



**Appeal number
FTC/143/2013**

*Common Customs Tariff – Combined Nomenclature – modular data centre –
whether appropriate to headings 8473 or 9406*

**UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER**

BLADEROOM GROUP LIMITED

Appellant

- and -

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

Respondents

Tribunal: The Hon Mr Justice Arnold

Sitting in public in London on 29 April 2015

Michael Joy for the Appellant

**Simon Pritchard, instructed by the Solicitor to HM Revenue and Customs, for the
Respondents**

MR JUSTICE ARNOLD:

Introduction

1. This is an appeal from a decision of the First-Tier Tribunal (Tax) (Tribunal Judge J.C. Gort and Mrs E. Bridge) (“the Tribunal”) dated 20 August 2013 [2013] UKFTT 574 (TC) dismissing an appeal by BladeRoom Group Ltd (“BRG”) against a decision of the Commissioners of Her Majesty’s Revenue and Customs (“HMRC”) to classify BRG’s BladeRoom product under Combined Nomenclature Code 94.06.0038 for Binding Tariff Information (“BTI”) purposes.
2. HMRC’s BTI decision described the BladeRoom as follows:

“Modular data centre. 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.”
3. The issue is whether the BladeRoom is properly classified as a part suitable for use with automatic data processing machines within heading 8473 or as a pre-fabricated building within heading 9406. It may be noted that BRG does not import BladeRooms into the European Union, rather it exports them from the EU. As I understand, BRG seeks a decision on classification with a view to persuading the customs authorities of certain importing countries as to the correct classification. No point has been taken by HMRC that this means that either the Tribunal or this tribunal should not entertain BRG’s appeals.

The law

The Community Customs Code

4. At the time material for the purposes of this appeal, Council Regulation 2913/92/EEC of 12 October 1992 establishing the Community Customs Code (“the Code”) provided *inter alia* that duties and other measures should be based on the Customs Tariff of the European Communities. Article 20(3) of the Code provided that the Customs Tariff comprised *inter alia* “(a) the combined nomenclature of goods”. Article 20(6)(a) provided that “[t]he tariff classification of goods shall be the determination, according to the rules in force, of (a) the subheading of the combined nomenclature”.

The Tariff Regulation

5. The proper classification of goods entering the EU is governed by the provisions of Council Regulation 2658/87/EEC of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (“the Tariff Regulation”). Annex 1 to the Tariff Regulation sets out the combined nomenclature (“the CN”). The Annex is amended each year with effect from 1 January.
6. Article 1(2) of the Tariff Regulation provides that the CN shall comprise:
 - “(a) the harmonized system nomenclature;
 - (b) Community subdivisions to that nomenclature, referred to as 'CN subheadings' in those cases where a corresponding rate of duty is specified;
 - (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.”
7. As the third recital explains, the “harmonized system” is the system laid down in the International Convention on the Harmonised Commodity Description and Coding System, promulgated by the World Customs Organisation in 1983, to which the EU is a party.
8. At the material time, Annex 1 to the Tariff Regulation was amended by Commission Regulation 861/2010/EU of 5 October 2010 (“the Amending Regulation”), which replaced Annex 1 with the text set out in the Annex to the Amending Regulation.

General rules for interpretation

9. Section 1(A) of the preliminary provisions in Annex 1 to the Tariff Regulation (as amended by the Amending Regulation) contains a number of general rules for the interpretation of the CN (“the GIRs”). The GIRs provide, so far as relevant, as follows:
 - “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.

- 2.(a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.
 - (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.

...

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

CN sections, chapters and notes

10. The CN is divided into sections which are further divided into chapters which are further sub-divided into headings. It also includes various interpretative notes. The relevant sections, chapters, headings and notes for present purposes are as follows.

11. Section XVI covers, amongst other things, “machinery and mechanical appliances; electrical equipment; parts thereof”. Note 2 to section XVI states that:

“... parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules: ... (b) other parts, if suitable for use solely or principally with a particular kind of machine ... are to be classified with the machines of that kind or in heading ... 8473 ... as appropriate....”

12. Chapter 84 of section XVI covers, amongst other things “machinery and mechanical appliances; parts thereof.” Heading 8471 of chapter 84 is as follows:

“Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included”.

13. Heading 8473 of chapter 84 is as follows:

“Parts and accessories (other than covers, carrying cases and the like) suitable for use solely or principally with the machines of headings 8469 to 8472”.

14. Section XX covers “miscellaneous manufactured articles”. Chapter 94 of section XX covers, amongst other things, “prefabricated buildings”. Note 4 to chapter 94 states:

“For the purposes of heading 9406, the expression ‘prefabricated buildings’ means buildings which are finished in the factory or put up as elements, presented together, to be assembled on site, such as housing or worksite

accommodation, offices, schools, shops, sheds, garages or similar buildings.”

15. Heading 9406 of chapter 94 is: “prefabricated buildings”. Items listed under this heading include “mobile homes” and “greenhouses”.

The Harmonised System

16. As noted above, the CN is derived from the International Convention on the Harmonised Commodity Description and Coding System. This is administered by the Customs Cooperation Council, which issues and updates explanatory notes known as HSENs on the various headings and subheadings. Although HSENs are not legally binding, they are a relevant aid to the interpretation of the CN because they provide an important means of ensuring the uniform application of customs tariffs by the customs authorities of contracting states.

17. The HSEN to heading 8473 explains that:

“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.”

18. The HSEN to heading 9406 explains that:

“This heading covers prefabricated buildings, also known as ‘industrialised buildings’, of all materials.

These buildings, which can be designed for a variety of uses, such as housing, worksite accommodation, offices, schools, shops, sheds, garages and greenhouses, are generally presented in the form of:

- complete buildings, fully assembled, ready for use;
- complete buildings, unassembled;

...

The buildings of this heading may or may not be equipped. However, only built-in equipment normally supplied is to be classified with the buildings. This includes electrical fittings ... heating and air conditioning equipment ...”

The Tribunal's decision

19. The Tribunal's decision was given after a three day hearing at which the Tribunal heard oral evidence from two witnesses for BRG and during the course of which the Tribunal had the benefit of a site visit to inspect a BladeRoom. The Tribunal accepted that the BTI description did not provide the full picture of what the BladeRoom is and does, which it described as follows:

“17. Our first impression was of the high level of security in the area of the BladeRoom and then the enormous size of that particular BladeRoom which consisted of several linked components which rested on feet to allow the free-flow of air beneath. There was only one door to access all the conjoined units and, whilst there were no windows, there were hatches and shuttered screens to allow the air to be pumped out at pressure. All the services, namely water and electricity, were supplied via piping and cabling suspended from the ceiling of the building in which the BladeRoom was sited. To enter the BladeRoom it was necessary to pass through two time-locked doors, the first closing behind you before the second could be opened. Once inside there was a noticeable difference in temperature between the different areas inside the BladeRoom, the cold corridors were uncomfortable because of the movement of pressurised air moving from the cooling zone into the racking corridors containing the servers. An engineer was working on one of the servers at the time of our visit, and it was possible for people to access all of the different areas inside the BladeRoom, but it was not a comfortable environment to be in. On exiting the area where the servers were, which was done via an internal door, we came into a corridor through which hot air was circulating at an uncomfortable temperature. We saw points which monitored air pressure and flow, sensors for fire and noise, and a system of buzz [sic – bus] bars which provided power to two duplicate systems of supply. All these sensors provided information to screens both within the BladeRoom as well as to external monitors. Indeed on arrival we had seen an external monitor with an observer nearby.

18. There were no fire exits or emergency exits to the BladeRoom which was very clearly not designed for human occupation, having no form of seating anywhere, not even in the control room which was the only area where it was possible to remain for any length of time with any degree of comfort. In that area was sited the BladeRoom's main computer which was housed above its own backup computer. This computer functions continually, receiving all the data from the sensors in the BladeRoom, making the necessary adjustments and feeding the information out to monitors outside the BladeRoom. Whilst it was possible for a number of people to stand in this area at one time, this was not recommended because of the interference

with the dust levels and atmosphere inside the BladeRoom, which were being constantly monitored. Adjacent to the control room there was a section called the 'air optimiser' which housed the adiabatic cooling system (a description of which is set out below) and also the large number of Argonite canisters which comprise the fire suppression system

...

20. The network servers which the BladeRoom houses form part of a 'cloud computing' system, which are used by both governments and big businesses for remote storage of quantities of information which can then be accessed via the Internet or through a web browser. The performance of the networked servers is 'mission critical', that is at no time must the service be allowed to fail. The BladeRoom is designed to ensure that the conditions for the networked servers housed within it were never other than optimal, i.e. the humidity and the temperature must be constant and the atmosphere must be dust free. To ensure this, there must be a continual source of electricity and the BladeRoom seen by us had two power supplies sourced directly from the national grid in order to ensure that there was never a power failure. The power system itself is designed to ensure, insofar as it is possible, that the power can be delivered without loss of function at all times. This is achieved not only by the BladeRoom (in the UK at any rate) being connected directly to the National Grid, but also by its being connected to a source of back-up power independent of the grid, which would typically be dedicated generators or battery banks. The BladeRoom's power distribution system manages the back-up power supply and connects into an uninterruptable power supply which ensures continuity of power between the utility failing and the back-up supply taking over. The servers can thus be kept running throughout.
21. We learnt from the evidence of Mr Paul Rogers that the impetus behind the BladeRoom was to improve the efficiency of the data industry, in particular, by reducing the power consumption which, in a conventional data store is considerable. The BladeRoom achieves savings of energy to such an extent that a BladeRoom unit operating in London would only use 14kw of energy for every 100kw energy used by the servers it houses, whereas a traditional bricks and mortar data centre would use 100kw of extra energy for every 5 100kw of IT energy use.
22. The system works by the air entering the BladeRoom via a set of intake vents (or dampers) from in the exterior wall. The amount of air intake is controllable by adjusting the vents from fully open to fully shut, and the controls operate in conjunction with an array of fans within the 'air optimiser' section of the BladeRoom. The air passes through a series of filters to remove

dust and other damaging particles, the filtered air then passes directly through a mechanical cooling system. In the UK environmental conditions are such that the direct mechanical cooling is only needed for around two days per annum. This is one of the variables which can be adjusted according to the geographical location of the BladeRoom.

23. The cooling system itself is in the 'adiabatic section' which is specifically designed to cool air without the necessity of using any energy. The air passes through a specially designed glass-fibre matrix on which the water saturation levels can be precisely raised or lowered depending on the amount of evaporative cooling required. Air which is either too dry or too damp has to be avoided by the sensitive electrical systems. After cooling, the air is drawn through fans into the main supply, or 'cold' zone. 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. However, on occasion, such as particularly cold days the amount of warm air leaving the BladeRoom can be controlled and it can be diverted to mix with the intake air before being recycled through the air optimiser section. This reduces running costs. It is also a feature that for the majority of the time there is no light in the BladeRoom, although there are lights for the occasions when people need to enter.
24. There are 60 sensors in the BladeRoom which electronically report the variables they measure at a speed of up to 2 per second. Any change in humidity or temperature or air quality is fed by the sensors to the BladeRoom's main computer which responds instantly by making adjustments. The information is monitored continually and is recorded on as many monitors as the client requires. There is normally a dedicated observer of one monitor, but there may be others, and whilst the system will correct any component failure as necessary, it also sends an alarm to the observer if there is a malfunction, such as a blocked air filter. People are normally employed on a 24-hour basis to carry out this function, however it is possible to set up the system to send automatic messages by text or e-mail to a mobile phone. The BladeRoom group itself can use an Internet connection to 'look' inside the BladeRoom computer anywhere in the world and can itself make any necessary adjustments if the client so requires.

25. The BladeRooms are shipped with dedicated computing equipment running the bespoke software which is pre-installed, and often the server racks as well. However, the remaining computing equipment (servers, network switches) that go into the racks, has, to date, always been installed by the client.
26. Prior to selling its first BladeRoom, considerable time and resources were invested by the Appellant in constructing a 'climate emulator'. This is a large machine capable of moving 25 cubic metres of air per second but can also simulate a wide range of climatic conditions ranging from minus 5 degrees to plus 48 degrees centigrade in temperature and 5 degrees to 100 degrees relative humidity. The first BladeRoom manufactured by the BladeRoom Group was tested using the climate emulator. The main computer in the BladeRoom has tables on which are recorded facts ('data') which have been built up from the climate emulator. It computes exactly how much cooling is needed depending on the temperature and humidity of the external and internal air available and whether to achieve this by adiabatic cooling or by alterations to the internal air pressure. Whilst the clients cannot adjust the look-up tables themselves, they can decide various matters such as whether to use less water or more energy. The system is so sensitive that the BladeRoom senses the very smallest drop in pressure by means of passing air across a tiny hole at a constant rate of .23m per second. The BladeRoom itself has 20 processing units all of which are inter-connected and all of which connect up to the main brain of the BladeRoom.
27. Although the control strategy was very complex, one of the logical modifications made by the program was when smoke was detected by the intake dampers. There was evidence that the input signal from the sensor equivalent to 'smoke outside' was run through the program the output signal was modified to 'close external dampers' with further signals to other parts of the system to 'enter recirculation mode'."
20. Before the Tribunal, BRG contended that the BladeRoom should be classified under heading 8471, alternatively heading 8473, and not heading 9406. The Tribunal rejected BRG's case with respect to both 8471 and 8473. At the hearing of the appeal before me, counsel for BRG confined BRG's challenge to the Tribunal's decision to its rejection of the case under 8473. It is therefore not necessary to set out the Tribunal's reasoning in relation to 8471. Its reasoning in relation to 8473 and 9406 was as follows:
 - "54. We find that the BladeRoom's function is not, as set out in the grounds of appeal, 'to be an integral part of a very large computing system', given that there is no direct interaction between the BladeRoom itself and the servers which it houses. We find that it is, as per the tariff advice application, 'a data centre to house IT infrastructure and to provide, via complex automatic processes, the optimum working environment for the

IT to function'. However, that does not provide an answer to the question as to its correct tariff classification, pointing as it does to both the housing aspect of the BladeRoom and its sophisticated data processing function.

55. In considering the tariff classification it is necessary to consider both the BladeRoom's objective characteristics and its intended use, which may itself constitute an objective characteristic, as stated by the ECJ in the case of *Deutsche Nichimen GmbH* referred to at paragraph 43 above. In the case of the BladeRoom from the outside its essential characteristic is that of a container. Once inside, however, its essential characteristic is that of a combination of very complex machines which themselves require the outer walls, the ceiling and the floor to protect them, just as do the banks of servers housed therein. Its intended use is both to house the banks of servers and to maintain them in the optimum environmental conditions, which includes ensuring that they function continually and without interruption using the minimum possible amount of electricity to do so.
56. We do not find the GIRs by themselves enable us to classify the BladeRoom. We find ourselves unable to classify the goods by reference to either Rule 3(a) or Rule 3(b). We therefore must classify them under the heading appropriate to the goods to which they are most akin, taking account of the notes to the respective headings 8471, 8473 and 9406.
- ...
61. With regard to 8473, 'Parts and accessories....suitable for use solely or principally with the machines of headings 84.69 to 84.72', 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.
62. In all the circumstances therefore the only heading under which the BladeRoom may be classified is 9406 'Pre-fabricated buildings'. Note 4 to chapter 94 refers to 'housing' amongst other things, which implies a degree of sophistication beyond that generally considered to be found in a shed. The fact that 9406 00 31 specifically refers to greenhouses, and that the notes to the heading set out that a pre-fabricated building may be supplied with equipment built-in including electrical fittings, heating and air conditioning equipment, persuades us, albeit reluctantly, that the BladeRoom is properly classified under heading 9406 00 38 and we accept Mr Pritchard's submissions in that regard. For all the above reasons this appeal is dismissed."

The nature of an appeal from the First-Tier Tribunal to the Upper Tribunal

21. Section 11(1) of the Tribunals, Courts and Enforcement Act 2007 provides for a right of appeal from the First-Tier Tribunal to the Upper Tribunal “on any point of law arising from a decision made by the first tier tribunal other than an excluded decision”. It is well established that the principles established under section 11(1) of the Tribunals and Inquiries Act 1992 and its predecessors were equally applicable under section 11(1) of the 2007 Act.

22. In *Procter & Gamble UK v Revenue and Customs Commissioners* [2009] EWCA Civ 407, [2009] STC 1990 Jacob LJ, with whom Mummery LJ and Toulson LJ (as he then was) agreed, said:

“7. ... in the end counsel were agreed that what really mattered was whether the decision of the Tribunal was wrong in law. For it is the Tribunal which is the primary fact finder. It is also the primary maker of a value judgment based on those primary facts. Unless it has made a legal error in that in so doing (e.g. reached a perverse finding or failed to make a relevant finding) or has misconstrued the statutory test it is not for an appeal court to interfere.

...

9. Often a statutory test will require a multi-factorial assessment based on a number of primary facts. Where that it so, an appeal court (whether first or second) should be slow to interfere with that overall assessment – what is commonly called a value-judgment.

10. I gathered together the authorities about this in *Rockwater v Technip* [2004] EWCA Civ 381 :

‘[71] ... In *Biogen v Medeva* [1997] RPC 1 at p. 45 Lord Hoffmann said when discussing the issue of obviousness:

“The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans la nuance*), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or

requiring an appellate court to undertake a *de novo* evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. When the application of a legal standard such negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation.”

[72] Similar expressions have been used in relation to similar issues. The principle has been applied in *Pro Sieben Media v Carlton* [1999] 1 WLR 605 at pp. 613-614 (*per* Robert Walker LJ) in the context of a decision about ‘fair dealing’ with a copyright work; by Hoffmann LJ in *Re Grayan Building Services* [1995] Ch 241 at p.254 in the context of unfitness to be a company director; in *Designers Guild v Russell Williams* [2000] 1 WLR 2416 in the context of a substantial reproduction of a copyright work and, most recently in *Buchanan v Alba Diagnostics* [2004] UKHL 5 in the context of whether a particular invention was an ‘improvement’ over an earlier one. Doubtless there are other examples of the approach.

[73] It is important here to appreciate the kind of issue to which the principle applies. It was expressed this way by Lord Hoffmann in *Designers Guild*:

“Secondly, because the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, I think that this falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle.”

11. It is also important to bear in mind that this case is concerned with an appeal from a specialist Tribunal. Particular deference is to be given to such Tribunals for Parliament has entrusted them, with all their specialist experience, to be the primary decision maker, see *per* Baroness Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at [30]”

23. What Baroness Hale said in *AH (Sudan)*, which has since been approved by Sir John Dyson SCJ (as he then was) giving the judgment of the Supreme Court in *MA (Somalia) v Secretary of State for the Home Department* [2007] UKSC 49, [2011] 2 All ER 65 at [43], was this:

“ ... This is an expert tribunal charged with administering a complex area of law in challenging circumstances. To paraphrase a view I have expressed about such expert tribunals in another context, the ordinary courts should approach appeals from them with an appropriate degree of caution; it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right: see *Cooke v Secretary of State for Social Security* [2002] 3 All ER 279, para 16. They and they alone are the judges of the facts. It is not enough that their decision on those facts may seem harsh to people who have not heard and read the evidence and arguments which they have heard and read. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently. ... ”

The appeal

24. BRG contends that, in deciding that the BladeRoom was not properly classified under heading 8473, the Tribunal erred in law in two alternative respects.
25. First, counsel for BRG pointed out that heading 8473 encompassed two groups of products: “parts ...” and “accessories ...”. He also pointed out that the Tribunal’s reasoning in [61] used the phraseology of the explanation as to the “accessories” covered by heading 8473 in the passage from the HSEN which I have set out in paragraph 17 above. He did not challenge the Tribunal’s conclusion with respect to “accessories”, but he submitted that the Tribunal had not considered, or at least had not given reasons for rejecting, BRG’s case that the BladeRoom was a “part”.
26. I do not accept this submission. In my judgment the Tribunal considered and rejected BRG’s case that the BladeRoom was a “part” in [54]. Consistently with this, and as discussed below, BladeRoom challenges the Tribunal’s reasoning in that paragraph.
27. Secondly, counsel for BRG submitted that, if and in so far as the Tribunal had considered and rejected BRG’s case that the BladeRoom was a “part”, it was wrong in law to do so.
28. It is common ground that guidance on what constitutes a “part” for this purpose can be obtained from passages in two decisions of the Court of Justice of the European Union which counsel for HMRC relied on before the Tribunal and which the Tribunal quoted in its decision (at [37] and [38]).
29. In Case C-276/00 *Turbon International GmbH v Oberfinanzdirektion Koblenz* [2002] ECR I-1406 the Court of Justice considered whether a refillable ink cartridge which was specially designed for use with a particular model of printer was a “part” or an “accessory” for use with the printer within heading 8473. The Court held that it was not a “part” for the following reasons:

- “30. In that connection, it should be observed that the word ‘part’, within the meaning of CN heading 8473, implies a ‘whole’ for the operation of which the part is essential (see *Peacock*, cited above, paragraph 21) and this is not so in the case of the cartridge at issue in the main proceedings. While it is true that, without an ink-cartridge, a printer is not able to carry out its intended functions, the fact remains that the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge. The inability of the printer, in the absence of an ink-cartridge, to transcribe on to paper the work produced with the aid of a computer is caused by lack of ink rather than a malfunctioning of the printer.
31. For those reasons an ink-cartridge such as that at issue in the main proceedings, which, in view of its characteristics as described by Turbon International in its written observations, plays no particular role in the actual mechanical functioning of the printer, cannot be regarded as ‘part’ of a printer within the meaning of CN heading 8473.”
30. In Case C-152/10 *Unomedical A/S v Skatteminsteriet* [2011] ECR I-5433 the Court of Justice considered whether a drainage bag was a “part” or an “accessory” of a catheter or a dialyser within heading 9018. After holding that these concepts were to be interpreted in the same manner in this context as in the context of heading 8473, the Court held that the drainage bags were not “parts” for the following reasons:
- “36. Neither the urine drainage bag for catheters nor the drainage bag for dialysers is indispensable for the functioning of those instruments or apparatus. It is apparent that catheters do not depend on the presence of a urine drainage bag in order to function and, similarly, that dialysers do not depend on the presence of a drainage bag in order to carry out dialysis, since the process of cleansing blood is complete at the time when the bag is used, that bag serving only to collect the liquid drained (see, by analogy, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21, and *Turbon International*, paragraph 23).
37. The latter finding cannot be called into question by the fact that dialysers work only when a bag is attached. In that regard, suffice it to state, as the European Commission points out, that, were it not for the security mechanism with which that apparatus is fitted, the dialysis process could be carried without a bag, that security mechanism being the sole link between the apparatus and the bag (see, by analogy, *Turbon International*, paragraph 23).”
31. As the Tribunal recorded, BRG contends that the BladeRoom is a part of a very large computing system (namely a large group of servers which typically provides a cloud computing facility). The Tribunal rejected this contention for

the reasons it gave at [54]. Those reasons do not disclose any error of law on the part of the Tribunal. Although counsel for BRG criticised the Tribunal for saying that there was “no direct interaction” between the BladeRoom and the servers on the basis that there was no such requirement in heading 8473, it does not appear to me that the Tribunal was saying that direct interaction was in itself a necessary requirement. Rather, it was explaining why it did not accept that the BladeRoom was part of the computing system.

32. Furthermore, in my judgment the Tribunal reached the correct conclusion. As the CJEU has explained, for an item to be a “part”, there must be a whole for the operation of which the part is essential. That requirement is not satisfied in the case of the BladeRoom. Counsel for BRG argued that the BladeRoom was essential to the computing system since it ensured both an uninterrupted power supply to, and the correct environmental conditions for the operation of, the servers. But as he was forced to accept, these requirements could be satisfied by what the Tribunal described (at [53]) as “a traditional bricks and mortar data centre”, albeit at the cost of significantly higher energy consumption. Thus the BladeRoom is not essential to the operation of the computing system.
33. BRG also contends that the Tribunal was wrong to conclude that the BladeRoom was correctly classified under heading 9406. Having concluded that BRG’s challenge to the Tribunal’s rejection of its case in relation to heading 8473 fails, it is not necessary for me for consider this contention at length. It suffices to say that, again, the Tribunal’s reasons do not disclose any error of law on the part of the Tribunal. On the contrary, in my judgment the Tribunal reached the right conclusion.

Conclusion

34. For the reasons given above, the appeal is dismissed.

MR JUSTICE ARNOLD

Release date: 14 May 2015