austin Healey 3000 Mk III Phase II, Drophead Coupé (LHD), 1967, is an example of the "Big Healey" British sports cars of the 1950s and 1960s. It was imported in original condition. Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

30 40. Car no. 24, the Jaguar E-Type, Fixed Head (LHD), 1967, was also in original condition when imported. It came with its original handbook and manufacturer warranty cards, and its original toolkit (which had not been used). Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

35 41. Car no. 25, the Jaguar XK140 SE, Drophead Coupé (LHD), 1955, was an original Special Equipment car. Again, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

40 42. Car no. 26, the Jaguar XK140 SE, Roadster (LHD), 1955, was a one-owner from new, original, unrestored car. Again, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

43. Finally, car no. 27, the AC Cobra, Roadster (LHD), 1965, was an example of a European chassis combined with an American power train. The car was the brainchild of Carroll Shelby, an American racing driver, who persuaded the British firm AC Cars to fit a Ford V8 engine in their AC Ace model. Shelby's Cobras won the World Championship for Grand Touring Cars in 1964. Again, Mr. Thomas contends that it is not relatively rare and that it has no special feature which illustrates a significant step in the evolution of human achievement or a period of that evolution.

44. We go on to consider the legal context in which the two conditions in dispute must be applied.

45. The requirement that a car must possess a certain scarcity value derives, as indicated above, from the ECJ's judgment in *Erika Daiber*. The relevant paragraphs of the judgment are [17] and [18] as follows:

[17] It must be noted in the first place that the Customs Co-operation Council's Explanatory Notes [HSEs] to Chapter 99 ("Works of Art, Collectors' Pieces and Antiques") read "most articles falling into the present Chapter are either unique or at least exist in such very small numbers that they may not be freely available for purchase". Moreover, although *prima facie* headings 99.01 and 99.03 may be regarded as being concerned with unique items, the same is not true of the remaining headings of the Chapter, which cover, for example, original engravings and lithographs, antiques and postage stamps not of current issue, which may not be unique.

[18] It follows that in order to be suitable for inclusion in a collection within the meaning of heading 99.05 an article must be relatively rare. Consequently, articles which have previously been mass-produced, but which currently exist only in a limited number, so that they cannot be easily obtained, satisfy that requirement."

46. Mr. Collings QC, for the Appellant, submits that it is not appropriate to consider the requirement of relative scarcity (or the requirement of historic interest) in isolation from the other criteria mentioned in the CNEN and derived from *Erika Daiber* – see above, paragraph 5.

47. He submits that high value (which is accepted by HMRC in relation to all the cars in dispute) may inform or suggest rarity and historic interest and *vice versa*. This, in our view is made out by reference to the *dispositif* in *Erika Daiber* which reads as follows:

"Collectors' pieces within the meaning of Heading No. 99.05 of the Common Customs Tariff are articles which possess the requisite characteristics for inclusion in a collection, that is to say articles which are relatively rare, are not normally used for their original purpose, are the subject of special transactions outside the normal trade in similar utility articles and are of high value."

48. In *Commissioners for HM Revenue and Customs v Paul West* [2008] EWHC 2277 (Ch), Sir Andrew Park accepted and agreed with an observation of the tribunal whose decision was appealed in that case that:

"It would not be surprising if it were the case that virtually all items which satisfied three of the conditions satisfied the fourth as well." *Ibid.* [24]

49. Mr. Thomas's submissions on the application of [17] and [18] of *Erika Daiber* to this case are that none of the cars exists in such very small numbers as to be not freely

available for purchase – *ibid.* [17] – and none exists in such limited numbers as not to be easily capable of being obtained – *ibid.* [18]. He says that HMRC employ a rule of thumb to the effect that a car would qualify as being relatively rare if fewer than 100 models of which it is an example survive worldwide. He made it clear that this was not an interpretation of the condition as laid down in *Erika Daiber*, but what he claimed was a reasonable and workable practice in applying the condition.

50. In estimating relative rarity or whether a car currently exists only in a limited number, so that it cannot be easily obtained, it is necessary to identify what is the “group of cars” or “genus” against which a particular car must be compared. In *Paul West*, Sir Andrew Park agreed that the ‘high value’ test there in issue “involves a comparison of the actual value of the item with something else” (*ibid.* [25]).

51. Mr. Collings originally submitted that the cars in issue had to be compared with the totality of cars of all types produced in the same year(s) of production worldwide. He later abandoned this comparator as being too ambitious. He criticised the practice of HMRC (described above) which might be appropriate if the test was that the car should be “absolutely rare”, but it was not appropriate where the test is the antithesis of that, namely that the car should be “relatively rare”.

52. He then submitted that the Tribunal should adopt, as a comparator, the existence or availability of sports cars of a particular type. He submitted that the presence of “Special Equipment” in a car’s specification put a car in a separate category, for the purposes of estimating relative rarity, from other cars of the same make and model without the “Special Equipment”. Similarly he submitted that right hand drive cars were in a separate category from left hand drive cars for the purpose of assessing relative rarity.

53. Mr. Thomas disagreed. In order to avoid an undesirable multiplication of categories, he submitted that we should consider that all cars of a particular make and model fell into the same category, irrespective of whether they were left- or right-hand drive or fitted with Special Equipment. He submitted that questions of the subjective value which particular collectors might place on aspects of a car’s design are not relevant to assessing relative rarity for the purposes of classification, which was required a fundamentally objective assessment. He contended that the correct comparator was the absolute number of cars of the same make and model which are available worldwide and that, on this basis, none of the cars in issue could be properly described as “relatively rare”.

54. Following *Erika Daiber*, we consider that the touchstone for determining this issue is the requirement that cars must “currently exist only in a limited number, so that they cannot be easily obtained” and that they must “possess the requisite characteristics for inclusion in a collection, that is to say [they must be] relatively rare, [etc.]”.

55. We accept that that question of classification calls for an objective assessment and that the subjective value of any particular collector is irrelevant. However, we regard

objective evidence that a car possesses the requisite characteristics for inclusion in a collection to be of direct relevance.

56. The Appellant has produced such evidence, which we accept, in relation to all the cars in issue and we accept that they all possess the requisite characteristics for inclusion in a collection. We regard the “group of cars” or “genus” against which a particular car must be compared as sports cars (whenever manufactured) of the type represented by the particular car in question. For this purpose we accept that “Special Equipment” cars and right- and left-hand drive cars form distinct groups or genera against which relative rarity falls to be assessed.

57. We consider that for a car to qualify as being relatively rare for these purposes it must be rare in comparison to other cars of the same type (such as right- or left-hand drive cars corresponding by way of function to whichever of roadsters, drophead coupés or saloons is in issue) which are generally obtainable.

58. On this basis in our judgment the number of cars of a particular make and model originally produced, and the number which survive are irrelevant. If the car is relatively rare in comparison with other cars answering to the same generic description (roadster, drophead coupé or saloon, including their modern functional equivalents, for example) then it fulfils the requirement in the CNEN to Commodity Code 9705 that it should “possess a certain scarcity value”. We conclude that all the cars in issue are relatively rare.

59. Turning to the issue of whether the cars are of historical or ethnographic interest in that they illustrate a significant step in the evolution of human achievements, or a period of that evolution, we must deal first with car no. 14. That car, uniquely in this appeal, was not one in relation to which Mr. Thomas accepted that the presumption of historic interest is raised – see: above at [11].

60. That car was not in its original state in that its engine had been replaced and it was imported with the replacement engine *in situ*, but with the original engine as part of the importation. The relevance of this relates to the question of whether the vehicle as presented on importation “is liable to attest to the evolution of the technology of its age” – see *Uwe Clees* at [19].

61. We regard this as an unusual factual situation. However we answer the question on these unusual facts in the sense that car no. 14, the Jaguar XK150 SE, Drophead Coupé (RHD), 1959, together with the original engine as imported was (at least *prima facie*) “liable to attest to the evolution of the technology of its age”.

62. Turning to the question of whether HMRC have successfully rebutted the presumption in relation to any or all of the cars, we consider the decision of the VAT Tribunal (Dr John Avery Jones CBE, Chairman) in *Barnfinds Limited v HM Revenue and Customs* (release date 13 July 2005). This decision related to the 1956 Jaguar XK120, the 1956 Jaguar XK140 and the 1960 Jaguar XK150. HMRC had accepted that the XK120 represented a significant step in the development of car production, but the Tribunal decided that the same did not apply to the derivative models, the

XK140 and the XK150. Mr. Thomas urges us to follow the *Barnfinds* decision. Mr. Collings invites us to depart from it.

5 63. Mr. Thomas submits that the addition of new features to a model is unlikely to demonstrate historical interest if it falls within a continuum of technological advance which characterises the development of new variants on existing models. He adds that the presence of additional features of a subsidiary character does not serve to demonstrate historical interest. On this basis he seeks to rebut the presumption in relation to cars nos. 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 22, 23, 24, 25, 26, and 27. Of these, cars nos. 15, 19, 20, 22, 23, 24, and 27 are not XK140 or
10 XK150 models.

64. *Barnfinds* was not followed in *Paul West* on the “high value” issue. In relation to the “historic interest” issue, the Tribunal said:

15 “The “historic interest” condition is in issue for the XK140 and 150 cars, but the XK120 is accepted as being a significant step in the evolution of car production. We agree with [Counsel for HMRC] that this criterion is satisfied for the first type to make that step, but not derivatives from it with only minor changes, such as more sophisticated electrical equipment and braking. We consider that if they are to “illustrate ... a period of that evolution” they should represent a significant step in that evolution, and in this case we find that the technical changes do not meet the requirements laid down by the European Court.” (*ibid.* at [10])

20 65. Specifically, Mr. Thomas did not accept that the inclusion of disc brakes in the Jaguar XK150 models was sufficiently significant. He commented that racing cars had previously been fitted with disc brakes. In relation to the Lotus car (car no. 19) he commented that as an example of the second series it was not of historical interest.

25 66. Mr. Collings disagreed on these points and criticised the decision in *Barnfinds* for introducing the requirement that a change must “represent a significant step in that evolution” before a model incorporating it could be said to “illustrate ... a period of that evolution”.

67. The ECJ’s reasoning in *Uwe Clees* on this point can be derived from passages in paragraphs [18], [22] and [24] of the judgment, as follows:

30 “[18] ... Inasmuch as the term ‘history’ covers human achievements in all field, account should be taken of the specific features of each field. It is therefore appropriate to take into consideration that motor vehicles are articles built for a purpose which is, in principle, utilitarian and not monumental, and that they are subject to the technical capacities of their age.

35 [22] ... Vehicles which meet those criteria [being in their original state, etc., being at least 30 years old, and being of a model or type which is no longer in production] are, as a rule, such as to attest to the distinctive technical and aesthetic features of the age in which they were manufactured and thus such as to illustrate, in particular, a period of the evolution of human achievements in the field of car design.

40 [24] ... compliance with those three criteria [see above] merely establishes a presumption of historical or ethnographic interest, which is rebutted where the competent authority establishes that the vehicle’s specific character is not in any way linked to a period in the past in the sense that the vehicle is not liable to evidence a significant step in the evolution of human achievements or illustrate a period of that evolution.”

68. The significance of the “technical capacities” or “distinctive technical and aesthetic features” of the age in which a vehicle was manufactured are emphasised in these passages as factors illustrating a period of the evolution of human achievements in the field of car design.

5 69. HMRC’s task in rebutting the presumption is to show that the vehicle’s specific character is not (contrary to the presumption) in fact in any way linked to a period in the past in the sense that the vehicle is not liable to evidence a significant step in the evolution of human achievements or illustrate a period of that evolution.

10 70. In our judgment the ECJ has set up a single test, which must be satisfied by the competent authority (HMRC) in rebutting the presumption, namely that the vehicles’ specific character is not in any way linked to a period in the past in the sense that the vehicle is not liable (a) to evidence a significant step in the evolution of human achievements or (b) to illustrate a period of that evolution.

15 71. With respect to the tribunal in *Barnfinds*, we consider that it confused the test as to whether HMRC can show that a vehicle’s specific character is not in any way linked to the past in the sense that it illustrates a period of the evolution of human achievements, by adding the qualification that such illustration should show a significant step in that evolution. There is nothing in the ECJ’s judgment in *Uwe Clees* to justify that approach.

20 72. We consider that the “historical interest” condition is more general. On the facts of this case we hold that the technical capacities and distinctive technical and aesthetic features of all the cars in issue link them respectively to periods in the past in the sense that they illustrate either a significant step in the evolution of human achievements or a period of that evolution. All the cars display such distinctive
25 technical and aesthetic features. We highlight, as one of the most obvious examples, the addition as standard of disc brakes in the Jaguar XK150 models.

73. For these reasons we allow the appeal, holding that the cars in issue ought correctly to be classified as collectors’ pieces of historical interest within classification 9705.

30 74. The appeal was brought on 30 March 2009 in anticipation of the change in the Tribunal’s rules effective on 1 April 2009, particularly in relation to costs. In the circumstances we consider that in the interests of disposing of the appeal fairly and justly we should direct pursuant to paragraph 7 of Schedule 3 to the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 that rule 29 of the
35 VAT Tribunals Rules 1986 shall apply to the appeal in relation to costs in place of rule 10 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009.

40 75. In consequence, the Appellant having applied for a costs direction in the event that the appeal succeeded, we direct that HMRC shall pay the Appellant’s costs of and incidental to and consequent upon the appeal to be assessed pursuant to rule 29(1)(b) of the VAT Tribunals Rules 1986 if not agreed.

76. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.



JOHN WALTERS QC

TRIBUNAL JUDGE

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