# TC03223

**Appeal number: TC/2012/05395**

***CUSTOMS DUTY – engineered solid 'ink sticks' whether classifiable as 'printing ink ... whether or not concentrated or solid' under CN heading 3215 or as 'parts' or 'accessories' of printers under CN heading 8443 – General Rules of Interpretation considered – held, applying GRI 3(a) that CN heading 3215 provides the more specific description – appeal dismissed***

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**XEROX LIMITED** **Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS** **Respondents**

**TRIBUNAL: JUDGE JOHN WALTERS QC**
**JULIAN STAFFORD**

**Sitting in public at Bedford Square, London on 4 June 2013**

**John M Peterson and Richard F O'Neill, Neville, Peterson LLP, New York, NY, USA, for the Appellant**

**Hui Ling McCarthy, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. In this appeal, the Appellant, Xerox Limited ("Xerox"), appeals against the decision of the Respondents ("HMRC") contained in a letter to Xerox from HMRC Excise, Customs, Stamps and Money Tariff Classification Service, ACT Sector, dated 26 January 2012 notifying a Binding Tariff Information ("BTI") in relation to goods ("the Goods") described in the BTI as follows:

> 'Solid printer ink in the form of a waxy block, for use in ink jet printers. When heated it converts to a liquid and is propelled via a vacuum system into the ink jet print head. In a profile shape measuring 3.0 x 4.0 x 3.0 cm. Presented in an injection moulded plastic carton separately housing three ink blocks. In a printed cardboard box.'

2. The BTI classified the Goods under the following classification under the Combined Nomenclature ("CN"): 3215 90 00 90.

3. The justification of the classification of the Goods, as stated in the BTI, is that General Interpretative Rule ("GIR") 1 had been used to classify the Goods by the terms of heading 3215 – 'Printing Ink, writing or drawing ink and other inks, whether or not concentrated or solid'. It is also stated in the BTI that GIR 5B has been used to identify the type of packaging and that GIR 6 has been used to classify the Goods to subheading level 3215 90 'Printing ink: Other'. CN heading 3215 is part of Chapter 32 of the CN ('Tanning or Dyeing extracts; tannins and their derivatives; dyes, pigments and other colouring matter; paints and varnishes; putty and other mastics; inks'), which, in turn is part of Section XIII of the CN ('Other Organic Compounds').

4. Xerox contends that this classification is incorrect and that the correct classification is 8443 99 00 00, which is the classification appropriate to "parts" and "accessories" under the CN as follows: 'Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof – Parts and accessories: Other'. CN heading 8443 is part of Chapter 84 of the CNM ('Nuclear Reactors, Boilers, Machinery and Mechanical Appliances; Parts thereof), which, in turn, is part of Section XVI of the CN ('Machinery and mechanical appliances; electrical equipment; parts thereof; sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles').

5. The issue for our decision, therefore, is whether the Goods are properly classifiable for customs duty purposes as 'Printing ink' or as 'Parts' or 'Accessories' of 'Printing machinery'.

6. Printing ink under heading 3215 is subject to duty on importation at a rate of 6.5% *ad valorem*, whereas no duty is chargeable on the importation of goods classified as parts or accessories to printing machinery under heading 8443.

7. We received a Witness Statement from Donald Titterington, Vice President of Printhead and Ink Research and Development at Xerox Corporation. Dr Titterington

also attended the hearing and gave oral evidence and was cross-examined by Miss McCarthy, for HMRC.

8. We also had a bundle of documents in evidence, but the relevant facts relating to the objective properties and characteristics of the Goods were in large measure agreed between the parties.

9. We find facts as follows:

**The facts**

10. The Goods are 'phase change components' which are specially designed to be used with particular models of Xerox solid ink printers which are designed for use in an office environment, and not by specially trained operators. By 'phase change components' is meant that the Goods, when inserted in the printers, are exposed to heating elements which induce a phase change, being a change from a solid waxy substance to a liquid form, enabling them in that form to be propelled by a printing jet onto paper or other print media. The Goods are informally referred to as 'ink sticks' and from time to time we refer to them thus in what follows. They are referred to in the documents produced by Xerox in support of the appeal as "solid ink", for example, the "Solid Ink Advantage Brochure" and the website publicity headed: "The Truth About Solid Ink".

11. The Goods ('ink sticks') are made up of waterless material containing resins, waxes, dyes or pigments and other chemicals, and are different in composition from liquid ink and powdered toner.

12. In their condition as imported, the Goods are solid, in definite complex engineered and stable shapes, with mechanical strength. An 'ink stick' may contain 50 or more discreet surfaces, being straight or curved. The Goods are designed to be installed into a printer, while remaining in their solid form and engineered shapes. On installation, they interact mechanically and their mechanical strength enables several 'ink sticks' to be stacked one on top of the other in the printer's feeder mechanism. This has the practical consequence that each colour of 'ink stick' can be reloaded into the printer's feeder mechanism without any interruption of the printer's operation. An indicator on the printer's user interface shows the level remaining of each colour of 'ink stick' in the printer, thus facilitating reloading at the appropriate time(s).

13. The Goods are the subject of hundreds of patents, most of them issued in the United States. Each 'ink stick' has a specialised and unique shape dictated by the printer, which it is designed to work with, and the colour of the pigment contained in it. Four different colours of 'ink stick' are used – cyan, yellow, magenta and black. Each colour of 'ink stick' has a shape unique to that colour, so that it will only fit into the printer feeder lane specific to that colour – this is designed to prevent users from accidentally loading 'ink sticks' of one colour into the 'raceway' on the printer's feeder mechanism dedicated to 'ink sticks' of another colour. Colour printing involves using complex algorithms and large digital data files to direct the print mechanism to dispense droplets of specific colours (cyan, yellow, magenta or black) in particular places in predetermined orders.

14. Miss McCarthy appeared to accept in her skeleton argument (paragraph 9(k)) the proposition of fact put forward by Xerox, namely that without the Goods the printer, to the use of which they are dedicated, could not function. However she also said in her skeleton argument (paragraph 40(b)) (and argued in her oral submissions) that it would be wrong to say that the printers do not function without the Goods – see: paragraph [48] below.

15. The case that the Goods are essential for the operation of the Xerox 8560 printer and that if they were not present, the mechanical and electrical components of the printer will not function is based on the evidence (which we accept) that the heater element ('melt plate') on the Ink Loader assembly and the mechanical drums and rollers will cease to operate in the absence of 'ink sticks'. The Xerox 8560 printer contains an interlock safety device which will halt the electrical and mechanical operation of the printer when any one of the four coloured 'ink sticks' is not present. This is the result of ink level sensors inside the printhead detecting that the printhead has run out of ink.

16. Miss McCarthy cross-examined Dr Titterington on this point. His evidence (which we accept) was that when an 'ink stick' is almost consumed, the printer's user interface will indicate "ink low". When an 'ink stick' is, for practical purposes, consumed, the printer's user interface will indicate "ink out". He made the point, however, that printing will continue for 'a little while' provided there is liquid ink (following a phase change to which 'ink sticks' are subject) in the printer's reservoir. But if that liquid ink falls below a certain level, printing is no longer possible. He also made the point that there will always be some solid matter from an 'ink stick' adhering to the heater element ('melt plate') to protect it from heat damage.

17. Each 'ink stick' is assigned a part number relative to the printer with which it is designed to be used and appears as a part on the printer's bill of materials. Each 'ink stick' is imprinted with a machine-readable registration mark and can be fitted with passive semiconductor chips capable of communicating with the electrical systems of printers and of providing information concerning printer operation, ink consumption and so on. However there was no evidence that the Goods, the subject of the appeal, were in fact fitted with passive semiconductor chips.

18. The process of printing – by which the Goods are heated, softened and liquefied, then sprayed onto transfer drums, paper or print media by sophisticated print heads, where they solidify under the influence of heat and pressure to make printed materials – consumes the Goods requiring them to be replaced by other Goods – that is, 'ink sticks' of any particular colour are consumed in the printing process and replaced by other 'ink sticks'.

19. The Goods compare to liquid or powdered inks as follows. Unlike liquid or powdered inks or toner, cartridges – designed to hold the ink, give mechanical strength and dimensional stability, and fit into the printer – are not necessary and are not used to contain the 'ink sticks'. The 'ink sticks' are directly inserted into the relevant 'raceways' on the printer's feeding mechanism – liquid or powdered inks or

toner require to be contained in a cartridge before application in a printer. Dr Tittering's evidence, which we accept, was that:

> '[i]n a conventional printer, a supply of liquid or amorphous powdered ink is contained within an engineered housing, typically composed of injection molded (*sic*) plastics. The injection molded plastic components are essential to providing dimensional stability and mechanical strength, to allow the cartridge to operate in the printer, and interact with other mechanical components of the printing mechanism. During the printer operation, ink is dispensed from the injection molded cartridge. Liquid ink is generally propelled through "print heads", mechanical devices featuring microscopic nozzles, which deposit the ink on the paper or other print medium. Powdered toners are usually dispensed by gravity through slits or apertures in the engineered cartridge housing it.'

20. Whereas the 'ink sticks' can be reloaded into the printer's feeder mechanism without any interruption of the printer's operation (see above), Dr Tittering makes the point (which we accept), in relation to cartridges of liquid or powdered ink or toner, that:

> '[w]hen the supply of ink is exhausted, the printer's operation must be stopped, and the liquid ink or powdered toner cartridge, must be replaced. The spent cartridge is then a solid waste product, which must be disposed of. Typically, spent cartridges will contain some unused ink or powder.'

21. There is a significant environmental advantage to the use of 'ink sticks', as compared with the use of conventional ink jet or laser printer cartridges. In particular, there is a significant reduction in 'post-consumer waste' – that is, there are no spent cartridges to dispose of. The 'post-consumer waste' associated with the use of 'ink sticks' is generally in the form of melted drippings from the Goods themselves, which are not toxic and can be easily disposed of.

22. We also accept Dr Titterington's evidence that there are other manufactured components, essential to the operation of a machine or mechanism, which are consumed or transformed during the operation of the machine or mechanism. He gave examples of carbon anode blocks used in Hall-Heroult aluminium reduction cells and carbon resistors used in arc welding.

**Xerox's case**

23. Mr Peterson, for Xerox, submitted that HMRC's 'fundamental error' was in failing to make the distinction between "ink", which is an amorphous material, and the nature of the Goods as engineered structures, being manufactured goods with properties, characteristics and uses different from those of mere "ink".

24. Merchandise must be classified according to its condition as imported, and on importation the Goods were not mere "ink", that is, they were not materials, but manufactured goods resulting from the process of materials into 'value-added manufactured goods'. By analogy, plastic resins, being materials, if imported in that state should be classified under CN headings 3901 to 3914, whereas plastics which had been molded, formed or shaped or otherwise used to make some manufactured goods, cannot be classified under those headings, but must be classified by reference to the manufactured goods actually imported. For example, plastic resin which had been heated into thermoplastic flowing form and injected into an engineered mold

before importation which resulted in the manufacture of a cover for one of Xerox's printers would (without controversy) be classified as a part of the printer with which it was intended to be used under CN subheading 8443.99.

25. Mr Peterson cited *Paderborner Brauerei Haus Cramer KG v Hauptzollamt Bielefeld* Case C-196/10 for the proposition that a material (malt beer), when subjected to a process (ultrafiltration) to form a product (malt beer base) has lost the objective properties and characteristics particular to beer under CN heading 2203 and was required to be classified as the article with the characteristics pertaining to the product after processing, The product after processing was an intermediate product for use in the production of a mixed drink and was required to be classified as ethyl alcohol under CN heading 2208 – it having acquired, as a result of processing, objective properties and characteristics corresponding to those of ethyl alcohol.

26. In this case, the Goods on importation, had already been manufactured from materials which answered to the description of "ink", suitable for direct application to paper or other media, into 'ink sticks' with objective properties and characteristics different from those of "ink". The objective properties and characteristics of 'ink sticks' which were not those of "ink", even solid ink, were stable shape, functionality in a printer, mechanical strength and trademark and technical information molded into the surfaces. The Goods have been processed so that they no longer correspond to the objective properties and characteristics of "ink" as that term is commonly and commercially understood – *viz:* a pigmented preparation, usually liquid, used to place marks on paper.

27. He submitted that the use to which an article is to be put is relevant in considering its objective properties and characteristics. The use to which 'ink sticks' were to be put was as parts of the printers for which they are designed.

28. In Mr Peterson's submission, it is irrelevant that the Goods, after importation, are intended to, and do, undergo a 'post-importation phase change' such that in the printer and as part of its operation the Goods are liquefied and propelled onto paper and other print media placing marks on them as "ink".

29. He draws an analogy with 'crayons, tailors' chalks, cosmetic pencils and the like' which are not classified as inks or pigments but as the engineered products which they have become. In the case of crayons, composed of a mixture of colouring matter, wax and other materials, the appropriate classification is as crayons under CN heading 9609 (he cites BTI GB 500462970 of 24 July 2008). CN heading 6815.99 would be appropriate in the case of crayons produced of talc, steatite and soapstone,

30. Again, by analogy with crayons and other products, Mr Peterson submits that the fact that the Goods are virtually or completely consumed in the course of their use does not prevent the engineered product being recognised as such for tariff classification purposes.

31. Mr Peterson submits that the correct classification for the Goods is as "parts and accessories" of the printers with which they are designed to be used. He accepts that

there are no provisions of the tariff which explicitly describe the Goods (in contrast to, for example, crayons). He cites *Peacock AG v Hauptzollamt Paderborn* (Case C-339/98) for the proposition that the word "part" implies a "whole" for the operation of which the part is essential (*ibid.* [21]) – a proposition that was common ground between Xerox and HMRC. He submits that the Goods are specifically designed as parts of the printers with which they are designed to be used and are ready for immediate installation for use in a printer in their condition as imported and are essential for the operation of the printer.

32. Without wishing to labour the point as to whether the Goods ought to be considered as parts or accessories (because parts and accessories are both classified under CN heading 8443.99), Mr Peterson submits that, if the Goods are not properly to be considered as parts of the printers concerned, they ought to be regarded as accessories since they have the function of enabling the printer to operate continually – that is, by virtue of the objective properties and characteristics of the Goods, the 'ink sticks' may be replenished (reloaded) without the need to stop the functioning of the printer – which is not the case with conventional liquid or powdered inks contained in cartridges.

**HMRC's case**

33. Miss McCarthy, for HMRC, contends that the Goods are composed of ink and that it is this property which is the most important factor and gives the Goods their essential function and accounts for their essential intended use. The Goods are a commodity which are used as ink and are consumed as ink during the printing process. They fit the description of 'printing ink' and are 'solid' and therefore fall directly under CN sub-heading 3215. She cites *Wiener SI GmbH v Hauptzollamt Emmerich* (Case C-338/95). That case is authority for the proposition that in the absence of a definition, the objective characteristics of goods must be sought in the essential (not exclusive) use for which they were intended.

34. Miss McCarthy submits that application of the GRIs to the Goods gives the result she contends for. Specifically, in her submission, the GRIs provide, so far as relevant, as follows:

> '1. The title of Sections, Chapters and sub-Chapters [of the CN] are provided for ease of reference only: for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.
>
> 2(a). Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article …
>
> 2(b). Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.
>
> 3. When by application of Rule 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods … those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components … which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

…

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rules the relative Section and Chapter Notes also apply, unless the context requires otherwise'

35. Miss McCarthy also made reference to Explanatory Notes to the CN of the Customs Cooperation Council (which the parties agreed are a persuasive aid to the interpretation of the CN, see: *Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart-West* (Case C-35/93)) as follows.

36. As to GIR 3(b), paragraph VIII is as follows:

'The factor which determines the essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.'

37. As to heading 3215 of the CN (Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid), the salient parts of the Explanatory Note to the international Harmonised Commodity Description and Coding System, published by a committee of the World Customs Organisation and relied on by Miss McCarthy are as follows:

'(A) **Printing inks (or colours)** are pastes of varying consistency, obtained by mixing a finely divided black or coloured pigment with a vehicle. The pigment is usually carbon black for black inks and may be organic or inorganic for coloured inks. The vehicle consists of either natural resins or synthetic polymers, dispersed in oils or dissolved in solvents, and contains a small quantity of additives to impart desired functional properties.

…

These products are generally in the form of liquids or pastes, but they are also included in this heading when concentrated or solid (i.e., powders, tablets, sticks, etc.) to be used as inks after simple dilution or dispersion.'

38. Miss McCarthy referred the Tribunal to *Turbon International GmbH (acting in its capacity as successor to Kores Nordic Deutschland GmbH) v Oberfinanzdirektion Koblenz* (C-276/00) [2002] ECR I-1389 ("*Turbon I*") and *Turbon International GmbH (as universal successor in title to Kores Nordic Deutschland GmbH) v Oberfinanzdirektion Koblenz* (C-250/05) ("*Turbon II*") and *Commissioners for HM Revenue and Customs v Epson Telford Limited* [2008] EWCA Civ 567 ("*Epson*").

39. *Turbon I* and *Turbon II* concerned the classification of a first generation Epson ink printer cartridge without an integrated print head for use in Epson Stylus Color inkjet printers. *Epson* concerned the classification of second and third generation Epson ink printer cartridges. In *Turbon I* and *Turbon II*, the Court of Justice concluded that the cartridges were to be classified as "ink" under heading 3215 and could not be classified as a "part". In *Epson*, the Court of Appeal, upholding Henderson J in the Chancery Division ([2007] EWHC 1045 (Ch)), again concluded that the cartridges were to be classified as "ink".

40. Miss McCarthy points out that CN heading 3215 expressly recognises that printing ink within the heading can be solid.

41. She also submits that the Explanatory Notes expressly recognise that the vehicle for the pigment in printing ink within the heading may consist of either natural resins or synthetic polymers, which, by reference to documents produced by Xerox to the Tribunal (specifically US Patent 8216505 and a Material Safety Data Sheet listing the ingredients of the 'ink sticks' as polyethylene and fatty amide waxes, resin and dyes), apparently encompass the vehicle used in the manufacture of the Goods.

42. She further submits that the Explanatory Notes make it clear that printing ink within CN heading 3215 need not be immediately ready for use in its state at the point of presentation, but may be in solid form to be used after simple further treatment, specifically 'simple dilution or dispersion'. She submits that the process to be applied to prepare the Goods for use is 'simple heating' and that nothing in the CN or the Explanatory Notes suggests that solids ready to be used as ink after heating are to be excluded from CN heading 3215 90. In particular, she notes that the Explanatory Note referable to CN heading 3215, in its reference to products in solid form, is not written restrictively in terms of confining that reference to products which are to be used as inks only after simple dilution or dispersion.

43. She relies on the conclusion of the Court of Appeal in *Epson* that the essential feature of the products in that case (ink cartridges) was the ink and that that feature dictated their classification as "ink" rather than "parts" of a printer.

44. She submits that Xerox's case that HMRC has made a fundamental error in failing to distinguish between the material "ink" and the manufactured engineered structures with different properties, which are the Goods, is misconceived. This is for three reasons. First, there is no specific classification for 'ink sticks' (other than as "ink" under CN heading 3215) – this distinguishes this case from crayons and candles, for example. Secondly, she submits that case law makes it clear that the manufacturing processes of a product are decisive only when a tariff heading expressly so provides,

and cites *Pacific World Limited, FDD International Limited v Commissioners for HM Revenue and Customs* (C-215/10), *Industriemetall Luma GmbH v Hauptzollamt Duisburg* (Case 38-76) and *Paul F. Weber (in liquidation) v Milchwerke Paderborn-Rimbeck eG* (Case 40/88) in support. Thirdly, she submits that crayons and candles (but not the 'ink sticks' in issue) each have an identifiable function in and of themselves, which sets them apart from wax, the material of which they are composed.

45. In particular, neither CN heading 3215 nor CN heading 8443 refers specifically to manufacturing processes and therefore such processes are not a relevant consideration in evaluating the most appropriate classification.

46. Further, and in any event, Miss McCarthy submits that the functionalities attributable to the Goods by reason of their manufacture do not result in the Goods being or becoming "parts" or "accessories" of a printer. Those functionalities are not sufficient to cause the Goods to have the objective properties and characteristics of "parts" or "accessories" of a printer, as opposed to the objective properties and characteristics of "ink". It is important to recall, in her submission, that the basic function of the Goods is to supply printers with ink. As a consumable, an 'ink stick' cannot be properly classified as a "part" or an "accessory". There is a distinction between parts and accessories which can be worn down (and thus require to be replaced) and materials or goods which are consumed.

47. If, which on her main case she says is not the position, the Tribunal should decide that the Goods were *prima facie* classifiable under two headings (as "ink" or "parts" of a printer), the essential character test – that is, the aspect of the Goods which gives them their essential character – indicates that they should be classifiable as "ink" – see: GRI 3(b).

48. The 'ink sticks' cannot in any event, in Miss McCarthy's submission, qualify for classification as "parts" or "accessories" of a printer because the evidence is that the printers function with or without the 'ink sticks' being inserted. If there are no 'ink sticks' in the printer's feeder mechanism, the printer's user interface will indicate "ink low" or "ink out". For this reason, she submits, the printer is going through its control circuitry to detect whether 'ink sticks' are in place, and, even if they are not, the printer is functioning exactly as it was designed to do, and is therefore not malfunctioning. If the residue of ink on the heater element (melt plate) is necessary to prevent the element burning, that can be disregarded on account of the negligible amount of ink involved.

49. Miss McCarthy submits that even if this is not accepted by the Tribunal, the mere fact that a printer will not function without the 'ink sticks' does not lead to the conclusion that the 'ink sticks' should be classified as a "part" of the printer. The function of the 'ink sticks' is to supply the printer with ink and their essential characteristic is that they are "ink". Miss McCarthy cites the Court of Justice's judgment in *Turbon II* at [19], approving the Advocate General's comment at [72] of her Opinion, that the ink in that case could not be regarded as a part of the printer (in

contrast to the cartridges in which it was contained) because the ink was not essential for the mechanical and electronic functioning of the printer.

50. Similarly, Miss McCarthy submits that the 'ink sticks' should not be classified as "accessories" of the printer. The fact that 'ink sticks' can be inserted into the printer's feeder mechanism without a break in the printing function of the printer does not show that the 'ink sticks' extend the ordinary function of the printer. This facility is truly a function of the way the printer has been designed, it is not a feature of the 'ink sticks' themselves. By analogy, she suggests that it would be absurd to regard paper supplied for a printer with two or more paper trays as being classifiable as a "part" of or "accessory" to a printer (and not as "paper") simply because paper can be reloaded onto one tray whilst the printer is operational and taking paper from the other tray.

**Xerox's response to HMRC's case**

51. Mr Peterson submitted that *Turbon I*, *Turbon II* and *Epson* were not directly relevant to the issue the Tribunal has to resolve because the products with which those cases were concerned, being cartridges (plastic casings) of printer ink, were composite articles, which brought the question of classification under GRI 3(b) into play. In this case, the Goods were not composite articles but simple goods consisting of one material or substance to which GRI 3 was not relevant. In particular, it would be incorrect for the Tribunal to decide the case on the basis of an enquiry into the essential character of the Goods (in accordance with GRI 3(b)), and he made the point that the 'essential character' of goods for the purposes of GRI 3(b) was anyway a legal fiction.

52. Instead, the Tribunal should confine itself to the application of GRI 1 – the headings of the CN and relative Section or Chapter Notes alone should determine the correct classification, by reference to the objective properties and characteristics of the Goods.

53. Mr Peterson pointed out that in *Turbon II* the cartridge was regarded by the Court of Justice as being necessary for the printer to function and therefore capable of being regarded as a "part" classifiable under CN heading 8473 (*ibid.* [18]). It was the fact that the goods in that case were composite articles which made it necessary to consider GRI 3(b), which in turn brought into play the question of the ascertainment of the essential character of the composite article.

54. The Court's conclusion in *Turbon II* that the cartridge was necessary for the printer to function is based on the referring court's finding that:

> 'when connected to a computer, a printer which contains no or only one cartridge does not respond to the 'print' command issued from that computer. In that situation, data are not transferred from the computer to the printer and the print head does not move from side to side nor is any paper drawn into the printer. The printer is, as it were, dead.' (*ibid* [12])

55. Mr Peterson submitted that the facts of this case were similar. A printer will not just print from liquid ink in the reservoir when there are no 'ink sticks' loaded – it will shut off to avoid damage to the heating element (melt plate).

56. He repeated his submission that the central question for the Tribunal was whether the Goods were a mere material or an engineered article distinct from the material of which it was composed. He made the point that the logic of HMRC's case would lead to the conclusion that Michelangelo's 'Pieta' statue should be classified as marble rather than as a statue. He submitted that the purpose of the engineering carried out to produce the Goods was to make the printer (rather than the ink) function. He accepted that simple ink does not make a printer function – that was the court's conclusion in *Turbon II*. However he submitted that the Goods were essential to the operation of the printer and that therefore they were classifiable as "parts" of a printer (which was the 'whole' in relation to which the Goods were a 'part').

57. Mr Peterson's primary case was that the Goods were "parts" of printers but he did not abandon the case that they were "accessories" of printers. He submitted that the reason a printer can operate while the 'ink sticks' are reloaded is the design of the 'ink sticks'. There is no housing to remove (as in the case of the conventional cartridge) and the 'ink sticks' are designed to be fully consumed.

58. He submitted that *Wiener* addressed a point not present in this appeal, and so was not relevant. In that case there were two classifications covering the manufactured made up goods in issue (pyjamas). It was a question of which of those classifications accorded with the essential use for which the goods were intended. That question does not arise in this appeal because the issue is as to the nature of the Goods themselves – whether they are to be regarded as a material or substance or whether they are to be regarded as manufactured goods advanced to the point that they are not properly to be considered as a material.

59. In relation to *Industriemetall Luma*, Mr Peterson agreed with Miss McCarthy that the manufacturing processes carried out are not a relevant consideration in evaluating the most appropriate classification. It was not the injection moulding (manufacturing process) that made the Goods what they were ('ink sticks') – it was the fact that as a result of the process the Goods were an engineered manufactured "part" of a printer.

60. Mr Peterson submitted that the fact that the 'ink sticks' were consumed in the course of the operation of the printer did not tell against them being classified as "parts" of the printer. There was no rule in the CN to this effect. He pointed out that some consumables are recognised as articles, giving crayons and brake pads as examples. He submitted that a brake pad would be recognised as a "part" of the vehicle to which it was attached.

61. If, which he submitted was not the case, the Tribunal required to move on from GRI 1 to consider GRI 2(b) and GRI 3 in the resolution of the issue in the appeal, the Tribunal should recognise, in applying GRI 3(a) that the CN heading for which Xerox was contending, 8443 (a "part" of a printer) was more specific than CN heading 3215 ("printing ink" etc.). He submitted that if GRI 3(c) was relevant, the classification should be under CN heading 8443, as being the heading which occurs last in numerical order among those which equally merit consideration.

62. With reference to the Explanatory Notes on CN heading 3215, Mr Peterson submitted that the reference to 'other inks' in solid form should be read as a reference to ink sticks used in calligraphy and not to the 'ink sticks' in this appeal, and he drew the Tribunal's attention to the exclusions at the end of the Notes as follows:

> 'This heading [i.e. 3215] does not include:
>
> (a) Developers consisting of a toner (a mixture of carbon black and thermosplastic resins) compounded with a carrier (grains of sand coated with ethylcellulose), used in photocopying machines (heading 37.07).
>
> (b) Refills for ball point fountain pens comprising the ball point and ink reservoir (heading 96.08). On the other hand, mere ink-filled cartridges for ordinary fountain pens remain in this heading.
>
> (c) Inked ribbons for typewriters or ink-pads (heading 96.12).'

63. Mr Peterson submitted that the Goods were not excluded from classification as "parts" of a printer by reason of the functioning of the printers not being dependent on the Goods. The Goods are, he submitted, essential for the operation of the Xerox 8560 printer. On this basis *Receveur principal des douanes de Roissy Sud (and others) v Rohm & Haas Electronic Materials CMP Europe GmbH (and others)* (Case C-336/11) was to be distinguished.

**Discussion and Decision**

64. We start by considering the GRIs in relation to the issue presented by the appeal. GRI 1 states that 'for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to' the following GRIs. We note here that we were not referred to any Section or Chapter Notes relative to the CN headings in contention and proceed on the basis that no such Section or Chapter Notes are relevant to the issue to be determined.

65. Clearly GRI 1 puts the terms of CN heading 3215 and CN heading 8443 in issue and we consider them below.

66. As to the following GRIs, they appear to us to require consideration *seriatim*. As Miss McCarthy submitted, they provide a hierarchical set of principles – if the classification can be ascertained by reference to a prior principle, it is unnecessary (and impermissible) to proceed to the application of a later principle.

67. GRI 2(a) refers to incomplete or unfinished articles and is irrelevant to the issue before us. GRI 2(b) deals with mixtures or combinations of materials and substances and provides that the classification of goods consisting of more than one material or substance shall be according to the principles of GRI 3. We note here that *Turbon I* and *Turbon II* concerned first generation ink cartridges without an integrated printhead which were regarded as composite goods made up of different components (*Turbon I* [25]) or materials (*Turbon II* [20]) - *viz:* ink and cartridge. *Epson* concerned the second and third generation of such ink cartridges. The Court of

Appeal applied the reasoning of the Court of Justice in *Turbon II*, regarding the ink cartridges as composite goods made up of different components (*ibid.* [44]). This led, in all three cases, to the application of GRI 3(b) – see: below.

68. However, the 'ink sticks' in this appeal are waxy blocks made up of waterless material containing resins, waxes, dyes or pigments and other chemicals. Unlike the ink cartridges in those three cases, which consisted of moulded injection plastic main bodies within which the ink was contained (see: the Tribunal's finding in *Epson* – cited at *ibid.* [22]), an 'ink stick' is an article consisting of one waterless material or substance (albeit a material or substance comprised of several ingredients). We therefore conclude that GRI 2(b) is not relevant to our decision.

69. We turn to the opening words of GRI 3. These introduce three rules (GRI 3(a), (b) and (c)) to be considered *seriatim*, in the sense that one considers GRI 3(b) only if the goods concerned cannot be classified by reference to GRI 3(a), and one considers GRI 3(c) only if the goods cannot be classified by reference to GRI 3(a) or (b). These opening words apply those rules 'when by application of [GRI] 2(b) or for any other reason, goods are *prima facie* classifiable under two or more headings' (our underlining).

70. Although we have concluded that GRI 2(b) is not relevant to this case (as it was in the *Turbon* and *Epson* appeals) we must still consider the rules in GRI 3 if we conclude 'for any other reason' that the Goods are *prima facie* classifiable under two or more of the CN headings.

71. We therefore examine CN heading 3215 in order to reach a view whether or not the Goods are *prima facie* classifiable under that heading.

72. In the interpretation of a CN heading we have regard to the Explanatory Note referred to in their submissions by both Miss McCarthy and Mr Peterson. We consider that the Explanatory Note gives some important guidance (cf *Develop Dr Eisbein* [21]), while noting that it does not have legally binding force.

73. We find that the Goods are products obtained by mixing pigment with a vehicle – this appears to be clear from their composition – and that they are solid sticks to be used as inks. So far it would appear from the Explanatory Note that they are to be included in CN heading 3215.

74. However, the Goods are not to be used as inks 'after simple dilution or dispersion', but after a heating and liquefying procedure (a phase change) which, on the evidence, we would not regard as 'simple' but as highly complex. To this extent it would appear that the Explanatory Note does not indicate that they are to be included in CN heading 3215.

75. Further, we note that the Explanatory Note specifically excludes from CN heading 3215 (a) developers consisting of a toner (a mixture of carbon black and thermoplastic resins) compounded with a carrier (grains of sand coated with ethylcellulose), used in photocopying machines ("Photocopying Toner"); (b) refills for ball point fountain pens comprising the ball point and ink reservoir ("Ball Point Refills"), while noting

that ‘mere ink-filled cartridges for ordinary fountain pens’ remain in CN heading 3215; and (c) inked ribbons for typewriters or ink-pads (“Inked Ribbons or Pads”).

76. The Explanatory Note indicates that Photocopying Toner is classifiable under CN heading 37.07, Ball Point Refills under CN heading 96.08 and Inked Ribbons or Pads under CN heading 96.12.

77. CN heading 37.07 covers ‘Chemical preparations for photographic uses (other than varnishes, glues, adhesives and similar preparations); unmixed products for photographic uses, put up in measured portions or put up for retail sale in a form ready for use’. It is contained in Chapter 37 dealing with ‘Photographic or cinematographic goods’.

78. CN headings 96.08 and 96.12 are both contained in Chapter 96 dealing with ‘Miscellaneous manufactured articles’.

79. CN heading 96.08 covers ‘Ballpoint pens; felt-tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating stylos; propelling or sliding pencils; pen-holders, pencil-holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading 9609’, which are ‘pencils, other than pencils of heading 9608, crayons, pencil leads, pastels, drawing charcoals, writing or drawing chalks and tailors’ chalks’.

80. CN heading 96.12 covers ‘Typewriter or similar ribbons, inked or otherwise, prepared for giving impressions, whether or not on spools or in cartridges; ink-pads whether or not inked, with or without boxes’.

81. The exclusion of these specific articles from CN heading 3215 indicates to us that the authors of the Explanatory Note regarded (a) the aspect of the nature of Photocopying Toner, that it was a product for photographic uses, as more significant than its affinity to printer ink; (b) the aspect of Ball Point Refills, as parts of ball point pens, as more significant than their affinity to ink; and (c) the aspect of Inked Ribbons or Pads, as typewriter or similar ribbons or ink-pads, as more significant than their affinity to ink.

82. The fact that there is no exclusion from CN heading 3215 in the Explanatory Note which would cover the Goods and that the only alternative classification to CN heading 3215 which has been suggested in CN heading 8443 on the basis that they are parts or accessories of printing machinery suggest to us that the authors of the Explanatory Note would regard the Goods as properly classifiable under CN heading 3215. The aspect of the Goods, as parts of or accessories to printing machinery, seems to us not obviously more significant than their affinity to ink – indeed we would regard the affinity of the Goods to ink as more significant than their aspect as parts of or accessories to printing machinery – see: our conclusion below.

83. Nevertheless at this stage of this Decision we note that there are indications both ways in the Explanatory Note on the question of whether the Goods should be included in CN heading 3215.

84. There is no definition of printing inks in the CN and we have found the Explanatory Note as not being clear on whether the Goods must be regarded as printing inks and we are, therefore, in a position where, on the authority of *Wiener* (*ibid.* [13]) the objective characteristic of the Goods can only be sought in the use for which they were intended. Mr Peterson agreed that the use to which an article is to be put is relevant in considering its objective properties and characteristics (see: above, paragraph [27]). We regard that intended use as use in printing onto paper or other print media, rather than use as parts of or accessories to printers. This suggests that the Goods retain the objective properties and characteristics of printing ink.

85. The Court of Justice's observations in *Turbon II* at [23], although made in the different context of determining the 'essential character' of ink cartridges for the purposes of GRI 3(b), support this conclusion. The Court said:

> 'the ink contained in the cartridge is the most important factor for the purpose of using the goods at issue. In fact, the ink cartridge is not inserted in the printer in order to make the printer itself function but specifically to supply it with ink.'

86. For the reasons given above, we conclude that the Goods are, at least *prima facie*, classifiable under CN heading 3215.

87. We are not dissuaded from this conclusion by Mr Peterson's submission that HMRC have made a fundamental error in failing to make the distinction between "ink", which is an amorphous material, and the nature of the Goods as engineered structures, being manufactured goods with properties, characteristics and uses different from those of mere "ink" (see: paragraph [24] above).

88. It seems to us that the relevant issue for our decision is not whether the Goods are materials on the one hand, or manufactured goods on the other, but whether they are classifiable as "ink" or as "parts" or "accessories" of printers. Furthermore, we consider that *Paderborner Brauerei* on which Mr Peterson relied at this point in his argument does not, on analysis, support his submissions on the facts of this case.

89. In *Paderborner Brauerei* the product requiring to be classified was 'malt beer base' used to produce a mixed drink under the designation 'Salitos Ice'. The 'malt beer base' was produced from brewed beer, clarified and then subjected to ultrafiltration, by which the concentration of ingredients such as bitter substances and proteins was reduced. The Court of Justice held (*ibid.* [37]) that, as a result of the ultrafiltration, the product lost the objective properties and characteristics particular to beer and acquired properties and characteristics corresponding to those of ethyl alcohol, or, in any event, akin to such properties and characteristics. The Court's decision therefore was that the 'malt beer base' must be classified under CN heading 2208, the heading of ethyl alcohol.

90. We of course accept that materials can be subjected to processes which will deprive the materials of the objective properties and characteristics of those materials and endow them with the objective properties and characteristics of articles which have been subjected to the processes in question. Plastic resin processed to form the cover of one of Xerox's printers might well be a good example. But we do not agree

that processes need always have that effect or that the processes of manufacture of the 'ink sticks' from materials which, as Mr Peterson accepted (see: paragraph [27] above), answered to the description of "ink" in this case, in fact had that effect.

91. As we have found that the Goods retain at least some of the objective properties and characteristics of "ink" (see, in particular, paragraphs [73] and [82] above), this case is, in our judgment, distinguishable from *Paderborner Brauerei* on its facts because, as we have shown, the *ratio* of the Court of Justice's decision was that the 'malt beer base' had lost the objective properties and characteristics of the material (beer) and acquired those of the processed substance, which were akin to those of ethyl alcohol.

92. We turn therefore to consider whether or not the Goods are *prima facie* classifiable under heading 8443 as "parts" or "accessories" of printers.

93. Here we consider that the stable shape, functionality and mechanical strength of 'ink sticks' is relevant. In *Turbon II*, the referring court had found (see: *ibid.* [12]) that:

> 'when connected to a computer, a printer which contains no or only one cartridge does not respond to the 'print' command issued from that computer. In that situation, data are not transferred from the computer to the printer and the print head does not move from side to side nor is any paper drawn into the printer. The printer is, as it were, dead.'

and, on the basis of these findings, the Court understood that the cartridge itself was necessary for the printer to function and held that it was therefore capable of being regarded as a part and classified accordingly (*ibid.* [18]).

94. Without 'ink sticks' being loaded into the feeder mechanism of the printer for whose use they are dedicated and when an 'ink stick' is, for practical purposes consumed, the printer's user interface will indicate "ink out". Printing will continue for a little while provided there is liquid ink in the printer's reservoir, but if that liquid ink falls below a certain level, printing is no longer possible. There will always be some solid matter from an 'ink stick' adhering to the heater element ('melt plate') to protect it from heat damage.

95. We consider that as a matter of reality the evidence shows that the printer does not function in the absence of 'ink sticks'. We accept that when the printer's user interface indicates "ink out" the printer is functioning as it was designed to do, but we regard the function of a printer as printing and when it is not printing we regard it as not functioning for relevant purposes – it is, as it were, dead. Further, we accept that the presence of even a small amount of solid matter from an 'ink stick' adhering to the heater element ('melt plate') to protect it from heat damage shows that the 'ink sticks' are constructed in such a way that the printer does not realistically function in their absence. We reject the case put by Miss McCarthy that if there are no 'ink sticks' in the printer's feeder mechanism, the printer, in not printing, is functioning, and conclude that the Goods are essential for the operation of the printer.

96. Also, we do not accept that a consumable – such as we agree an 'ink stick' is – cannot for that reason be properly classified as a "part" or an "accessory". We consider that the proper criterion for an article being a "part" is whether or not there is a "whole" for the operation of which the part is essential (*Peacock* [21]). On this test we consider a consumable can be a part – a brake pad, for example, may be a part of a car – and in our view classification of the Goods as "parts" of printers cannot be denied on this basis alone, although we accept that a consumable which is consumed very quickly and must frequently be replaced is unlikely to be properly classified as a "part"..

97. For these reasons, we conclude that the Goods are, at least *prima facie*, also classifiable as "parts" of printers under CN heading 8443.

98. We reject, however, Mr Peterson's case that the Goods could also be classified as "accessories" of printers.

99. The concept of an "accessory" was considered in *Turbon I* (*ibid.* [32]) where the Court mentioned as the aspects of an "accessory" that it is designed to adapt machinery (in this case a printer) for a particular operation, or to perform a particular service relative to its main function, or to increase its range of operations. The Court held that the ink cartridges in issue were not "accessories" of the printers in question because they merely enabled the printers to fulfil their usual function, namely, the transcription on to paper of work produced with the aid of a computer.

100. Here, Mr Peterson's argument is that the 'ink sticks' are "accessories" because they have the function of enabling the printer to operate continually without the need to stop printing for reloading of 'ink sticks'. In this they make for a different (and more efficient) function of printing than is obtainable when ink is supplied in conventional liquid or powdered inks contained in cartridges.

101. We, however, accept Miss McCarthy's submission that this facility is a function of the way the printer has been designed – that is, it will perform its usual function of printing without the need for interruption for reloading 'ink sticks' – rather than a function of the 'ink sticks' themselves.

102. In the light of the above conclusions we turn to GRI 3(a). The relevant part of GRI 3(a) is the rule that the heading which provides the most specific description shall be preferred to headings providing a more general description.

103. We have concluded that CN heading 3215 ('printing ink ... whether or not concentrated or solid') provides a more specific description of the goods than CN heading 8443 ('printers ... parts thereof').

104. In effect, the only indication that CN heading 3215 was not the only heading under which the Goods were *prima facie* classifiable is that they are not to be used as inks 'after simple dilution or dispersion', but after a heating and liquefying procedure (a phase change) which, on the evidence, we would not regard as 'simple' but as highly complex. The fact that the Explanatory Note does not take account of this

process could easily be attributable to its not being up-to-date with technology in the production of ink for printers.

105. On the other hand, we consider that the stable shape, functionality and mechanical strength of 'ink sticks' is, in comparison, not a strong or convincing basis for a conclusion that the objective properties and characteristics of the Goods are not those of solid printing ink but of parts of a printer. This conclusion is reinforced by the fact that the 'ink sticks' are consumed in the operation of printers over what may be a relatively short period. We disagree with Mr Peterson's submission that CN heading 8443 is more specific than CN heading 3216 (see: paragraph [61] above). CN heading 8443 provides in our judgment a less specific description of the Goods than CN heading 3215, which accords with the intended use of the Goods as we have found it to be (see above, paragraph [84]).

106. Another reason for our conclusion that CN heading 3215 is more specific than CN heading 8443 comes from a comparison with the treatment of ink-filled cartridges for ordinary fountain pens, which we consider provides a telling analogy. The Explanatory Note states that Ballpoint Refills (comprising the ball point and ink reservoir) are classifiable with ballpoint pens under CN heading 9608 and not as "ink" under CN heading 3215. But in the case of ordinary fountain pens, although they are also classifiable under CN heading 9608, ink-filled cartridges for use with ordinary fountain pens remain classifiable as "ink" under CN heading 3215. This indicates to us that an article containing or comprising ink (such as an 'ink stick' in this case) must have some additional physical feature which could not be described as "ink"' to require it to be classifiable under a CN heading other than 3215. Further, that additional physical feature must be such as to indicate specifically the other CN heading under which it would be classifiable – as the ball point element of Ballpoint Refills indicates CN heading 9608. The Goods, in our view, have no physical feature which could not be described as "ink", albeit solid "ink" and we conclude that they are classifiable under CN 3215.

107. We therefore dismiss the appeal and uphold HMRC's decision notifying the BTI.

**Further appeals**

108. 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**

**RELEASE DATE: 16 January 2014**