



Appeal number: FTC/69/2014

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

UPPER TRIBUNAL (TAX AND CHANCERY CHAMBER)

XEROX LIMITED

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

TRIBUNAL: MR JUSTICE NUGEE

Sitting in public at the Rolls Building, London EC4A 1NL on 9 November 2015

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

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

DECISION

Mr Justice Nugee:

Introduction

- 5 1. This is an appeal by Xerox Ltd (“**Xerox**”) from a decision (“**the Decision**”) of the First-tier Tribunal (Judge John Walters QC and Mr Julian Stafford) (“**the FTT**”) dated 16 January 2014. The Decision is reported as *Xerox Ltd v HMRC* [2014] UKFTT 083 (TC), and references below to numbers in square brackets are, unless otherwise apparent, references to paragraphs of the Decision.
- 10 2. The appeal is brought with the permission of the FTT (Judge Walters) granted on 25 March 2014. It concerns the correct classification for customs purposes of what are colloquially called ‘ink sticks’ (“**the Goods**”) which are imported for use exclusively with Xerox solid ink printers.
3. As explained in one of the many US patents included in the bundle before me:
15 “Solid ink or phase change ink printers conventionally receive ink in a solid form, either as pellets or as ink sticks. A color printer typically uses four colors of ink (yellow, cyan, magenta, and black). The solid ink pellets or ink sticks ... are delivered to a melting device, which is typically coupled to an ink loader, for conversion of the solid ink to a liquid. ... Each melting device receives solid ink from the feed
20 channel to which the melting device is connected and heats the solid ink impinging on it to convert the solid ink into liquid ink that is delivered to a print head for jetting onto a recording medium...”
- 25 4. A fuller description of the Goods is given below but briefly they are made of waterless ink compounds composed of a proprietary formula containing resins, waxes, dyes or pigments and other chemicals; this material is capable of being formed into complex and stable shapes; and the ink sticks are made by injection moulding the material into highly engineered forms which are specially designed to fit into specific models of Xerox printers.
- 30 5. The question at issue is whether the Goods should be classified for customs purposes under heading 3215 of the Combined Nomenclature (“**CN**”) as ‘printing ink’ or ‘other inks’ (in which case they would be subject to duty at a rate of 6.5%) or under heading 8443 as ‘parts’ of printers (in which case they would be free of duty). The FTT, upholding the decision of the Respondents,
35 Her Majesty’s Commissioners for Revenue and Customs (“**HMRC**”), held that they were properly classifiable under heading 3215. Xerox contend that they were wrong to do so and that the Goods should properly be classified under heading 8443.

Legal background

6. Before coming to the facts in detail, it is helpful to set out the legal background. I can do this by referring to the succinct statement by Lawrence Collins J in *Vtech Electronics (UK) plc v Commissioners for Customs & Excise* [2003] EWHC 59 (Ch) (“*Vtech*”) at [6] to [12], as follows:
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- “6. The Common Customs Tariff came into existence in 1968. By Article 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.
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7. The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature (“CN”) established by Article 1 of Council Regulation 2658/1987. The CN is established on the basis of the World Customs Organisation’s Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 15 1983 to which the Community is a party.
8. Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes “to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System”. The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.
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9. The CN, originally in Annex I to Regulation 2658/87, is re-issued annually: the version applicable to the present case is Annex I to Regulation 2204/99 (12.10.99 OJ L278). The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature (“CN subheadings”); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.
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10. The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are “00” and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.

5 11. There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System (“HSEs”). The Community has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as CNENs.

10 12. Binding Tariff Information is issued by the customs authorities of the Member States pursuant to Article 12 of the Common Customs Code (Council Regulation 2913/92/EEC) on request from a trader. They are called “BTIs”, and such information is binding on the authorities in respect of the tariff classification of goods...”

15 In the present case the version of the CN put before me was in fact that adopted on 31 October 2012, but it was not suggested that there had been any recent changes in the relevant headings.

20 7. Part 1 of the CN contains preliminary provisions, which include the “General rules for the interpretation of the CN”, known as the General interpretation rules (“GIR”). I was told that these have been unchanged for many years. They “have the force of law” (*Vtech* at [16]). The relevant GIR for present purposes are as follows:

25 “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 relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

...

30 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:

35 (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.

40 (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, insofar as this criterion is applicable.

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

...

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

(GIR 2(b) (referred to in GIR 3) concerns mixtures or combinations of materials or goods consisting of more than one material or substance. The
20 FTT held that it was not relevant to the present case, and that is not challenged on this appeal.) It can be seen that as stated by Henderson J in *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) at [14]:

“the General Rules quoted above provide a hierarchical set of principles, and if the correct classification can be ascertained at a
25 given stage it is unnecessary to proceed any further.”

8. Part 2 of the CN sets out the relevant codes by sections, chapters, headings and sub-headings, together with the appropriate tariff. The competing sub-headings in the present case are 3215.90.00.90 and 8443.99.90.00.
9. Heading 3215 is part of Chapter 32 which is itself part of Section XIII. The
30 relevant provisions are as follows:

Section XIII Other organic compounds

Chapter 32 Tanning or dyeing extracts; tannins and their derivatives, dyes, pigments and other colouring matter; paints and varnishes; putty and other mastics; inks.

- 35 3215 Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid

-Printing ink

	3215.90	-Other
	3215.90.00.10	--Ink formulation, for use in the manufacture of ink-jet cartridges
	3215.90.00.20	--Heat sensitive ink fixed on a plastic film
5	3215.90.00.30	--Disposable cartridge ink ...
	3215.90.00.40	--Dry ink powder ...
	3215.90.00.90	--Other
10.	Heading 8443 is part of Chapter 84 which is itself part of Section XVI. The relevant provisions are as follows:	
10	Section XVI	Machinery and mechanical appliances; electrical equipment; parts thereof, sound recorders and reproducers, television image and sound recorders and reproducers, and parts and accessories of such articles
15	Chapter 84	Nuclear reactors, boilers, machinery and mechanical appliances; parts thereof
	8443	Printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442; other printers, copying machines and facsimile machines, whether or not combined; parts and accessories thereof
20		-Parts and accessories
	8443.91	--Parts and accessories of printing machinery used for printing by means of plates, cylinders and other printing components of heading 8442
	8443.99	--Other
25	8443.99.10	---Electronic assemblies
	8443.99.90.00	---Other

The facts in more detail

11. I can take a more detailed statement of the facts from the Decision of the FTT. The FTT had a witness statement from Dr Titterington, Vice President of Printhead and Ink Research and Development at Xerox Corporation, and also the benefit of hearing him being cross-examined. On the basis of his evidence they found the following facts:

“10 The Goods are ‘phase change components’ which are specially

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

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

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

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

orders.”

12. I can note more briefly some other facts found by the FTT:
- (1) Each ink stick is assigned a part number relative to the printer with which it is designed to be used: [17].
 - 5 (2) Each ink stick is imprinted with a machine-readable registration mark: [17].
 - (3) As a stick reaches the heating element or ‘melt plate’, it is heated, softened and liquefied and then sprayed onto transfer drums, paper or print media by sophisticated print heads. This process consumes the ink sticks: [18].
 - 10 (4) The fact that the engineered shape of the sticks enables several sticks to stack on top of each other has the distinct advantage (compared with conventional printers which use plastic cartridges containing liquid or powdered ink) that it is not necessary to stop the printer’s operation to replace the cartridge: [20].
 - 15 (5) The fact that the ink sticks are consumed by the process of printing also has the advantage of a significant reduction in ‘post-consumer waste’ as there are no spent cartridges to dispose of. The post-consumer waste associated with ink sticks is generally in the form of melted drippings which can be easily disposed of: [21].
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13. Neither party suggested to me that the FTT had made any errors in this description of the Goods. Mr Peterson (of the New York bar), who appeared with his partner Mr O’Neill for Xerox, showed me samples of (yellow) ink sticks, and demonstrated the way in which the ink sticks are loaded into raceways in one of Xerox’s printers. I am conscious that the facts are not for me (as an appeal to the Upper Tribunal only lies on a point of law) but it was very helpful to be able to see physical examples of the ink sticks. As the FTT said, they are solid, stable and in complex engineered shapes, which enable them not only to slot into the correct raceway, but also to stack on top of each other.
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14. I was also shown material confirming that Xerox refers to the ink sticks on its website and in its marketing as “Solid Ink”. The cardboard box in which the sample ink sticks are sold describes them on the front as “Cartridge-Free ColorQube 8700” (ColorQube 8700 is the name of the particular printer for which these were designed) but on the back says “Solid Ink is colorful and vibrant”. I was also referred by Miss McCarthy, who appeared for HMRC, to a Xerox document referring to “High performance solid ink technology” and “The Solid Ink Advantage”, and a print out from its website extolling the many advantages of the products under the title “The Truth About Solid Ink”. Mr Peterson did not dispute any of this but explained that Xerox has to sell the products to consumers and it would not be good business to market them
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under the (no doubt technically accurate but less comprehensible) name of “Phase change components”.

The appeals

- 5 15. On 14 December 2011 Xerox applied to HMRC’s Tariff Classification Service for a BTI in relation to a sample (magenta) ink stick. On 26 January 2012 HMRC issued a BTI classifying the stick to 3215.90.00.90. The BTI said that GIR 1 had been used to classify the product to heading 3215 (printing ink, writing or drawing ink and other inks, whether concentrated or solid) and GIR 6 to classify the goods to subheading level 321590 (other than printing ink); 10 the Taric Code was 3215.90.00.90 (other than elsewhere within this heading). Xerox requested a reconsideration by HMRC, but on 27 March 2012 HMRC wrote confirming the classification to 3215.90.00.90, explaining that the product was not in their opinion within heading 8443 as it did not constitute a working part of the machinery, and was within heading 3215 which 15 specifically allowed solid inks.
16. On 26 April 2012 Xerox appealed to the FTT contending that the product was not ink within heading 3215 but was a part or accessory of a printer within heading 8443.
17. In the Decision dated 16 January 2014 the FTT held (i) that the Goods were 20 *prima facie* classifiable as printing ink under heading 3215 ([86]); (ii) that the Goods were also *prima facie* classifiable as ‘parts’ of printers (although not ‘accessories’) under heading 8443 ([97]); and (iii) applying GIR 3(a), that heading 3215 provided a more specific description of the Goods than heading 8443 ([103]). They therefore held that the goods were properly classifiable to 25 heading 3215 and dismissed the appeal.
18. Xerox now appeal to the Upper Tribunal, contending that the Goods should be classified to heading 8443. It does so on two alternative grounds, namely:
- (1) assuming that the FTT were right that the Goods were *prima facie* 30 classifiable under both headings, the proper application of GIR 3(a) should have led them to conclude that heading 8443 provides the more specific description; if however the headings were equally specific such that the Goods could not be classified pursuant to GIR 3(a), GIR 3(b) has no application and the Goods therefore fall to be classified under GIR 3(c) which requires them to be classified under the heading 35 which occurs last in numerical order, namely 8443;
- (2) alternatively, the FTT were wrong to hold that the Goods were *prima facie* classifiable under heading 3215; they should have held that the Goods were only classifiable under heading 8443 as ‘parts’ of printers (Xerox does not repeat the contention that they are ‘accessories’).
- 40 19. HMRC has served a Respondent’s Notice seeking to uphold the decision of the FTT on the alternative ground that the Goods were not in fact properly

classifiable under heading 8443 at all. They also contend that if the Goods do not fall to be classified under GIR 3(a), they should be classified to heading 3215 under heading GIR 3(b).

Are the Goods classifiable under heading 3215 ?

- 5 20. Although this was not the order in which Mr Peterson argued the issues, I take first the question whether the Goods were *prima facie* classifiable under heading 3215, or to be more precise whether the FTT made any error of law in concluding that they were.
- 10 21. In my judgment they made no error of law in this respect. Indeed I confess that despite the lengthy analysis of the FTT, and the arguments skilfully deployed before me, I regard the question as in truth a very short and simple one. Heading 3215 expressly includes “printing ink ... and other inks, whether or not ... solid”; the Goods (as the FTT found) are ink in solid form; and they are therefore squarely within the heading.
- 15 22. However in deference to the carefully marshalled arguments of Mr Peterson, I will consider in detail the various points that he raised.
- 20 23. I mention first one point to get it out of the way. As appears above, although HMRC (in the BTI) and the FTT both agreed that the Goods were classifiable under heading 3215 they did not adopt quite the same view of the Goods. HMRC in the BTI classified the Goods to subheading 3215.90 which shows that they took the view that the Goods were not ‘printing ink’ but ‘other inks’ (as indeed the BTI says). The FTT however took the view that the Goods were ‘printing ink’: see [84]. I have heard no argument as to whether the Goods, if within heading 3215 at all, are properly to be regarded as ‘printing ink’ or ‘other inks’. The Goods are undoubtedly designed to be used in printers but it does not follow that (assuming they are inks) they are ‘printing ink’ as opposed to ‘other inks’, and there has been no attempt before me to explore what the distinctive characteristics of printing ink might be. The argument has been confined to classification at the level of the heading (are they within 3215 ?) and not at the level of subheadings. I therefore express no view as to whether, if the Goods are within heading 3215 at all, they are ‘printing ink’ or ‘other inks’.
- 25 24. What however is not in dispute is that they are made of ink, or at any rate of the materials described as ink by heading 3215: Mr Peterson accepted in terms in his skeleton argument that the FTT “correctly ruled that the heading 3215 provision for “ink” described the materials from which the instant Goods were made”. This seems to me plainly right and since it is not in dispute I can deal with it quite briefly.
- 30 25. The Court of Justice (now the CJEU, formerly the ECJ) has consistently stated that:
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“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 and in the section or chapter notes.”

5 I was shown the statement to that effect in Case C-403/07 *Metherma GmbH & Co KG v Hauptzollamt Düsseldorf* (“**Metherma**”) at [46] but there are many other statements to the same effect. The objective characteristics and properties of the Goods which the FTT referred to were (i) that the products were obtained by mixing pigment and a vehicle and (ii) that they are solid sticks to be used as inks ([73]). So far as (i) is concerned, it is accepted that
10 these are the materials described in heading 3215; since the very same mixture of pigment and vehicle is used, after undergoing a phase change from waxy solid to liquid form, in the same way as conventional liquid ink, that is by being propelled by a printing jet onto paper or other printing medium, this seems to me undeniable. The description of the Goods as “Solid Ink” adopted
15 by Xerox itself for marketing purposes seems to me entirely accurate and apt: they are solid items made of a substance which in its liquid form is ink.

26. Mr Peterson however criticises the FTT for two distinct errors of law. I will take the second first. This is based on the FTT’s statement at [91] that:

20 “we have found that the Goods retain at least some of the objective properties and characteristics of “ink” (see in particular paragraphs [73] and [82] above)...”

Mr Peterson said that it logically followed that if the FTT had found that the Goods only retained *some* of the objective properties and characteristics of ink they had not retained all of them; and that if they had not retained all of them,
25 they were not *prima facie* classifiable under heading 3215.

27. This does not seem to me a fair reading of this part of the FTT’s Decision. In [91] they were dealing with a submission, based on Case C-196/10 *Paderborner Brauerei-Haus KG v Hauptzollamt Bielefeld* (“**Paderborner Brauerei**”), that the Goods had lost the objective characteristics and properties
30 of ink. In *Paderborner Brauerei*, the Court of Justice had held at [37] that a ‘malt beer base’ which had been produced from brewed beer by a process of ultrafiltration had lost the objective properties and characteristics particular to beer, and so was not to be classified as ‘beer’ but as ‘ethyl alcohol’. It was in that context that the FTT said that the Goods retained at least some of the
35 objective properties and characteristics of ink – that is in order to show that it had not lost them. The FTT evidently regarded *Paderborner Brauerei* as a case where the processes that the product had undergone so denatured it that it was no longer capable of answering the description of ‘beer’, whereas in the present case the processes the Goods had undergone did not mean that they
40 were no longer capable of answering the description ‘ink’. As I read this part of the Decision, that is all they were saying, and in that I do not think they can be faulted.

28. Moreover, although Mr Peterson submitted that the FTT must implicitly have found that the Goods did not retain all the objective properties and characteristics of ink, it was noticeable that he did not point to any particular property or characteristic which the Goods had lost as a result of the processes. This is because it is not possible to find in the FTT's Decision any finding by them that there was any such property or characteristic which had been lost.
29. The only hesitation that the FTT expressed about classifying the Goods as ink was based on the Explanatory Note to heading 3215. This is an example of the Explanatory Notes to the Harmonised System ("**HSEs**") as referred to in *Vtech* at [11] (above). The substance of the Note is as follows:
- (A) **Printing inks** (or colours) are pastes of varying consistency, obtained by mixing a finely divided black or coloured pigment with a vehicle. The pigment is usually carbon black for black inks and may be organic or inorganic for coloured inks. The vehicle consists of either natural resins or synthetic polymers, dispersed in oils or dissolved in solvents, and contains a small quantity of additives to impart desired functional properties.
- (B) **Ordinary writing or drawing inks** are solutions or suspensions of a black or coloured material in water, usually with the addition of gum and other products (e.g. preservatives). These include inks based on iron salts, inks based on logwood extracts or on synthetic organic colours. Indian ink, used mainly for drawing, consists usually of carbon black in suspension in water (with the addition of gum Arabic, shellac, etc.), or in certain animal glues.
- (C) **Other inks in this heading include:**
- (1) Copying and hectographic inks (ordinary inks thickened with glycerol, sugar, etc.).
 - (2) Inks for ball point pens.
 - (3) Inks for duplicating machines or for impregnating ink-pads or typewriter ribbons.
 - (4) Marking inks (e.g. based on silver nitrate).
 - (5) Metallic inks (finely divided metals or alloys in suspension in a solution of gum, e.g. gold, silver or bronze inks).
 - (6) Prepared sympathetic or invisible inks (e.g. based on cobalt chloride).

These products are generally in the form of liquids or pastes, but they are also included in this heading when concentrated or solid (i.e.,

powders, tablets, sticks, etc.) to be used as inks after simple dilution or dispersion.”

30. Having found that the Goods were products obtained by mixing pigment with a vehicle, and solid sticks to be used as inks, the FTT said, at [73]:

5 “So far it would appear from the Explanatory Note that they are to be included in CN heading 3215.”

They then went on, at [74]:

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

- 15 31. Miss McCarthy said there was nothing very complex about the process of heating and liquefying the solid ink: although described as a ‘phase change’, it is nothing more scientific than melting. I have considerable sympathy with this submission as I would not myself have thought the process a particularly complex one: a ‘phase change’ as I understand it in this context describes the change from the solid form of a substance to a liquid form, and I agree that what this describes is the ink sticks being melted – indeed the US patent cited above refers to a ‘melting device’ and the FTT themselves refer to the heater element as a ‘melt plate’, and the post-consumer waste as ‘melted drippings’. Questions of fact, however, (not just of primary fact but of evaluative fact, such as whether a process is simple or complex) are for the FTT not for me, and despite my doubts I rather think it is not open to me to overturn their finding that the process was highly complex.

- 20 32. I need not however reach any decided conclusion on this. Miss McCarthy submitted that if the FTT had relied on their finding that the process was highly complex as an indication that the Goods fell outside heading 3215, they were in error as it is settled law that Explanatory Notes, although an important aid to the interpretation of the scope of the various headings, do not have legally binding force and may not alter the meaning of the headings (see eg *Metherma* at [48]); and that since the heading itself referred to ‘ink ... whether concentrated or solid’, the Explanatory Note could not be used to contradict that.

- 25 33. But it seems to me that all that the FTT were saying was that the reference in the Explanatory Note to products in solid form to be used as inks ‘after simple dilution or dispersion’ did not apply to the Goods, and hence did not itself support their inclusion in heading 3215. I agree. Whether the phase change is a simple or complex process, it is not dilution or dispersion, and to this extent the Explanatory Note does not directly refer to solid inks to be used as inks

5 after a phase change (no doubt, as the FTT suggested at [104], because it is not
up to date with technology in the production of ink for printers). The
Explanatory Note therefore does not directly answer the question whether
solid inks such as the Goods are within heading 3215. If it had, there would
presumably have been little room for argument on this question. The FTT did
not say, and I do not read them as finding, that the Explanatory Note indicated
that the Goods were *not* in 3215; what they said (at [84]) was that the
Explanatory Note left matters unclear. Again I agree: the reference in the
Explanatory Note to “these products” may refer (as the layout tends to
10 suggest) to all the products referred to at paragraphs (A) to (C), or may refer
only to the products listed at paragraph (C), but whichever it is the
Explanatory Note does not pretend to be an exhaustive list of categories of
inks as paragraph (C) expressly says that “Other inks in this heading
include...” So the fact that the Explanatory Note does refer to solid inks to be
15 used as inks after simple dilution or dispersion, but does not refer to solid inks
to be used as inks after (simple or complex) phase change or melting, does not
mean that the latter are outside heading 3215; all it means is that the Note does
not say anything about them. This is what the FTT said, in my view rightly.

20 34. The FTT then went on to consider the intended use of the Goods, concluding
at [84] that the intended use was “use in printing onto paper or other print
media”, and adding:

“This suggests that the Goods retain the objective properties and
characteristics of ink.”

25 (It is incidentally noticeable that they do not here suggest that the Goods only
retain *some* of the properties).

30 35. It seems to me, reading these parts of the Decision as a whole, that the fact that
the FTT found the phase change process to be highly complex did not in the
end cause them to conclude that the Goods lacked some of the properties or
characteristics of ink. I see no error of law here: as heading 3215 itself makes
clear, it covers not only liquid inks but inks in solid form; and the fact that the
Goods were made of the materials that make up ink, and were intended to be
used as ink (albeit after being melted) to my mind justify their conclusion that
the Goods have the properties and characteristics of ink.

35 36. Mr Peterson’s other, and main point, under this issue was that the FTT had
ignored the critical distinction between tariff provisions which describe a
material, and those which describe manufactured goods. Mr Peterson said that
the CN in general proceeded from less advanced descriptions to more
advanced descriptions and that goods that had been manufactured were
properly classifiable under the description applicable to manufactured goods
rather than just being classified under the materials of which they were made.
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37. He gave several examples by way of analogy. One was that of plastic resin (a
material). If the resin were injection moulded into the shape of a printer cover

(a manufactured article), one would describe that as a printer part and not any longer as plastic resin. Similarly a wax crayon, or a wax candle, although in each case made of wax, are manufactured articles which should be classified as crayons or candles respectively rather than as wax; an oak table top is a piece of furniture, not wood; Michelangelo's *Pietà* is a piece of statuary, not marble; a ceramic pot is a piece of ceramic tableware, not clay.

38. I suspect that Mr Peterson may be right that the examples he gives would in each case be classified under the heading relating to manufactured or worked goods rather than that relating to the materials of which they are made. Some caution is necessary however. I was not shown any authority directly bearing on this question and in principle it must depend on the precise wording of the competing headings in each case (which I have not seen) and the objective characteristics and properties referred to therein.

39. And it is dangerous to generalise as the analysis might not be the same in every case. Thus in the case of the ceramic pot, it may be that 'clay' is to be regarded as denoting the material in its unfired state and therefore as having the objective characteristics and properties of unfired clay (being able to be worked etc); if so, the reason why a finished ceramic piece is not classified as clay would be because it no longer has the properties of clay. By contrast I would have thought that a wooden table top might well still have the objective characteristics and properties of 'wood', and the *Pietà* still have the objective characteristics and properties of 'marble'. Whether in each case they did so would depend on a careful analysis of the relevant headings, with the benefit of any Explanatory Notes and any relevant guidance from the Court of Justice. In such a case it may therefore be that although Mr Peterson is right in the result, the analysis would not be that the table top and *Pietà* have ceased to have the objective characteristics and properties of wood and marble (resulting in classification under GIR 1), but rather, as Miss McCarthy suggested, that the headings of furniture and statuary are more specific (that is, a classification under GIR 3(a)).

40. In short I do not feel confident on the limited material I have seen that I can conclude either that Mr Peterson is in fact right (although I suspect he is) in each of the examples he gives or, if he is, the precise analysis that leads to that result in each case. That means that they do not provide a firm enough basis on which I can conclude that there is a universal principle that manufactured or worked goods are never *prima facie* classifiable under the headings referring to the materials from which they are made; or that it follows that the FTT made an error of law in classifying the Goods under heading 3215.

41. But in any event I am not persuaded that these other hypothetical cases do afford an exact analogy to the present case. What Mr Peterson posits in each case is a heading that is a simple description of a material as opposed to a heading describing manufactured goods. But I do not think 'ink' is quite like that. It is not I think a simple description of a material, but is a description of a material (itself manufactured) to be used for certain purposes. It is well

established in the jurisprudence of the Court of Justice that the intended use of the goods in question can be relevant to tariff classification: see for example *Metherma* at [47] where the Court said:

5 “the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties.”

42. Admittedly in my decision in *HMRC v Cooneen Watts & Stone Ltd* [2014] UKUT 0031 (TCC) (“*Cooneen*”), I said, on the basis of the cases I was there referred to, that I was unpersuaded that the function or intended use of goods is always relevant to tariff classification; rather the position is that the function or intended use of goods can be an objective characteristic of goods, and is relevant to tariff classification if referred to, expressly or impliedly, in the wording of the relevant heading of the CN (see my decision at [92]). It has not been suggested to me in the present appeal that what I said there was wrong. Miss McCarthy however said that in the case of ‘printing ink’ (and also ‘writing or drawing ink’) the intended use of the product for printing, writing or drawing was referred to in the heading. I agree. Miss McCarthy was inclined to accept that she could not say the same about ‘other inks’ where the heading did not say what the ink was to be used for, but here I do not agree with her. It seems to me that implicit in the very word ‘ink’ is the notion that the material is not just a product made by mixing a pigment with a vehicle, but is a product which is intended to be used ‘as an ink’, that is to make a mark by printing, writing, drawing or otherwise, on paper or some other medium. This is an example of the “intended use of a product” being “inherent in the product” as referred to in *Metherma*.

43. This seems to me precisely what the FTT had in mind when they said at [73] that the Goods were “solid sticks to be used as inks”, and at [84] where they said that the intended use of them was “use in printing onto paper or other print media.” This is another finding of fact which cannot be (and is not sought to be) overturned: it was plainly justified by the evidence which showed clearly that the intended use of the Goods was that they be loaded into printers so that they could be melted into liquid form and used for printing. Thus although Mr Peterson made the point that the Goods have to be classified in the state they are in when imported, it does not I think matter that in that state they are solid and unable to be used for printing without undergoing a phase change: the intended use of them (and the only purpose of them) is to be used as inks by being subjected to such a phase change.

44. I regard this as a significant difference from the examples posited by Mr Peterson. A heading such as ‘wood’ or ‘marble’ is a simple description of a material and as I said in *Cooneen* at [92] if the heading is of that type it does not necessarily contain any reference either express or implied to the function or intended use of the goods. And a table top is not in any meaningful sense intended to be used as wood, but as a piece of furniture; the *Pietà* is not in any

meaningful sense intended to be used as marble, but as a piece of statuary. But solid ink is intended, on the FTT's findings, to be used as ink.

45. In these circumstances I come back to the question whether the FTT have been shown to have made any error of law in concluding that the Goods are *prima facie* classifiable under heading 3215. In my judgment no such error has been shown. They correctly identified the objective characteristics and properties of ink, including its physical composition and its intended use as ink; and correctly found that the Goods had those characteristics and properties. The heading 3215 was not just a description of the material of which the solid ink sticks were made, but was an apt description of what the solid ink sticks were to be used for.

46. I therefore dismiss this ground of appeal.

Under which heading should the Goods be classified under GIR 3(a) ?

47. I have upheld the FTT's decision that the Goods are *prima facie* classifiable under heading 3215. Logically the next question is whether the Goods are also *prima facie* classifiable under heading 8443, as if they are not that is the end of the inquiry and they fall to be classified under heading 3215 by a simple application of GIR 1, there being no competing heading. It is only if the Goods are *prima facie* classifiable under heading 8443 as well that it is necessary to resort to the tie-break provisions in GIR 3.

48. However I find it more convenient next to consider the question which arises under GIR 3(a), on the assumption that Mr Peterson is right (as the FTT held) that the Goods are *prima facie* classifiable under heading 8443 as 'parts' of printers. In that case GIR 3(a) requires that the heading which provides the most specific description is to be preferred to the heading which provides a more general description. So the question is whether the description provided by heading 3215 is more specific than the description provided by heading 8443.

49. I raised a question in argument as to whether for these purposes the comparison falls to be made between the entirety of one heading and the entirety of the other, or whether it is to be made between the relevant part of each heading which describes the goods in question. In other words, in the present case is the comparison between the whole of heading 3215 ('Printing ink, writing or drawing ink and other inks, whether or not concentrated or solid') and the whole of heading 8443 (which includes not only printers but copiers and fax machines and parts and accessories thereof); or is it between the relevant part of heading 3215 ('printing ink' or 'other inks') and the relevant part of heading 8443 ('parts' of 'other printers')? I did not receive any clear answer, and was not referred to any authoritative decision which deals with this point. In some cases I can see that it might make a significant difference as a heading might refer to a broad category of goods but include within that category one example which was a very specific description of the

goods in question.

50. In the present case for reasons given below it does not in my view in fact make any difference to the result, but it does seem to me (albeit without the benefit of any authority or argument on the point) that the comparison should be made between the relevant part of each heading rather than the heading as a whole. The language of GIR 3(a) refers to the heading which “provides the most specific description”, and a heading which is itself a broad category of goods but contains within it a specific description which fits the goods in question does, it seems to me, “provide” that description. It also I think accords more with the apparent intent of GIR 3(a) that if goods are specifically described in a heading they should be classified under that heading. I will therefore proceed on the basis that the question is whether the relevant part of heading 3215 which describes the Goods (‘printing ink’ or ‘other inks’) is a more specific description than the relevant part of heading 8443 (‘parts’ of ‘other printers’).
51. Again I regard this as in essence a very short and simple question. The description ‘printing ink’ or ‘other ink’ seems to me inherently much more specific than the description ‘parts’ of ‘printers’. I can explain why I take this view quite briefly:
- (1) A printer is likely to have many parts, made of different materials and performing very different functions – such as the plastic cover, raceways, melt plate, and print head, to name some of those which have already been mentioned above. There are no doubt a myriad of other parts, mechanical, electrical, electronic and purely decorative, which go to make up a typical printer.
 - (2) To describe an item as a ‘part of a printer’ does not therefore tell one either what material the item is made of, or what its specific function is. All it really tells one is that it is one of the very many parts which go to make up a printer.
 - (3) By contrast to describe an item as ‘printing ink’ or ‘other ink’ tells one both what material the item is made of (a pigment carried in a vehicle) and what its function is (to be used as an ink, that is to make marks on paper or other medium), as already explained above.
 - (4) I regard it as self-evident that this is a more specific description – that is it tells one more detail about the goods in question – than the description ‘parts of a printer’. Indeed I do not think there is any sustainable argument to the contrary.
52. I should add, for the sake of completeness, that if I am wrong that the comparison is to be made between the relevant parts of the headings, the position would be no different. For exactly the same reasons the description ‘Printing ink, writing or drawing ink and other inks, whether or not

concentrated or solid' is a more specific description than the description in heading 8443, which includes printing, copying and fax machines and parts and accessories thereof.

53. However as before I will consider in detail the arguments put forward by Mr Peterson.
54. Mr Peterson said that the FTT had made an error in their approach to GIR 3(a). His submissions were as follows. In determining whether an article is *prima facie* classifiable under a particular tariff heading, the decisive criterion is to be sought in the article's objective characteristics and properties (as I have already referred to above). But once this exercise has been done, the result is a binary determination: either a tariff heading describes the article or it does not. If as a result of this exercise an article is *prima facie* described in two or more provisions, one then goes to GIR 3, starting with GIR 3(a). GIR 3(a) requires an examination of the competing tariff provisions. This exercise does not call for any further comparison of the objective characteristics and properties of the goods. It is in essence a textual exercise requiring a comparison of the language of the competing headings, to see which, if any, more specifically describes the goods.
55. To put it another way, the GIR 3(a) exercise is not concerned with examining the goods again to see how closely or obviously they fit under a particular heading, or with which of two or more competing headings the goods have more affinity. It does not matter for this purpose whether the conclusion that the goods are *prima facie* classifiable under a particular heading was an obvious and straightforward one, or was a narrow decision under which the goods only just scraped in. Either they are in the heading or they are not. What is of relevance at this stage is how specific the description in the heading is.
56. But when one examines the FTT's decision on GIR 3(a), it can be seen that they erred. The FTT's consideration of GIR 3(a) is found in [103]-[106]. At [103] they state their conclusion that heading 3215 provides a more specific description of the Goods than heading 8443.
57. At [104] they say that the only indication that heading 3215 was not the only heading under which the Goods were *prima facie* classifiable was the fact that the Explanatory Note to heading 3215 referred to inks to be used as inks after simple dilution or dispersion whereas they regarded the phase change as highly complex. They then speculate that this might have been because the Note had not kept up to date with the technology. This is a reiteration of the considerations that they had taken into account in deciding whether the Goods were *prima facie* classifiable under heading 3215. It is not an examination of how specific the description in the competing headings is.
58. At [105] they say:

5 “On the other hand, we consider that the stable shape, functionality and mechanical strength of ‘ink sticks’ is, in comparison, not a strong or convincing basis for a conclusion that the objective properties and characteristics of the Goods are not those of solid printing ink but of parts of a printer. This conclusion is reinforced by the fact that the ‘ink sticks’ are consumed in the operation of printers over what may be a relatively short period.”

10 This focuses on the properties of the Goods in the context of examining how strong the basis was for concluding that the Goods were *prima facie* classifiable under heading 8443. But it is irrelevant for the purposes of GIR 3(a) how strong (or weak) the basis for classifying the Goods under a particular heading was: by this stage of the analysis the Goods have already been found to be *prima facie* classifiable under each of two or more headings, and it does not matter that it may in one case have been an easy conclusion and in the other a close-run thing. What matters is which provides the more specific description.

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20 59. In [106] they rely on an analogy with the treatment of ink-filled cartridges for ordinary fountain pens (which the Explanatory Note explains are included in heading 3215) as compared with ballpoint refills (which the Explanatory Note explains are classifiable with ballpoint pens under heading 9608 rather than ink under 3215). They continue:

25 “This indicates to us that an article containing or comprising ink (such as an ‘ink stick’ in this case) must have some additional physical feature which could not be described as “ink” to require it to be classifiable under a CN heading other than 3215. Further, that additional physical feature must be such as to indicate specifically the other CN heading under which it would be classifiable – as the ball point element of Ballpoint Refills indicates CN heading 9608. The Goods, in our view, have no physical feature which could not be described as “ink”, albeit solid “ink” and we conclude that they are classifiable under CN 3215.”

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35 Again this focuses on the properties of the Goods, not on a comparison of the language of the competing tariff provisions. Moreover it appears to conclude that the Goods cannot be classifiable under heading 8443 as they do not have an additional physical feature which cannot be described as ink, but by this stage of the analysis the FTT has already concluded that the Goods are *prima facie* classifiable under heading 8443.

40 60. The errors that the FTT made can be illustrated by the fact that at [82] they had said:

“The aspect of the Goods, as parts of or accessories to printing machinery, seems to us not obviously more significant than their affinity to ink – indeed we would regard the affinity of the Goods to

ink as more significant than their aspect as parts of or accessories to printing machinery – see: our conclusion below.”

5 This tends to confirm that the reason they concluded that the Goods should be classified under heading 3215 rather than under heading 8443 was because they regarded the Goods as having greater affinity to ink than to printer parts. But the question of affinity is irrelevant to GIR 3(a) – it may be relevant to the extremely rare case under GIR 4 where goods are not *prima facie* classifiable under any heading by the application of GIR 1 to 3, and are to be classified under “the heading appropriate to the goods to which they are most akin”, but 10 this is not a GIR 4 case and one never gets to GIR 4 if the goods in question are classifiable under two or more heads, as the tie-break provisions in GIR 3 will always produce an answer, by GIR 3(c) if nothing else.

61. I accept these submissions which were convincingly made by Mr Peterson (Miss McCarthy indeed accepted that some of the FTT’s reasoning could not 15 be supported), and for the reasons that he gives I accept that the FTT’s approach to GIR 3(a) did involve the errors of law which are identified above.

62. Since I have accepted that the FTT’s approach to the GIR 3(a) exercise was flawed, it falls to be redone. Both parties proceeded on the basis that I could 20 do the exercise myself, and given that I have accepted that it is in essence a textual comparison not a factual investigation I agree.

63. Mr Peterson submitted that a proper application of GIR 3(a) led to the conclusion that the Goods were classifiable under heading 8443. I have already explained above why I do not agree, but will briefly note the main 25 points made by Mr Peterson. He said that heading 3215 was an example of a heading that merely described the material of which the Goods were composed but heading 8443 described the Goods as they were imported in their manufactured state. For reasons already given I do not agree that heading 3215 is limited to a description of the materials of which the Goods are composed – it seems to me to include a reference to their use as inks. And 30 although it is true that heading 8443 necessarily refers to an item that has been manufactured for a specific purpose (as a part of a printer), this tells one nothing about either its material or its particular function within the printer.

64. Mr Peterson said that classification of an article as part of a printer required the article to satisfy exacting requirements, namely that it must be dedicated to 35 use with a specific machine or type of machine and must be essential to the proper functioning of the machine. I accept this, but I do not accept that it necessarily follows that heading 8443 provides the more specific description. Mr Peterson said that the more specific description meant the description that was more difficult to satisfy in terms of the requirements needed. This will no 40 doubt often be the case but as the present case illustrates, I do not think it is always a safe substitute for the test required by the language of GIR 3(a), which does not refer to the complexity of the product, or how difficult it is to satisfy the requirements of each heading; instead it refers to the “most specific

description”.

65. The GIR have their own Explanatory Notes (again these are HSEs), and as Miss McCarthy submitted, these seem to me to provide helpful guidance. Para (IV) of the Explanatory Note to GIR 3, which concerns GIR 3(a), is as follows:

“It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that:

- (a) A description by name is more specific than a description by class (e.g. shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).
- (b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

Examples of the latter category of goods are:

- (1) Tufted textile carpets, identifiable for use in motor cars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.
- (2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods of heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.”

66. Miss McCarthy suggested that heading 3215 contained a description by name within sub-paragraph (a). I am not sure I agree with this; but I do accept that the examples given in sub-paragraph (b) are relevant and helpful, particularly the second. This is an example of a product that has been specially manufactured to fit into aeroplanes (“shaped and identifiable for use in aeroplanes”) and so is *prima facie* classifiable as a part of an aeroplane (I was told that heading 88.01 refers to non-powered aircraft and 88.02 to other aircraft including helicopters), but is also *prima facie* classifiable as safety glass, which is a description of the material of which it is made (glass) but also of its intended function. The Note makes it clear that the latter is to be regarded as the more specific description. This seems to me to be closely similar to the present case. Here too the Goods have been specially manufactured to fit into a more complex object, and are “shaped and identifiable for use in” printers. I will assume that they are *prima facie*

classifiable as parts of printers. But they are also *prima facie* classifiable as inks, which as explained above is in my judgment both a description of the material of which they are made, and also a reference to their intended function. The example tends to support the view that I have already expressed that the Goods are to be classified not as parts of printers but as inks, the latter being a more specific description than parts of printers, which covers a wide range of different items. Similar considerations apply to the other example where a carpet designed for use in a car is more specifically described as a carpet than as an accessory for a car.

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10 67. For these reasons although I accept that the FTT's approach to GIR 3(a) was flawed, I regard the correct application of GIR 3(a) as leading to the same conclusion as they reached, namely that heading 3215 provides a more specific description of the Goods than heading 8443.

15 68. It follows that I agree that the Goods are to be classified under heading 3215 by virtue of GIR 3(a). That makes reference to Miss McCarthy's alternative submission on GIR 3(b) unnecessary. This was put forward as very much a fallback submission and if it had arisen I do not think I would have accepted that GIR 3(b) had any application to the present case: GIR 3(b) is concerned with "mixtures and composite goods consisting of different materials or made up of different components" but the Goods here do not seem to me to be mixtures or composite goods in any relevant sense. But I do not need to decide the point and propose to say no more about it.

Are the Goods prima facie classifiable under heading 8443 as parts of printers ?

25 69. It also makes it unnecessary to consider Miss McCarthy's submission that the Goods were not in fact *prima facie* classifiable under heading 8443 at all. Although I heard argument on the point, I do not propose to decide this either. It seems to me to raise quite difficult issues.

30 70. It is settled law that the word 'part' implies a 'whole' for the operation of which the part is essential (Case C-339/08 *Peacock AG v Hauptzollamt Paderborn* at [21], Case C-276/00 *Turbon International GmbH v Oberfinanzdirektion Koblenz* (known as *Turbon I*) at [30]). The FTT found that the Goods were essential for the functioning of the printer (at [95]). Miss McCarthy challenged that, primarily on the basis of the FTT's own finding (at [94]) that when an ink stick is for practical purposes consumed "printing will continue for a little while provided there is liquid ink in the printer's reservoir". I am rather doubtful if this is an answer to the point. As Mr Peterson said, if no ink sticks are ever loaded, it would appear that the printer will not work at all ("unless you buy the product the printer won't work"); and any liquid left in the reservoir when an ink stick is "for practical purposes" consumed (whatever that means) is itself just the residue of the melted ink stick.

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71. But in any event the question whether something is essential for the

functioning of a machine cannot be determinative. Petrol, for example, is essential to the functioning of a petrol-engine car, but the parties were agreed that petrol is not part of a car. This seems instinctively right and I agree. This shows that some consumables are not parts of the machines which use them.
5 On the other hand Mr Peterson said that the mere fact that part of a machine gets used up in use does not prevent it being part of the machine. The FTT accepted this, citing examples taken from Dr Titterington's evidence, namely carbon anode blocks used in Hall-Heroult aluminium reduction cells and carbon resistors used in arc welding. These seem quite technical examples,
10 but a much simpler example is brake pads. These are to my mind plainly parts of a car (or of a bicycle or whatever), even though they are consumed in use and in due course have to be replaced.

72. What I do not find so easy to understand is where the line is to be drawn between a consumable such as petrol in a car, which is not part of a machine,
15 and a consumable such as a brake pad, which is. I doubt it can turn on such simple matters as how quickly the consumable is used up. Some help may be obtained from comparing Case C-250/05 *Turbon International GmbH v Oberfinanzdirektion Koblenz* (known as *Turbon II*) with *Turbon I*. In *Turbon I* the Court had held that an ink cartridge (containing liquid ink) was not a part
20 of a printer, proceeding on the basis that "the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge" and that the cartridge "plays no particular role in the actual mechanical functioning of the printer" (at [30]-[31]). In *Turbon II* it appeared that the Court had proceeded on an incorrect factual basis and in fact "a printer
25 which contains no or only one cartridge does not respond to the 'print' command issued from the computer" (at [12]). This suggests that the question turns on whether the item in question plays a role in the electronic or mechanical functioning of the printer.

73. But I still do not find it easy to understand the critical distinction between the
30 ink cartridge in that case which did play a mechanical role, and petrol in a car, which is needed for the engine to turn over but is not part of the car; nor do I find it easy to understand whether the ink sticks in the present case are more like the cartridges in *Turbon II* (which do have a role to play in the mechanical or electronic functioning of the printer) or are more like the liquid ink they
35 contained, which was held not to be part of the printer (see *Turbon II* at [19]).

74. Miss McCarthy also had an intriguing argument that since the ink sticks have to be classified as they are at the date of importation, and since they are gradually consumed during use but the printer still works when 75% of a stick has been consumed, the essential role is not played by the ink sticks as they
40 were when imported. I may not have done justice to the full subtlety of this point but this is sufficient to indicate the nature of the argument.

75. Having adverted to some of the difficulties, I do not propose to answer them. In the light of my conclusions it is not necessary to do so, and since I have found these questions difficult and any view I express would not affect the

outcome, it seems to me to be better to leave them to be decided in a case where it is essential to do so.

Conclusion

76. For the reasons I have given I will dismiss this appeal.

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MR JUSTICE NUGEE

RELEASE DATE: 19 November 2015