[2016] UKFTT 33 (TC)

TC04826

Appeal number: TC/2013/07521

CUSTOMS DUTY – Combined Nomenclature – classification of panels used to fill spaces in a server rack – classification of grommets used to seal openings in data room floor – whether classified under Chapter 39 as plastics – whether classified under heading 8473 as "accessories suitable for use solely or principally" with ADP machines – meaning of "accessories"– **Turbon, Unomedical, BladeRoom** ***and*** **Amoena** ***considered – whether panels classified under heading 8546 as electrical insulators – whether panels classified under heading 3925 as builders' ware of plastics – whether grommets classified under heading 9603 as brushes – classification of panels and grommets by US exporters – classification under BTIs – appeal dismissed***

FIRST-TIER TRIBUNAL
TAX CHAMBER

EDP EUROPE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MR JOHN COLES

Sitting in public at the Royal Courts of Justice on 19 May 2015 and 19 August 2015

Mr Peter Howard and Mr Damian Stackhouse, directors of the Appellant, for the Appellant

Ms Jennifer Thelan of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. On 25 July 2013 HM Revenue and Customs ("HMRC") decided EDP Europe Limited ("EDP") had used incorrect commodity codes when importing certain products ("the Goods"). They issued a Post Clearance Demand ("the Demand") for extra customs duty and import VAT.

2. The Goods are:

(1) blanking panels made of a product called Formex ("the panels"). The panels fill spaces in a rack used to hold computer servers; and

(2) four types of grommet ("the grommets"), used to seal openings in the floors of data centres.

3. HMRC's case was that the Goods fell to be classified in Chapter 39 as "plastics and articles thereof" with the panels being classified under commodity code 3926 90 97 90 as "other articles of plastics" and the grommets being classified under code 3925 90 10 00 as "builder's ware of plastics." Products within these codes bear duty at 6.5%.

4. EDP's main submission was that the panels and grommets should both be classified under code 8473 30 80 00 as "accessories suitable for use solely or principally" with Automatic Data Processing ("ADP") machines. Products within that code are free of duty.

5. In the alternative, EDP argued that the Goods should be classified under the codes used by their US exporters. The panels had been classified under code 8546 90 10 00 as "electrical insulators – of plastics" and the grommets under code 9603 90 99 00 as brushes.

6. We decided as follows:

(1) the panels are classified under 3920 20 80 99 as "other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials – of polymers of propylene – of a thickness exceeding 0.10 mm – other"; and

(2) the grommets are classified under 3926 90 97 90 as "other articles of plastics – other – other – other."

7. This means we agree with neither party. However, like HMRC, we have classified the Goods as falling within Chapter 39. The rate of duty is also the same as for HMRC's proposed classifications, being 6.5%.

The law

8. The legal background was helpfully summarised by Henderson J in *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) as follows:

"[7] The EU is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System, generally known as 'the Harmonised System'. The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System, and all contracting states therefore use the headings and sub-headings of the Harmonised System. The system is administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as 'HSENs'.

[8] At Community level, the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature ('CN') established by art 1 of Council reg 2658/87 and art 20.3 of reg 2913/92. The CN is re-issued annually. It comprises three elements:

(a) the nomenclature of the Harmonised System;

(b) Community sub-divisions to that nomenclature; and

(c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

[9] The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are '00'. There may also be ninth and tenth digits which identify further Community (TARIC) sub-headings, of which there about eighteen thousand.

[10] Apart from the HSENs to which I have already referred, the European Commission also issues Explanatory Notes of its own to the CN which are known as 'CNENs'.

[11] The Court of Justice of the European Communities ['the CJEU]' has repeatedly stated that the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The two categories of Explanatory Notes, that is to say the HSENs and the CNENs, are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financien* [2005] ECR I-8151 ['*Intermodal*'], at paras 47 and 48.

[12] Part 1 of the CN contains at s 1A the General Rules for the Interpretation of the CN. These General Rules are known as 'GIRs'. Unlike the Explanatory Notes, they have the force of law (see *Vtech Electronics (UK) plc v C&E Commissioners* [2003] EWHC 59 (Ch) at para 16).

9. So far as relevant to the issues before the Tribunal, the GIRs provide as follows:

"Classification of goods in the Combined Nomenclature shall be governed by the following principles:

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any related section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2 (a) …

(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 or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

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

4. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

5. …

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

10. Finance Act ("FA") 1994, s 16(5) states that:

> "…the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

11. FA 1994 s 16(6) provides that the burden of proof in this appeal lies on the appellant.

Background to the appeal

12. EDP supplies materials used in data centres. On 3 April 2012, HMRC carried out a Customs & International Trade visit to EDP, and identified certain underpayments. EDP paid those amounts and was advised it could submit a claim for repayment of customs duty and import VAT for other products, which it did.

13. By a decision letter dated 25 July 2013, HMRC agreed to repay £386.18, but advised EDP that a further underpayment of £21,866.84 had been identified. HMRC said this had arisen because the Goods and certain baffles had been misclassified.

14. The decision letter identified five types of grommet, including an "extended raised floor grommet" and an "extended six inch brush grommet." Both have the same EDP part number (10013). Although EDP supply two types of extended raised floor grommet, one with three inch brushes and one with six inch brushes, only the latter has the part number 10013 (the other has the part number 10012). The Tribunal has therefore proceeded on the basis that there are four types of grommet in issue, not five.

15. On 14 August 2013 HMRC issued the Demand for the same amount, £21,866.84.

16. EDP requested a statutory review. By a letter dated 4 October 2013, HMRC's Review Officer varied the decision, excluding three of the importations because they were outside the time limit for the communication of a customs debt. He reduced the Demand to £21,247.15. On 1 November 2013 EDP appealed to the Tribunal.

17. EDP subsequently abandoned the part of its appeal which related to the baffles. These were therefore not considered by the Tribunal.

18. The hearing was listed for two days, beginning on 19 May 2015. EDP put forward a primary case and a secondary case in relation to both the panels and the grommets. The primary case was that both should be classified under code 8517 70 90 00 as "telephone sets [and] other apparatus – parts – other." The secondary case was that the panels should be classified under code 8546 90 10 00 as "electrical insulators – of plastics" and that the grommets should be classified under code 9603 90 99 00 as "brooms, brushes – other – other."

19. Towards the end of the first day of the hearing, Mr Howard drew HMRC's attention to a note at the end of a document provided in support of EDP's appeal. It

said that the US exporter of the panels had classified them under heading 8546, namely as electrical insulators.

20. We decided it was in the interests of justice to adjourn the appeal to allow HMRC to consider that information and make any related submissions. The adjournment also gave EDP the opportunity to decide whether to make submissions in relation to heading 8473, a possible classification which emerged only in the course of the hearing.

21. Both parties subsequently made submissions and responded to each other's submissions. The hearing resumed on 19 August 2015. EDP's revised case was that the correct code for both panels and grommets was 8473 30 80 00, on the basis that they were "accessories suitable for use solely or principally" with ADP machines.

22. Following the conclusion of the hearing, and at the invitation of the Tribunal, HMRC made further submissions in relation to two other headings within Chapter 39, namely 3918, which includes floor, wall and ceiling coverings of plastics, and 3920, being "other plates, sheets, film, foil and strip, of plastics…"

23. In their further submissions, HMRC confirmed they stood by their original case. EDP responded to HMRC's submissions and reiterated certain points made orally during the hearing.

The evidence

24. HMRC provided the Tribunal with a helpful Bundle of correspondence and other material. The Bundle was subsequently augmented by other documents provided during the hearings and with the submissions for the August hearing.

25. The documentary evidence consisted of:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) photographs of the Goods;

(3) a letter dated 18 June 2013 from the President of Upsite Technologies Inc ("Upsite"), the US exporter of the grommets;

(4) information about the Goods from various sources, including marketing materials, websites and magazine articles;

(5) the 2015 Best Practice Guidelines for the EU Code of Conduct on Data Centres ("the EU Best Practice Guidelines"); and

(6) diagrams showing (a) the effects of airflow in a data centre; (b) server configurations and (c) the server system airflow.

26. EDP also provided samples of the Goods, which were examined by the Tribunal and HMRC.

27. Shortly before the second day of the hearing, EDP asked that a statement by Mr Adrian Honeybill of HNC Construction Engineering be included in the Tribunal Bundle. HMRC did not object to its late inclusion and we allowed it to be admitted.

28. Mr Howard and Mr Stackhouse both gave evidence, were cross-examined by Ms Thelan and answered questions from the Tribunal. We found them to be honest and credible witnesses.

29. From that evidence, we find the following facts.

The facts

Servers

30. Servers play an important background role in this appeal. They are computers used by commercial enterprises and others for data processing, information systems and telecommunications, and sit in "enclosures." An enclosure may be a "cabinet" containing a small number of servers, or a data centre, with a much larger number of servers. For simplicity, we have referred to all enclosures as "data centres."

31. These servers are not the same as laptop or desktop computers, which are essentially self-contained, with their own "housing" or external structure. Equipment within that housing allows the heat generated by the computer to be dispersed, so its functioning remains undamaged.

32. Servers are also not the same as "towers." A tower is a number of servers within a housing. Like laptops and desktops, towers are self-contained, with their own equipment which ensures appropriate cooling within the tower.

33. Servers are attached to racks using rivets or screws. Each rack holds a number of servers, one under the other. Racks can be moved around within the data centre as requirements change.

34. An international standard is used when referring to the size of racks and servers, known as a Rack Unit, abbreviated to "U" or "RU." Each RU is equal to 1.75 inches; server racks are commonly described as being so many RUs high.

35. Each server has a cool air intake and a hot air output. The hot air generated by the servers may reach temperatures up to 50 degrees Celsius. Cool air is commonly provided from the underfloor area ("the plenum") and released into the data centre using a variety of methods. Cool air which does not reach the air intakes is known as "bypass air."

36. Servers are usually aligned in the racks so that the cool air intakes are at the front and the hot air outputs at the back. If a rack is not completely filled with servers, there will be a gap in the rack. The hot air expelled from the back of a server will move through this gap to the front of the rack, reaching the air intakes and creating "hot spots." The server will then heat up and become less efficient. If the temperature is high enough, the server will shut down and may be permanently damaged.

The panels

37. The panels are used to fill up the gaps in the racks and prevent the back-to-front flow of hot air. EDP sells the panels for use in both existing data centres and new ones.

38. The panels are attached to the racks using rivets, pins or screws, depending on the type of rack. Rivet holes are "popped out" of the panel to allow them to be attached.

39. The panels are flat and rectangular in shape, and are sold in boxes of 10. Each panel is 19.25 inches wide and 47.25 inches high (27 RUs), and are scored horizontally, with a line for each RU. They can easily be separated along these scored lines to make smaller subpanels. Scoring allows a customer to fill the gap in the rack with the right sized panel. For example, if a rack had a gap of 10 RUs (17.5 inches), the customer could separate a subpanel of ten joined pieces along the scored lines, and use that subpanel to fill the gap in the rack.

40. From time to time, servers and/or racks may be moved around the data centre, new servers/racks may be introduced and/or old ones removed. In any of these scenarios, the panels can be easily detached and reused in a different configuration, by undoing the rivets, screws or pins.

41. Data centres require significant energy, and using blanking panels contributes to energy efficiency: it is listed as one of the "expected minimum practices" by the EU Best Practice Guidelines. The purpose of those Guidelines is to "assist data centre operators in identifying and implementing measures to improve the energy efficiency of their data centres."

42. The panels are made of a flame-retardant polypropylene called Formex, which has insulating properties. The marketing material says Formex "is flexible and easier to work with than sheet metal, fiberglass or other rigid material" and continues:

> "The cost of labor for installation of the system is also less expensive than the professional installation of substitute materials, due to the ease of installation."

43. The panels are imported from the USA, where they are made. Documentation provided by the manufacturer states:

> "Formex GK-40BK is an electrical insulating material manufactured by ITW Formex. Under the Harmonized Tariff Schedule of the United States (2012) Supplement it is classified as 8456.90.00."

44. Heading 8546 is "electrical insulators."

The grommets

45. As already noted, most data centres provide cool or "conditioned" air through the plenum. However, the plenum also contains multiple cables for electricity and the transfer of data to/from the servers. The plenum is normally surfaced with tiles, and cables enter the data centre through an opening cut in a tile (a "cut-out").

46. There is invariably a gap between the sides of the cable and the sides of the hole, through which conditioned air could pass from the plenum into the data centre. The grommets seal those gaps.

47. Each grommet consists of a plastic frame with a hole in the centre. Brushes are implanted around the edge of the hole. These are made of "multi-layer, opposing and inter-woven filaments" of premium grade nylon. The number and size of the filaments varies with the type of grommet. For example, the mini-raised floor grommet has approximately 13,200 filaments, each of which is 0.01 inches in diameter.

48. The part of the grommets which holds the brushes is described in the marketing material as "the grommet frame." Less than 20% of the total cost of a grommet is attributable to the frame; more than 50% is attributable to the brushes.

49. The grommets are installed as follows:

(1) a larger cut-out is made in the tile through which the cable enters the data centre. The marketing materials specify the "tile cutting requirements" for each grommet;

(2) the grommet is inserted into the cut-out and attached to the plenum using screws or adhesive;

(3) when a cable is passed through the opening, the brushes seal the gap to prevent conditioned air leaking from the plenum into the data centre.

50. Marketing material for the grommets states that:

> "Based on measurements at multiple data centres, on average 60% of valuable conditioned air is not reaching the air intake of IT equipment due to unsealed floor openings…"

51. Although we were not provided with the authority for that 60% figure, HMRC did not dispute that, without grommets, air would leak into the data centres through the gaps between the cables and the sides of the cable entry holes. HMRC also accepted that the air which entered in this way would not be directed to the cool air intakes within the data centre. We find as a fact that, in the absence of grommets, conditioned air would leak into the data centre; we do not need to make a finding as to the percentage which would fail to reach the cool air intakes.

52. The grommets are sold under the name "Koldlok," a registered trade mark. The four types of grommet in issue are as follows (the number in brackets is the EDP part number):

(1) *Mini Raised Floor Grommet* (10077). This is the smallest of the grommets. It is designed to seal "small cable openings in the floor of new or existing computer rooms" and is effective for a "one inch cable bundle." It is fixed with four self-drilling screws, provided with the grommet.

(2) *Integral Raised Floor Grommet* (1010). This is designed to "seal openings in new raised floor cutouts prior to the installation of communications

or power cabling." It is installed using four self-drilling screws, provided with the grommet. This and the next two grommets are all suitable for four half-inch cables.

(3) *Extra Large Surface Mount Raised Floor Grommet* (2040). This is designed to be installed in existing data centres. It has two interlocking halves, which "facilitate recabling and allow tiles to be moved without capturing cables." The grommet is attached using a "custom adhesive mounting kit" consisting of pressure-sensitive foam, backed by adhesive; this kit is provided with the grommet.

(4) *Extended 6 Inch Brush Raised Floor Grommet* (10013). This can be easily modified to seal large, non-standard openings in the plenum, such as those found under power distribution units holding multiple electric sockets.

53. Although some of the grommets are marketed as suitable for new data centres, all can easily be moved once installed. A grommet may be repositioned following a change to the location of a server or rack: this is because the cables supplying the server(s) with electricity and data also require relocation. The grommet would then be unscrewed (or detached if adhesive had been used); the floor tile into which the grommet had been inserted would be removed, and a complete floor tile put in its place; a new cut-out would be made in an appropriate floor tile in the new location and the grommet inserted into that new cut-out.

54. As with the panels, the use of grommets reduces energy usage and costs. The EU Best Practice Guidelines states that closing "all unwanted apertures in the raised floor" is an expected minimum practice to reduce energy use.

55. The US supplier of the grommets, Upsite, classifies them as brushes under code 9603 90 99 00.

The panels: competing classification codes

56. EDP's primary submission was that the panels should be classified under code 8473 30 80 00 as an accessory suitable for use solely or principally with machines of heading 8471, namely ADP machines.

57. In the alternative, EDP submitted that the panels should be classified under code 8546 90 10 00 as electrical insulators. EDP's original case, that they should be classified under 8517 70 90 00 as "electrical machinery – telephone set [and] other apparatus – parts" was abandoned and we have not considered it further.

58. HMRC submitted that that the panels should be classified under code 3926 90 97 90, being "other articles of plastics – other – other – other." This was also the code used in two Dutch Binding Tariff Information ("BTI") decisions.

59. HMRC also provided (a) a BTI issued by the Hungarian customs authorities and (b) a witness statement from Mr David Harris, an HMRC Officer, giving information about a further BTI issued by the German customs authorities. These two BTIs both

classified the products as within Chapter 39, as being "plastics and articles thereof," but used different headings from the one proposed by HMRC for the panels.

60. The next sections of our decision examine each of these options.

The panels: classification as plastics?

Plastics: the parties' submissions

61. HMRC's case was that the panels fell to be classified under 3926 90 97 90. The relevant part of the CN is as follows:

> "**Chapter 39 Plastics and articles thereof**
>
> 3926 - Other articles of plastics and articles of other materials of headings 3901 to 3914
>
> 3926 90 - Other
>
> 3926 90 97 - Other (other than made from sheet)
>
> 3926 90 97 90 - Other."

62. Ms Thelan said that the use of plastic is "an essential aspect" of the panels. Not only are they made of polypropylene, but the marketing material refers to the use of plastic as an advantage, when contrasted with other "substitute materials."

63. Mr Howard submitted that plastic is not an essential aspect; the panels could be made of other substances, such as metal. Ms Thelan responded by saying that had the panels been made of a different substance, they would have a different classification. By way of example, plastic screws are classified as 3926 90 97 90, whereas metal screws are classified under heading 7318, which covers "screws…of iron or steel."

Plastics: the BTIs

64. HMRC identified four arguably relevant BTIs. The first is Dutch and dated 26 January 2010. HMRC used Google translate to produce an English language version. As we have already noted, this BTI classified the product under code 3926 90 97 90, the same code as HMRC contend should be applied to the panels.

65. The BTI describes the product ("the Dutch panel") as follows:

> "A plastic panel intended for cooling of network servers in 19 inch rack models, including the following exterior features: no mechanical parts; cutouts and clamping devices for 19 inch rack models; sizes ranging from 482,6 mm x 45 mm x 38,43 mm to 482,6 x 90 x 38,43 mm. The entirety is to be regarded as an accessory of a server and should be classified according to its nature and composition as a product of plastic as defined by GN [Gecombineerde Nomenclatuur] post 3926. The product cannot be identified as a piece of equipment for buildings as defined by GN post 3925. The product is packed per 5 or 10 pieces in a cardboard box."

66. Mr Howard and Mr Stackhouse drew attention to the statement in the BTI that the Dutch panel was "an accessory of a server." They submitted that the description

was inconsistent with its classification and that the Dutch panel should instead have been classified under heading 8473.

67. Ms Thelan sought to explain the phrase "accessory of a server" by suggesting that the word "accessory" may "flow from the use of Google translate." She added that in any event the phrase has no legal significance.

68. The second BTI is also Dutch. It has the same date as the first and classifies the product under the same heading. The description is identical, other than that this panel has "a self-adhesive strip, treated with reagent, to measure temperature." As with the first Dutch BTI, the description states that "the entirety is to be regarded as an accessory of a server."

69. The third BTI is Hungarian, and dated 7 June 2011. It classifies a Formex sheet under code 3919 90 00 99, being "self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls." The Formex in question is described as "a product specially designed cut into two layers, electrical insulating adhesive sheet. It provides electrical insulation according to the circuitry design."

70. The German BTI referred to a Formex product classified under code 3920 10, namely as "other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials - of polymers of ethelyne." Mr Harris's witness statement said he was unable to provide a copy of the BTI to the Tribunal as it had been categorised as "commercially sensitive."

71. In post-hearing submissions, Ms Thelan said that the panels should not be categorised in the same way as the Dutch panels, namely under sub-heading 3920. We consider her submissions on this at §83 below.

72. She also said that the panels also did not fall within heading 3918, as products within that heading were floor, wall or ceiling coverings of plastic, and the panels did not meet any of those descriptions.

Plastics: discussion

73. Chapter 39 is entitled "plastics and articles thereof." The first part of the Chapter covers plastics in "primary forms" and the second part covers scrap, "semi-manufactures" and articles.

74. The headings in the second part are as follows:

> 3915: Waste, parings and scrap of plastics
>
> 3916: Monofilament of which any cross-sectional dimension exceeds 1 mm, rods, sticks and profile shapes, whether or not surface-worked but not otherwise worked, of plastics
>
> 3917: Tubes, pipes and hoses, and fittings therefor (for example, joints, elbows, flanges), of plastics

3918: Floor coverings of plastics, whether or not self-adhesive, in rolls or in the form of tiles; wall or ceiling coverings of plastics, as defined in note 9 to this chapter

3919: Self-adhesive plates, sheets, film, foil, tape, strip and other flat shapes, of plastics, whether or not in rolls

3920: Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials

3921: Other plates, sheets, film, foil and strip, of plastics

3922: Baths, shower-baths, sinks, washbasins, bidets, lavatory pans, seats and covers, flushing cisterns and similar sanitary ware, of plastics

3923: Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics

3924: Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics

3925: Builders' ware of plastics, not elsewhere specified or included

3926: Other articles of plastics and articles of other materials of headings 3901 to 3914.

75. The panels are made of plastic. The classification for which HMRC contends falls under heading 3926, which applies to "other articles of plastic," in other words, those which are not within any other headings or subheadings in the Chapter. We therefore first considered those other headings and subheadings.

76. Headings 3915 to 3917 clearly do not apply. We also agree with Ms Thelan that heading 3918 is inappropriate. This is because Note 9 to Chapter 39 says that:

> "For the purposes of heading 39.18, the expression 'wall or ceiling coverings of plastics' applies to products in rolls, of a width not less than 45 cm, suitable for wall or ceiling decoration, consisting of plastics fixed permanently on a backing of any material other than paper, the layer of plastics (on the face side) being grained, embossed, coloured, design-printed or otherwise decorated."

77. The panels are neither "in rolls" nor "fixed permanently on a backing of any material."

78. Heading 3919 was used to classify a product made of Formex by the Hungarian customs authorities. However, the panels are not self-adhesive, so they cannot fall under that heading. Moreover, the Formex considered by the Hungarian customs authorities provided "electrical insulation according to the circuitry design" so is very different from the panels.

79. Heading 3920 applies to "other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials." The next heading, 3921, applies to "other plates, sheets, film, foil

and strip, of plastics," in other words, those not within the previous headings. We must therefore first decide whether the panels come within heading 3920; if they do not, heading 3921 must be considered.

80. Heading 3920 also begins by stating that it applies to "*other* plates..." This is a reference back to heading 3919, namely to plates etc which are self-adhesive. The panels are not self-adhesive so they are potentially "other plates."

81. The heading continues by specifying that the product must be made of non-cellular plastic which has not been "reinforced, laminated, supported or similarly combined with other materials." The panels are rectangles made of polypropylene, a non-cellular plastic, and they are not reinforced, laminated, supported or combined with other materials.

82. GIR 1 requires that we also consider any related section or chapter notes. Note 10 to Chapter 39 says:

> "In headings 39.20 and 39.21, the expression 'plates, sheets, film, foil and strip' applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use)."

83. Ms Thelan said that this Note makes clear that heading 3920 is:

> "intended to cover products presented as a raw material in a rectangular (including a square) shape, which whether it is cut or uncut, would be intended to be further worked before becoming articles ready for use."

84. That is not, however, what Note 10 says. Rather, it specifically provides (our emphasis) that it applies to "plates…whether or not…surface-worked, uncut or cut into rectangles…but not further worked (*even if when so cut they become articles ready for use*)."

85. In other words, the Note does not include any requirement that the item be further worked at some later point; on the contrary, it specifies that goods fall within the heading if, as a result of cutting and/or surface work, they have become "articles ready for use."

86. The panels are scored so as to be easily separable into smaller rectangles, with "pop-out" holes into which rivets, screws or similar can be placed. Both the scoring and the marking of pop-out holes are the result of "surface work." No further work was carried out on the panels. As we have already said, the fact that they are "ready for use" as a result of the surface work does not prevent the classification applying.

87. The panels therefore satisfy the words of heading 3920, taking into account Note 10 to Chapter 39.

88. Below heading 3920 sits subheading 3920 10, being "polymers of ethylene", and subheading 3920 20 "polymers of propylene." The panels are made of polypropylene and so fall under 3920 20.

89. That subheading is then further subdivided according to thickness. The panels are more than 0.1mm thick and so come under 3920 20 80. The UK Trade Tariff adds a further two digits, but none of the further specific subheadings are applicable. The last two digits are therefore 99, being "other."

90. As we have found that the panels meet the description in 3920 20 80 99, they cannot come within 3926 90 97 90, as HMRC contended. That is a residual category for plastics which do not fall within other headings.

91. It also follows from our analysis that we have not adopted the classifications used in the German BTI or the two Dutch BTIs. We are aware that in *Intermodal* at [45], the CJEU said that where a BTI has been issued by another EU country, a court or tribunal could "take the view that the tariff classification made in that BTI is wrong" but should "take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN."

92. We are told that the German BTI refers to "Formex" and that the product has been classified under 3920 10. This heading is the same as the one we have identified as applicable to the panels, but the subheading is different, classifying the product as a "polymer of ethelyne." We have very little information about the German product and so do not know why that subheading was selected. However, as the panels are made only of polypropylene, they must be classified under 3920 20 rather than under 3920 10.

93. We know more about the Dutch panels. Both have "cut outs and clamping devices", the second had, in addition, "a self-adhesive strip, treated with reagent, to measure temperature." It therefore appears to us that both products were "further worked" and so distinguishable from the panels. Because they were "further worked" Note 10 precludes them being classified under headings 3920 or 3921. They instead default to 3926 90 97 90, being "plastics and articles thereof – other." This is the classification applied by the Dutch customs authorities.

94. For the avoidance of doubt, we are not saying that any of these BTI classifications are wrong. In the case of the German BTI, we have insufficient facts to understand the basis for the classification; in the case of the Dutch BTIs, the products are distinguishable from the panels. We have also, we believe, taken the "particular care" referred to in *Intermodal* when identifying the code for the panels.

95. Before leaving the Dutch BTIs, we acknowledge EDP's submission that describing the Dutch panels as "an accessory of a server" was inconsistent with their classification. But classification must, of course, be carried out according to the GIRs. A product description used in another country's BTI is not relevant to that exercise. We therefore agree with Ms Thelan that this wording has no legal significance.

96. For completeness, we also checked whether the use of the word "accessory" arose, as Ms Thelan suggested might be the case, from the use of Google translate. The Dutch language version of the BTI describes the product as "een toebehoren van een server." The Dutch language version of heading 8473 says that it applies to "delen en toebehoren (andere dan koffers, hoezen en dergelijke)" which translates as "parts and accessories (other than covers, carrying cases and the like)." The BTI therefore uses the same word ("toebehoren") as is used for "accessories" in heading 8473, and so Google translate was accurate.

Plastics: conclusion

97. We find that the panels are *prima facie* classifiable under 3920 20 80 99 as:

> "Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials – of polymers of propylene – of a thickness exceeding 0.10 mm – other – other."

98. However, we cannot determine whether that is the correct classification for the panels until we have established whether they also satisfy heading 8473 30 80 00 as "accessories suitable for use solely or principally" with ADP machines, and/or heading 8546 90 10 00 as "electrical insulators – of plastics.

99. If the panels are *prima facie* classifiable under two or more codes, we must consider whether the headings, section or chapter notes prescribe an order of priority. If not, the next step is to consider GIR 3(a), which requires us to decide which of the headings provides the more specific description.

The panels: classification as accessories?

100. EDP's case was that the panels should be classified as accessories of ADP machines under heading 8473 30 80 00. We have set out the submissions of the parties in relation to this proposed classification in the next following sections of our decision.

101. The relevant part of the CN is as follows:

> "**Chapter 84: Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof**
>
> 8473 - Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8471)
>
> 8473 30 - Parts and accessories of the machines of heading 8471
>
> 8473 30 80 - Other."

No submission on "parts"

102. EDP's case was limited to "accessories" and did not extend to arguing that the panels were "parts" of a server.

103. Given that Note 5C to Chapter 84 states that a "part" of an ADP machine is one which "is connectable to the central processing unit either directly or through one or more other units" and "is able to accept or deliver data in a form (codes or signals) which can be used by the system," we agree that the panels are not parts of a server.

The Section and Chapter Notes

104. GIR 1 requires that classification be determined "according to the terms of the headings and any relative section or chapter notes." Heading 8473 comes within Chapter 84, which in turn sits in Section XVI. We therefore need to consider the Notes to Section XVI, the Notes to Chapter 84, and the heading itself.

105. Note 1 to Section XVI sets out a number of exclusions from that Section, of which only Note 1(g) requires further consideration. It excludes:

> "parts of general use, as defined in note 2 to Section XV, of base metal (Section XV), or similar goods of plastics (Chapter 39)."

106. Although the panels are not "parts" of an ADP machine, as already noted the word "parts" in that context has the particular meaning prescribed by Note 5C to Chapter 84. We therefore considered whether the panels might be "parts of general use" as defined by Note 2 to Section XV, and as extended to "similar goods of plastics" by Note 1 to Section XVI.

107. Section XV covers "base metals and articles of base metal." Note 2 says that "parts of general use" are items falling within certain specified headings, only one of which requires consideration. Heading 8302 applies to:

> "Base-metal mountings, fittings and similar articles suitable for furniture, doors, staircases, windows, blinds, coachwork, saddlery, trunks, chests, caskets or the like; base-metal hat-racks, hat-pegs, brackets and similar fixtures; castors with mountings of base metal; automatic door closers of base metal."

108. The HSEN for that heading says:

> "This heading covers general purpose classes of base metal accessory fittings and mountings, such as are used largely on furniture, doors, windows, coachwork, etc. Goods within such general classes remain in this heading even if they are designed for particular uses (e.g., door handles or hinges for automobiles). The heading does not, however, extend to goods forming an essential part of the structure of the article, such as window frames or swivel devices for revolving chairs."

109. Heading 8302 therefore applies to accessories which are "fittings and mountings." While panels are clearly not "mountings", we found it more difficult to decide whether they were "fittings." However, we decided that they were not, for the following reasons:

(1) The heading covers "general purpose classes of…accessory fittings…such as used largely on furniture, doors etc," whereas the panels are not "general purpose" but have a very specific use.

(2) The heading only extends to goods "designed for particular uses," if they are "general purpose" accessories. As the panels are not "general purpose", this inclusory phrase is not relevant.

(3) Other items within the heading include "brackets and similar fixtures" castors and door closers. The list of examples in the HSEN includes hinges, handles, catches, and curtain rods. These accessories are attached to the main item on a permanent basis, unlike the panels, which are easily detachable and moveable.

110. We therefore find that the panels are not excluded from Section XVI by Note 1. The other Section Notes do not provide any assistance, and neither do the Notes to Chapter 84. The HSEN to that Chapter says (at Note B) that:

> "In general, the goods of this Section may be of any material. In the great majority of cases they are of base metal, but the Section also covers certain machinery of other materials (e.g., pumps wholly of plastics) and parts of plastics, of wood, precious metals, etc."

111. Again, there is nothing here to exclude the panels from being within Chapter 84.

Heading 8473 and the related HSEN

112. Turning to heading 8473 itself, this covers "accessories (other than covers, carrying cases and the like) suitable for use solely or principally with machines of headings 8469 to 8472."

113. ADP machines are classified under heading 8471. There was no dispute that the servers were ADP machines, or that the panels were "suitable for use solely or principally" with the servers. It therefore followed that, if the panels are "accessories" of the servers, they will fall under heading 8473.

114. The HSEN for heading 8473 says:

> "The accessories covered by this heading are interchangeable parts or devices designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine, or to increase its range of operations."

115. The HSEN also sets out a (rather dated) list of accessories which fall within the heading:

> "(1) Form feed devices for the continuous feeding of stationery into typewriters, accounting machines, etc.
>
> (2) Automatic spacing devices for typewriters, accounting machines, etc.
>
> (3) Listing devices for attachment to addressing machines.
>
> (4) Auxiliary printing devices for tabulating machines.
>
> (5) Copy holders for attachment to typewriters.
>
> (6) Metal address plates.

(7) Calculating devices for incorporation in typewriters, accounting machines, calculating machines, etc.

(8) Diskettes for cleaning disk drives in ADP machines, etc

(9) Electronic memory modules

116. The HSEN also says that:

> "stands for machines of headings 84.69 to 84.72 not normally usable except with the machines in question, remain in this heading [ie 84.73]."

117. In other words, server racks are within 8473.

Heading 8473: submissions and discussion

118. Mr Howard and Mr Stackhouse relied on the HSEN, saying that the panels met one or both of the requirements there set out, namely that they were "designed…to perform a particular service relative to the main function of the machine" and/or "to increase its range of operations."

119. Taking the second of these first, the natural meaning of the phrase "increasing [the machine's] range of operations" is that the machine is enabled to do something additional to its normal function. That this is right can be seen from the HSEN list: for example "form feed devices for the continuous feeding of stationery" and "listing devices for attachment to addressing machines" enable the typewriter and the addressing machine to do more than they would be able to do without the accessories.

120. In contrast, the panels do not extend the servers' range of operations. Instead, they protect the servers' main function. We therefore do not agree that the panels "increase [the server's] range of operations."

121. EDP's main submission, however, was that the panels "perform a particular service relative to the main function of the machine," namely that they prevent the servers overheating, which would damage their main function.

122. Ms Thelan asked us to reject EDP's submission, firstly because the panels were not essential to the function of the machine. She said that "a server installed on its own" would not need the panels; that servers would work without the panels, albeit not for long; and that cooling could be provided in another way, such as by increasing the air conditioning.

123. By "a server installed on its own" we understand Ms Thelan to mean a laptop, desktop or tower. However, as we have already found, those computers have their own cooling systems; they are not the same as servers in data centres.

124. Even if the servers could be cooled by different means, that does not preclude the heading applying: the HSEN does not say that items are accessories only if they are essential to the functioning of the machine. On the contrary, the HSEN explicitly states that both the racks on which the servers sit and diskettes for cleaning disk drives are accessories, but neither are essential.

125. We therefore agree with EDP that the panels "perform a particular service relative to the main function of the machine." However, is that enough to satisfy the HSEN definition of accessory?

The HSEN for heading 8473: interchangeable parts and devices

126. The HSEN definition opens with the words "the accessories covered by this heading are interchangeable parts or devices designed to…" In order to come within that definition, the panels must be "interchangeable parts or devices."

127. We did not find this phrase easy to understand. The Oxford English Dictionary ("OED") says that the word "interchangeable" means "capable of being put or used in place of each other." For example, factories may make "interchangeable" or standard parts rather than bespoke articles. But that meaning is difficult to apply in the context of the sentence we are trying to construe.

128. We found more assistance from the similar usage in other parts of the CN and in the related HSENs, with our emphases:

(1) Heading 8207 applies to "*interchangeable tools* for hand tools"; the related HSEN says that "this heading covers an important group of tools which are unsuitable for use independently, but are designed to be fitted to [other tools]."

(2) The HSEN to heading 8509 says that "food grinders and mixers" include "similar grinders and mixers (including those which, by means of *interchangeable parts*, can also be used for cutting or other manipulations)."

(3) Note 2 to Chapter 87 says that "machines and working tools designed for fitting to tractors of heading 8701 as *interchangeable equipment* remain classified in their respective headings even if presented with the tractor, and whether or not mounted on it." The HSEN expands this: "agricultural machines designed for fitting to tractors as *interchangeable equipment* (ploughs, harrows, hoes, etc.) remain classified in their respective headings even if mounted on the tractor at the time of presentation."

(4) Heading 8508 covers vacuum cleaners, and the related HSEN says they:

> "may be presented with auxiliary devices (accessories) (for brushing, polishing, insecticide spraying, etc.) or *interchangeable parts* (carpet devices, rotary brushes, multiple-function suction heads, etc.). Such an appliance is classified here together with the parts and accessories presented with it, provided they are of a kind and number commonly used with the appliance. When presented separately, they are classified by reference to their nature."

(5) Heading 9019 covers "mechano-therapy appliances," and the related HSEN says these are "mainly used to treat diseases of the joints or muscles, by mechanical reproduction of various movements." After listing appliances for specific parts of the body, the HSEN goes on to say that the heading also includes "universal-type apparatus, power-operated, which by the use of *interchangeable accessories*, can be employed for numerous

mechano-therapeutic purposes (e.g., for treatment of diseases of the joints or muscles of the neck, shoulder, elbow, wrist, fingers, hip, knee, etc.)."

129. In all these examples, the word "interchangeable" means something which can be attached to the main item in question and then removed again.

130. Moreover, in all the above usages the accessory either *adapts the item for a particular operation* (as with the hand tools and the mechano-therapy universal-type apparatus) or *increases the item's range of possible operations* (as with the attachments to the grinders and tractors). In other words, these accessories carry out two of the tasks which HSEN 8473 specifies as necessary for an item to be classified as an accessory to an ADP machine.

131. We could stop there, and find that the phrase "interchangeable parts or devices" in HSEN 8473 means the same as it does in these other headings, namely something which can be attached to the main item and then removed again.

132. However, we acknowledge that none of the examples we have cited involves an interchangeable part or device which is recognisably performing "a particular service relative to the main function" of the item in question, and that is, of course, the phrase on which EDP are seeking to rely.

133. We found further assistance in heading 8466, which covers "parts and accessories suitable for use solely or principally with various types of machine tools as set out in headings 84.56 to 84.65." The HSEN for heading 8466 sets out its scope (again, our emphases):

> "(A) Parts of the machines of headings 84.56 to 84.65.
>
> (B) Accessories for these machines, that is, subsidiary devices used in connection with the machines, such as *interchangeable devices* which modify the machine so that it can perform a wider range of operations; devices to increase precision; devices which *perform a particular service relative to the main function of the machine*.
>
> (C) Tool holders for any type of tool for working in the hand.
>
> The very wide range of parts and accessories classified here includes:
>
> (1) Tool holders which hold, guide or operate the working tool and which permit the interchange of such tool-pieces. They are of very varied types…
>
> (2) Work holders designed to hold and sometimes manipulate (as required for a particular operation) the part being worked by the machine…
>
> (3) Auxiliary attachments for notching, for spherical turning, etc.
>
> (4) Copying attachments (including those which are electrically or electronically operated) for the automatic reproduction of work according to a pattern.

(5) Surface-finishing attachments for lathes, planing, shaping, etc., machines.

(6) Mechanical or pneumatic attachments used to automatically control the progress of the work or the tool in the course of working.

(7) Other special auxiliary attachments, designed to increase the precision of the machine without actually entering into its operation…"

134. It can be seen that at paragraph (B) above, this HSEN says that accessories include "devices which perform a particular service relative to the main function of the machine." In other words, it uses the same language as in HSEN 8473.

135. Two of the accessories listed in HSEN 8466 meet that description. These are "work holders" which provide the service of holding the part being worked on and attachments which control the progress of the work."

136. In both examples, the word "interchangeable" has the same meaning as in the other usages we have already considered: these accessories can be added to, and then removed from, the main item in question. It is when added to the machine that the accessories provide the relevant service, such as by holding a part or controlling progress.

137. If we now return to the examples of accessories set out in HSEN 8473 (see §115), we can see that each of those examples can be attached to, and removed from, the machine in question. Most either adapt a machine for a particular operation, or increase its range of operations. Only one "perform[s] a particular service relative to the main function of the machine" namely the diskettes for cleaning disk drives. These are inserted *into* the ADP machines and provide the service inside the machine. HSEN 8473 also classifies server racks as within the heading, and that too is consistent with our understanding: the servers are "attached" to the racks, and the racks then provide a service to the servers.

138. From the use of the same or similar words elsewhere in the CN and HSEN, and from the consistency between those usages and the examples in HSEN 8473, we find that the phrase "interchangeable parts or devices" refers to items which can be attached to, and removed from the machine in question, and that the phrase "perform a particular service relative to the main function of the machine" must be understood in that context. In other words, to be an accessory in the context of heading 8473, an item must perform a particular service for the machine *when it is attached to* that machine.

139. If we are right in our analysis, the panels are not "interchangeable…devices." Although they provide a service, they are not attached to the servers, but rather to the racks.

140. Before we conclude, however, we must first consider whether our definition is consistent with the case law. Ms Thelan cited ***Turbon International GmbH v Oberfinanzdirektion Koblenz*** [2002] Case C-276/00 ("*Turbon*"); ***Unomedical A/S v Skatteministeriet*** [2011] C-152/10 ("*Unomedical*"); and ***BladeRoom Group Ltd v***

HMRC [2015] UKUT 250 (TCC) ("*BladeRoom*"). We also considered *Amoena v HMRC* [2015] EWCA 25 ("*Amoena*").

The case law: Turbon

141. The issue in *Turbon* was whether an ink cartridge was a "part" or an "accessory" of a printer. The cartridge and the ink were both specifically designed for that particular printer. The CJEU held at [30] that the cartridge was not a part and at [32] that it was not an accessory, saying:

> "…such a cartridge cannot be classified under heading 8473 as an accessory of the printers in question. While the cartridges are interchangeable, they are not designed to adapt the printers for a particular operation, or to perform a particular service relative to their main function, or to increase their range of operations, within the meaning of the HS explanatory note relating to heading 8473. Such cartridges merely enable ESC printers to fulfil their usual function, namely, the transcription on to paper of work produced with the aid of a computer."

142. Ms Thelan sought to rely on *Turbon* because she said that, like the cartridges, the panels did not provide a service relative to the main function of the machine. She submitted that the panels did not "impact the functioning of any of the machines in the data centre directly…the machinery in the data centre will still function in their absence."

143. We do not agree: on the facts as found, the panels *do* impact the functioning of the servers. In the absence of the panels, servers located near a gap in the rack will overheat and shut down; repeated shut downs may cause permanent damage.

144. However, the CJEU opened their discussion of "accessories" by saying "the cartridges are interchangeable." In contrast, the panels are not interchangeable because they are not attached to the servers, whether by insertion or otherwise.

145. Thus, although the panels can be distinguished from the cartridges in *Turbon* because they "perform a particular service" and so satisfy that part of the HSEN definition, they do not satisfy the opening words, because they are not "interchangeable." In other words, both the cartridges and the panels fail the "accessory" test, but for different reasons.

The case law: Unomedical

146. In *Unomedical* the CJEU considered the classification of drainage bags attached to catheters. Having found at [36]-[37] that the bags were not "part" of the catheters, the CJEU went on to say at [38]:

> "Likewise, those bags do not enable the instruments and apparatus to be adapted for a particular operation, nor do they increase their range of operations, or enable them to perform a particular service connected with their main function. A drainage bag attached to a catheter has the sole purpose of collecting liquid drained after the catheter itself has fulfilled its own function, which is to drain the urine present in the

> bladder. For its part, a drainage bag for a dialyser does not enable that apparatus to perform operations other than that for which it is designed, namely that of cleansing blood."

147. The bags were attached to the catheters. They were not accessories because they provided no service for the catheters, which were unaffected by the presence or absence of the bags. The service was, instead, being provided for the users.

148. Ms Thelan's submissions on *Unomedical* were similar to those she made on *Turbon,* but we agree with EDP that the panels, unlike the catheter bags, do provide a service to the servers.

149. The problem is not with that part of the HSEN definition, but with its opening words. Unlike the catheters, the panels are not "interchangeable" because they are not connected to the machine in question. Both the catheter bags and the panels fail the "accessory" test, but for different reasons.

The case law: BladeRoom

150. The issue in *BladeRoom* was the classification of a modular data centre. HMRC described it in their BTI as follows (see [2] of the decision):

> "The data centre breaks down to 10 interdependent sections or modules when being shipped. Each section relies on the remaining sections in order to operate. It has integrated sensors embedded within it which constantly and precisely monitor digital and physical signals from the information technology (IT) infrastructure including server load, power draw, internal and external air temperature, pressure and humidity. An automatic controlled array of fans, cooling coils, ducts, intelligent valves, filters and doors etc create a 'corridor' of cool air which is directed through the internal 'IT' infrastructure as required. Heat produced by the servers is conducted away or fed back into the system as determined by the automatic control programme. Service technicians are able to access the equipment in the data centre by using spaces referred to as 'cold aisles'. Servers controlling this system are present at the point of shipping and, usually, the racks (in this case up to 195), however, the networked servers required by the customer would not be present. This data centre is structured from, mainly, steel, the dimensions of: section or module 15m long by 4.5m wide by 3.7m high. The assembled data centre would be 15m by 3.7m high by 45m long."

151. When this case was heard at the First-tier Tribunal ("FTT") under reference [2013] UKFTT 574 ("*Bladeroom FTT*"), HMRC submitted that the BladeRoom should be classified under heading 9406 as a prefabricated building. The appellant argued that the BladeRoom was a machine within heading 8471, or in the alternative, a part or accessory of a machine and so within heading 8473. However, all the submissions made related to "part" rather than "accessory," see [48]-[51] of that decision.

152. The FTT decided that the Bladeroom did not meet the requirements of heading 8471, and then dealt briefly with heading 8473, saying at [61]:

> "With regard to 8473, 'Parts and accessories....suitable for use solely or principally with the machines of headings 84.69 to 84.72', which was not initially relied on by the Appellants, this does not seem to us to be an appropriate classification for the BladeRoom. The BladeRoom is not an interchangeable part or device designed to adapt the servers, nor does it perform a particular service relative to the main function of the servers, or increase the servers' range of operations."

153. At [62] the FTT found that, in consequence "the only heading under which the BladeRoom may be classified is 9406 'pre-fabricated buildings.'"

154. The appellant appealed to the Upper Tribunal ("UT"), arguing that the FTT should have decided that the BladeRoom came within heading 8473 as a "part" of an ADP machine. No submissions were made on whether it was an "accessory." The UT dismissed the appeal, finding at [32] that the BladeRoom was not a "part" of an ADP machine.

155. *BladeRoom* is therefore not a binding authority in relation to the meaning of "accessory." We nevertheless observe that the BladeRoom provided "via complex automatic processes, the optimum working environment for the IT to function," see [54] of *Bladeroom FTT.* These included providing cooling to the servers, albeit via a method which did not appear to involve panels, see [23] of that decision:

> "The cool air passes through the servers from front to back, and is kept at a positive pressure such that the cool air always moves from the front to the back of the servers, being warmed as it goes through the servers, and lowering the temperature within the servers themselves.. The backs of the servers are in the warm zone, and the air there leaves the BladeRoom through exhaust vents built into the exterior of the unit wall. The various parts of the BladeRoom are designed to ensure that the cool air coming from the adiabatic system and the hot air produced by the servers do not intermingle, the corridors are sealed with door locks to prevent this."

156. All we can take from *BladeRoom* is that there was no suggestion from the appellant, or from either tribunal, that the BladeRoom should have been classified as an accessory because of the cooling it was providing to the servers.

The case law: Amoena

157. The issue in *Amoena* was whether a mastectomy bra ("MB") is a "part of" or an "accessory to" an artificial breast worn by women following surgical removal of their own breast.

158. The appellant contended that the correct code was to be found within Chapter 90, which includes medical apparatus and accessories thereof. Note 2(b) to that Chapter says:

> "Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a

> number of machines, instruments or apparatus of the same heading…are to be classified with the machines, instruments or apparatus of that kind."

159. The Court of Appeal followed *Turbon* and *Unomedical* and found that the MB was not a part or accessory. Arden LJ, giving the leading judgment, said at [41] that:

> "…the MB is also not an accessory of the breast form for the purposes of Ch 90. It does not improve the performance of the breast form or give it any additional functionality which it is not capable of having without the MB."

160. Both McCombe and King LJJ concurred, albeit reluctantly. McCombe LJ said at [95] that he found the CJEU decision in *Turbon* to be "logically challenging," and added at [97]:

> "For my part, I would have thought that a printer cartridge was classically something which 'performs a particular service relative to the main function of' the printer, namely to enable it to print, but apparently not."

161. He went on to say:

> [100] Is the MB an accessory to the breast form in the sense that it 'perform[s] a particular service relative to the main function' of the breast form. As might be understood from the above, I think that, on any natural meaning of these words, it does precisely that; it holds it in place and prevents it sliding off the body, even if there may be other devices that are capable of achieving that result.
>
> [101] Is that enough for us to hold that the MB is an 'accessory' to the breast form, if the law that we have to apply is that an ink cartridge for a printer does not perform such a service for the printer? Regrettably, I feel constrained to hold that the answer is 'No'."

162. King LJ echoed this:

> "[104]…I, like McCombe LJ, find the logic in parts of the decided cases testing and indeed I too would have thought that a printer cartridge was typical of something which 'performs a particular service relative to the main function of' a printer, namely to enable it to print.
>
> [105] The analysis of Arden and McCombe LJJ however lead me to the reluctant conclusion that, notwithstanding any view I may hold as to the natural meaning of the relevant words, the law is such that I also can only conclude that the MB would not be an accessory to a breast form within the meaning of Ch 90."

163. On 29 May 2015, the Supreme Court granted the appellant permission to appeal against the Court of Appeal's decision.

164. It is possible that the Supreme Court may in due course hold that "accessory" in the context of Chapter 90 should not be interpreted in line with *Turbon* and

Unomedical. If so, their decision may affect the meaning of the same phrase in heading 8473.

165. Our task, however, is to apply the law as it is, not as it might be. Albeit reluctantly, the Court of Appeal followed *Turbon* and *Unomedical* and did not redefine the word "accessory."

The panels: conclusion

166. We have found that the panels can be distinguished from the cartridge in *Turbon* and the catheter bag in *Unomedical,* but that they are nevertheless not accessories because they are not "interchangeable." We therefore find that they are not classified under heading 8473.

167. We acknowledge that our analysis rests heavily on the HSENs. That is, however, consistent with established CJEU case law. As AG Jacobs explained at [90] of his Opinion on *Peacock AG v Hauptzollampt Paderborn* [1999] C-33998:

> "It is, in any event, appropriate that the Community should apply, whenever possible, the classification which flows from the HSENs, both pursuant to its commitments under the HS Convention and because those notes are drawn up by the committee which has the most detailed responsibility for determining the interpretation of the HS, on which the CN is based, the Community and its Member States being represented on that committee and taking part in its deliberations."

The panels: classification as electrical insulators?

168. EDP's alternative submission was that the panels should be classified under 8546 90 10 00 as "electrical insulators – of plastics."

169. The relevant part of the CN is as follows:

> "Chapter 85: Electrical machinery and equipment and parts thereof; sound records and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles.
>
> 8546 - Electrical insulators of any material;
>
> 8546 90 - Other
>
> 8546 90 10 00 - Of plastics"

Electrical insulators: the parties' submissions

170. EDP relied on the fact that the panels are made of Formex, which is fire-resistant and an insulating material. Furthermore, the US manufacturer had classified the panels under 8546 90 10 00. Since the same classification rules apply to the US and the UK, EDP submitted that the heading should be the same in both countries.

171. Ms Thelan disagreed. She relied on the HSEN for heading 8546, which says:

> "Insulators of this heading are used for the fixing, supporting or guiding of electric current conductors while at the same time insulating them electrically from each other, from earth, etc."

172. She said that the panels do not insulate a cable or other conductor carrying an electric current. The use of that classification by the US manufacturer was not binding and it would be incorrect to apply the heading to the panels.

Electrical insulators: discussion

173. The consistent case law of the CJEU is that "the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN," see *Holz Geenen GmbH v Oberfinanzdirektion München* [2000] C-309/98 at [14].

174. The heading here is "electrical insulators." There are no relevant section or Chapter notes to assist. The question is: what are the objective characteristics and properties of an electrical insulator?

175. As Ms Thelan says, the HSEN gives further guidance, saying that (our emphasis) "insulators of this heading are *used for* the fixing, supporting or guiding of electric current conductors while at the same time insulating them electrically from each other, from earth, etc." In other words, the HSEN directs us to look at the *use* of the product. But is this permissible, given that goods are to be classified according to their "objective characteristics and properties"?

176. In *HMRC v Coneen, Watts & Stone* [2014] UKUT 0031 (TCC) at [90] Nujee J considered this question in a different context. His decision has recently been upheld (and this passage in particular approved) by the Court of Appeal under reference [2015] EWCA Civ 1261 at [31]:

> "…there are many instances where the Court of Justice has had regard to the intended function or use of the goods in question. But this is because very many of the headings do refer, expressly or impliedly, to the function or use of goods. Thus in *Neckerman* [*Neckerman Versand AG v Hauptzollamt Frankfurt am Main Ost* C-395/93] the relevant heading was 'pyjamas' and the Court of Justice held (at [7]) that the objective characteristics of pyjamas, which distinguished them from other ensembles, could be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear…This seems to me a good example of the Court finding in the wording of the heading ('pyjamas') an implicit reference to the function or use of the goods, namely to be worn in bed, this being the characteristic that distinguishes pyjamas from other sets of garments."

177. We find that heading 8546 provides another example of the intended use of the product being inherent in the wording of the heading. An insulator must insulate, and an electrical insulator must act as a barrier between an electric current to prevent it earthing through other wires, cables, people or objects. As we have seen, the HSEN explicitly endorses that approach.

178. When the heading is understood in that way, it is clear that it does not apply to the panels. Although Formex has insulating properties, the panels are not being used to insulate conductors for an electric current.

179. What, though, of the US classification? EDP are right that the Harmonised System applies to both the UK and the US. As we have already noted at §91, the CJEU said in *Intermodal* at [45] that where a BTI has been issued by another EU country, a court or tribunal could "take the view that the tariff classification made in that BTI is wrong" but should "take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN." In other words, even where a BTI has been issued by another EU country, it is not determinative.

180. In *Axial Systems v HMRC* [2013] UKFTT 319 (TC) (Judge Raghavan and Mrs Sadeque), the appellant had similarly provided evidence of the classification of the goods used by the US manufacturer. The tribunal considered *Intermodal*, and in the light of that judgment said at [156] that "it would be odd if the Tribunal were required to give any greater weight to determinations by authorities from non Member States."

181. The tribunal went on to say at [157]:

> "At its highest, the most that can be said is that if the US authority had given the classification as suggested, this would be something which would cause us to take particular care over our assessment of classification (the level of care that we consider we have taken in relation to classification in any event). A US authority classification would not however be something which would be determinative of our classification. In the same way that HMRC's stated view as to the correct classification does not necessarily establish that such classification is correct, the views of a third country authority or for that matter another Member State authority do not of themselves establish what is the correct classification."

182. In this case there is no evidence that the US customs authorities have given a formal ruling as to the classification of the panels. Like the tribunal in *Axial*, we consider we have taken "particular care" over the classification of the panels, and found that they are not "electrical insulators."

The panels: conclusion on classification

183. It follows from our analysis that the panels do not come within heading 8473: they are not accessories because they are not "interchangeable" devices. Neither do they fall to be classified under heading 8546 as electrical insulators.

184. We have, however, already found that the panels are within subheading 3920 20 80 99. We therefore classify the panels in accordance with GIRs 1 and 6 as:

> "Other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials – more than 0.1mm thick – other."

The grommets: competing classifications

185. EDP's main submission was that the grommets should be categorised as accessories for use with ADP machines under 8473 30 80 00, the same code as proposed for the panels.

186. In the alternative, EDP submitted that the grommets should be classified under 9603 90 99 00 as "brushes."

187. An earlier submission that the grommets be classified under 8517 70 90 00 as "telephone sets [and] other apparatus – parts – other" was abandoned, and so has not been considered.

188. HMRC submitted that the grommets should be classified under 3925 90 10 00, as "builders' ware of plastics, not elsewhere specified or included."

The grommets: classification as accessories?

189. We deal briefly with heading 8473. EDP's case was that the grommets were necessary for the servers to work properly; without grommets, the servers' functionality would be compromised because of overheating.

190. Ms Thelan said the grommets "have no direct effect on the actual physical functioning of the automatic data processing machines...Rather, they impact the environment in which the machines operate."

191. We have already concluded that the panels are not accessories because they are not "interchangeable parts or devices." The same applies to the grommets and we reject classification under heading 8473 for that reason.

The grommets: classification as brushes?

192. Mr Howard and Mr Stackhouse said that classification under 9603 90 99 00 as "brushes – other – other" was correct, because the functioning part of the grommet was the brush: it is the brush that seals the area around the cable. The brush also accounts for the greater part of the grommet's cost. It should therefore be the brush and not the "frame" which drives the grommets' classification.

193. Furthermore, the US company from which EDP purchased the grommets had classified the grommets under that heading. As with the panels, coding should be consistent, given that both the US and the UK were applying the Harmonised System.

194. In response, Ms Thelan said that, in the context of heading 9603 and the related HSEN, a brush is defined by function, namely that it has "the capacity to apply, remove or transfer another material or substance." As regards the code used by the US exporter, she repeated her earlier submissions on the non-binding nature of foreign classifications.

195. Our starting point is the words of the heading and the immediately following subheadings, which are as follows:

"9603 Brooms, brushes (including brushes constituting parts of machines, appliances or vehicles), hand-operated mechanical floor sweepers, not motorised, mops and feather dusters; prepared knots and tufts for broom or brush making; paint pads and rollers; squeegees (other than roller squeegees):

9603.10 Brooms and brushes, consisting of twigs or other vegetable materials bound together, with or without handles

Tooth brushes, shaving brushes, hair brushes, nail brushes, eyelash brushes and other toilet brushes for use on the person, including such brushes constituting parts of appliances :

9603.21 Tooth brushes, including dental-plate brushes

9603.29 Other

9603.30 Artists' brushes, writing brushes and similar brushes for the application of cosmetics

9603.40 Paint, distemper, varnish or similar brushes (other than brushes of subheading 9603.30); paint pads and rollers

9603.50 Other brushes constituting parts of machines, appliances or vehicles."

196. The OED defines "brush" as follows (there are other meanings but they are specialist and not relevant):

"1 A utensil consisting of a piece of wood or other suitable material, set with small tufts or bunches of bristles, hair, or the like, for sweeping or scrubbing dust and dirt from a surface; and generally any utensil for brushing or sweeping.

2 An instrument consisting of a bunch of hairs attached to a straight handle, for applying moisture to a surface, moist colours in painting, colouring, and similar purposes.

3 Any brush-like bunch or tuft."

197. The primary and secondary meanings of "brush" therefore relate to the functions of applying, removing or transferring another material or substance, as Ms Thelan submitted. Is it right to read the CN heading as excluding the third OED meaning of "any brush-like bunch or tuft"?

198. We note that the heading itself makes several implied references to "brushing" functions: floor-sweepers, mops, dusters, paint pads and rollers, and possibly squeegees. Where a subheading is specific, the same is true: tooth brushes; shaving brushes; hair brushes; nail brushes; eyelash brushes; toilet brushes; artists' brushes; writing brushes; brushes for applying cosmetics and paint brushes.

199. The HSEN for heading 9603 says:

"This group comprises a variety of articles, differing considerably both in materials and shape, used for toilet purposes, for household cleaning, for applying paints, adhesive or liquid products, and for certain industrial operations (cleaning, polishing, etc.).

200. It then sets out 16 types of brush, each of which has the capacity to apply, remove or transfer another material or substance (dust, moss, paint etc), as Ms Thelan says. None of the listed brushes have the function of sealing a hole.

201. The heading, the specific subheadings and the HSEN all support Ms Thelan submission that brushes categorised under 9603 all have a "brushing" function; in other words, that they are within meanings 1 and 2 of the OED definition.

202. It is true that the heading contains various residual "other" headings:

"9603 50 00	Other brushes constituting parts of machines, appliances or vehicles
9603 90 00	Other
9603 90 10	Hand-operated mechanical floor sweepers, not motorised
	Other
9603 90 91	Road-sweeping brushes; household type brooms and brushes, including shoe brushes and clothes brushes; brushes for grooming animals
9603 90 99	Other"

203. We considered whether the grommets could be classified under 9603 50 00 as "other brushes constituting parts of machines, appliances or vehicles." However, it seems to us that the subheading does not extend the meaning of "brush" but rather separates out brushes (as that term is understood within the heading) used in machines, appliances and vehicles.

204. Subheading 9603 90 00 is for "other" brushes. There are two specific sub-subheadings, one for floor sweepers and one for "road-sweeping brushes; household type brooms and brushes, including shoe brushes and clothes brushes; brushes for grooming animals." These two specific sub-subheadings also refer to brushes which have the functions of applying, removing or transferring another material or substance.

205. We therefore find, in accordance with wording of the heading and the guidance given by the HSEN, that heading 9603 does not apply to the grommets. In relation to the code used by the US exporter, the points made earlier in relation to the panels are repeated, see §179ff.

The grommets: classification as builder's ware of plastics?

206. The parties agreed that the grommet was made of plastic. In particular, Ms Thelan asked Mr Howard and Mr Stackhouse if they accepted that nylon (of which the brush is made) was a form of plastic and they confirmed they did.

207. HMRC's case was that the grommets should be classified under 3925 90 10 00. The relevant part of the CN is as follows:

"**Chapter 39 Plastics and articles thereof**

3925 - Builders' ware of plastics, not elsewhere specified or included.

3925 90 - Other

3925 90 10 00 - Fittings and mountings intended for permanent installation in or on doors, windows, staircases, walls or other parts of building.

3925 90 20 00 - Trunking, ducting and cable trays for electrical circuits.

3925 90 80 00 - Other "

208. Ms Thelan drew attention to Note 11(b) to Chapter 39, which says that heading 3925 includes "structural elements used, for example, in floors, walls or partitions, ceilings or roofs." The grommets had, she said, been installed in the floor of a data centre and so constituted part of its structure.

209. EDP submitted that:

(1) the grommets were not "permanent" and so did not fit the description given by the subheading: "fittings and mountings intended for *permanent* installation in or on doors, windows, staircases, walls or other parts of building." On the contrary, grommets were both easily moveable and frequently moved.

(2) grommets were not "structural" and so did not meet the description given by Note 11(b). Instead, they were commonly inserted after the construction of the data centre, once it was clear where a grommet was required because of cabling to the servers.

210. Ms Thelan responded by saying that EDP's interpretation of "permanent" nor "structural" was too narrow. In relation to "permanent," she said:

> "within a particular data room configuration, the Grommets are, effectively, permanent (at least until that configuration is changed). Thus, in the context in which they are used, they are installed permanently."

211. There was, she said, no difference, in that sense, between a grommet and a door handle; both could be removed and replaced, but until that happened, both were "permanent."

212. In relation to "structural", she relied on the Google definition as meaning "relating to or forming part of the structure of a building or other item." She submitted that:

> "when used, the grommets form part of the structural configuration of the data room insofar as they form part of the structure which channels the air flow in the data centre. Effectively, they improve the way in which the flooring within the data centre works."

213. Finally, she said that the grommets were sometimes installed in new data centres, and that this had been accepted by Mr Howard in cross-examination. Thus, they were part of the structure of those data centres, and the position was no different when they were added later.

Discussion

214. We begin, once again, with the terms of the heading itself: it covers "builders' ware of plastics." There is no OED definition of "builders' ware", but we find that its everyday meaning is "materials (not equipment) used by builders in their trade."

215. GIR6 directs that we must also consider the words of the subheading, namely "fittings and mountings intended for permanent installation in or on doors, windows, staircases, walls or other parts of buildings."

216. The OED defines "permanent" as:

> "Continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to *temporary*."

217. We have found as facts that grommets seal the holes through which particular cables pass to particular servers; if the server configuration changes, a new "cut-out" is made in a different part of the floor and the grommet is moved. Even those grommets marketed as suitable for installation in new data centres can be, and are, subsequently moved to other locations. Their placement is not permanent, but temporary.

218. Ms Thelan compared grommets to door handle, but this is inapposite. The subheading requires that the item be "intended" for permanent installation. When a handle is fixed to a door, there is no expectation that it will be moved to another door. It is intended to be permanent, despite the fact that it can be unscrewed and replaced.

219. We find that the grommets are not "intended for permanent installation in…other parts of buildings" and so do not come within this subheading.

220. The guidance given by Note 11 to the Chapter reinforces our conclusion. It says that heading 3925 "applies *only* to the following articles" (our emphasis), making it clear that the heading is restricted to the articles listed in the Note. At (b) of that list is "structural elements used, for example, in floors, walls or partitions, ceilings or roofs."

221. Ms Thelan relied on the Google meaning of "structural" as "relating to or forming part of the structure of a building or other item." We found this to be a loose and not particularly helpful definition. Radiators, kitchen units and built-in wardrobes all "relate to" the structure of a building, but they are not structural as that term is normally understood. The mere insertion of something into the floor or walls of a building does not make it "structural."

222. A floor is clearly structural. But when the grommets are inserted into the floor, they do not make *the floor* work better. Instead, they prevent the conditioned air which travels under the floor from leaking out through holes made in the floor.

223. Structural elements of a building are not moved around to suit the needs of equipment within that building. Even though grommets can be included in the floors of new data centres, they are moved as required by the servers and racks. They are not "structural."

224. We therefore reject HMRC's submission that the grommets should be classified under 3925 90 10 10 because they are neither permanent nor structural. In other words, they are not "builders' ware" at all.

Grommets: classification as plastic – other

225. It follows that we have rejected both EDP's suggested classifications and that put forward by HMRC. We classify the grommets as follows.

226. The frame and the brushes which make up the grommets are both made entirely of plastic. This constitutes an objective characteristic.

227. Chapter 39, which covers plastics, is subject to a number of exclusions, but none applies to the grommets.

228. We have set out at §74 the subheadings for the second part of the Chapter, covering scrap, "semi-manufactures" and articles. None of the more specific subheadings apply, and the grommets must therefore fall under heading 3926 as being "other articles of plastics."

229. They also do not fit any of the further divisions of that subheading, and so fall to be classified under 3926 90 97 90, being "other articles of plastics – other – other – other."

230. We therefore decide that the grommets are classified under that subheading in accordance with GIRs 1 and 6.

Decision and appeal rights

231. Our decision is as follows:

(1) The panels are classified under 3920 20 80 99 as "other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials – of polymers of propylene – of a thickness exceeding 0.10 mm – other."

(2) The grommets are classified under 3926 90 97 90 as "other articles of plastics – other – other – other."

232. Both panels and grommets have been classified using GIRs 1 and 6, in other words according to the terms of the headings, subheadings and any related section or chapter notes.

233. We thank Mr Howard, Mr Stackhouse and Ms Thelan for their helpful submissions. We particularly acknowledge the contributions made by Mr Howard and Mr Stackhouse, who got to grips with the structure of the CN in the context of a case which was neither straightforward nor simple.

234. 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.

Anne Redston

TRIBUNAL JUDGE
RELEASE DATE: 21 JANUARY 2016