

C-760/19-1



**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**Appeal number: TC/2018/0883**

**BETWEEN**

**JCM EUROPE (UK) LIMITED**

**Appellant**

**-and-**

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

**Respondents**

**TRIBUNAL: JUDGE AMANDA BROWN  
JO O'NEILL**

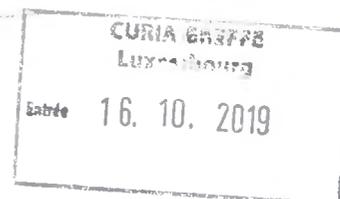
**DIRECTIONS**

We heard Mr Stephen Cock for the Appellant and Ms Lyndsey Searle of Counsel for HM Revenue and Customs' Solicitor's Office for the Respondents.

**IT IS DIRECTED** as follows:

1. The questions set out in the Schedule to these Directions be referred to the Court of Justice of the European Union for a preliminary ruling in accordance with Article 267 of the Treaty on the Functioning of the European Union.
2. The officer of the Tribunal shall forthwith transmit to the Registrar of the Court of Justice of the European Union these Directions and the accompanying Schedule, which contains findings of fact relevant to the questions referred.
3. The Appellant's appeal be stayed pending receipt of the answer of the Court of Justice of the European Union.
4. Liberty to apply.

Registered at the Court of Justice under No. <u>113 10 43</u>
Luxembourg, 17. 10. 2019
Fax / E-mail: .....
Received on: <u>16. 10. 19</u>
For the Registrar Cecilia Strömholm Administrator



## **QUESTIONS**

5. Is Commission Implementing Regulation (EU) 2016/1760 of 28 September 2016 concerning the classification of certain goods in the Combined Nomenclature (CN) invalid in so far as it classifies the bank note validator and cash boxes specified in the Regulation under CN Code 8472 90 70, rather than CN Code 9031 49 90?
6. In particular, is Commission Implementing Regulation (EU) 2016/1760 invalid in so far as it:
  - (1) unduly restricts the scope of heading 9031;
  - (2) unduly extends the scope of heading 8472;
  - (3) takes into account impermissible factors;
  - (4) does not take proper account of the Explanatory Notes, CN headings and/or the General Interpretative Rules when classifying the product as described in that Regulation.

**Amanda Brown**  
**TRIBUNAL JUDGE**  
**Release date: 8 October 2019**

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**SCHEDULE TO THE REQUEST BY THE  
THE FIRST-TIER TRIBUNAL (TAX CHAMBER)  
FOR A PRELIMINARY RULING OF THE COURT OF JUSTICE  
OF THE EUROPEAN UNION**

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**PARTIES**

1. The parties to the proceedings in the First-tier Tribunal (Tax Chamber) of the United Kingdom (the “tribunal”) are:

(1) The Appellant: JCM Europe (UK) Limited (“JCM”). JCM is part of JCM Global which describes itself as the worldwide leader and most trusted name in currency and transaction management, and its products are used in countries around the globe. JCM develops innovative currency solutions for a diverse range of industries, including gaming, vending, retail, financial, transportation, security, and custom application. The original company, Japan Cash Machine Inc., Ltd was founded in Osaka, Japan and became a leading manufacturer of cash registers. This developed into wider solutions to, what it describes as, time-consuming money handling and to reduce the labor needed for money management. This led to the development of token dispensers, units for combined bill verification and ultimately its embedded bill validator with lockable and removable cash box. Its products are used in casinos, amusement arcades, shops and transportation centres and, in particular, in gaming machines, vending kiosks, point of sale self-service checkouts, ticket dispensers (for car parking and travel) and other automated systems where payments are required to be made and processed.

(2) The Respondents: the Commissioners for her Majesty’s Revenue and Customs (“HMRC”) who are responsible for the collection and management of taxes and customs duties in the United Kingdom.

**SUBJECT MATTER OF THE DISPUTE AND NEED FOR A REFERENCE**

2. JCM has appealed to the tribunal against HMRC’s Binding Tariff Information (“BTI”) ruling issued on 3 January 2018 in respect of the tariff classification for one of its products; namely the iPRO-RC. The product was described in the application for a BTI ruling as a “*bank note validation unit, with storage facilities and recycling ability. Cashbox capacity of 400 notes with an option for 1,000 notes. Recycles two note denominations up to 100 notes each.*”

3. The iPRO-RC was originally classified by HMRC under sub-heading 9031 49 90. The iPRO-RC was reclassified by HMRC on 3 January 2018 as a result of the EU Commission’s implementation of Regulation (EU) 2016/1750 which classified the iPRO-RC under sub-heading 8472 90 90 (the “**Contested Regulation**”).

4. By this request for a preliminary ruling from the tribunal, the Court is asked to determine the validity or otherwise of the Contested Regulation and clarify the interpretation and application of sub-headings 9031 49 90 and 8472 90 90 of the Combined Nomenclature to Annex I to Council Regulation (EEC) No. 2658/87 of 23 July 1987.

5. The referring tribunal has concluded that the Contested Regulation does apply to the product identified as an iPRO-RC. However, the tribunal considers that there is a strongly arguable case that the Contested Regulation may be invalid on the grounds that it either restricts or extends the scope of either sub-heading impermissibly, or that the implementation thereof fails to take proper account of the CNEN and/or HSEN to the headings and sub-heading referable to each.

6. It is JCM's view that the iPRO-RC ought properly to be classified under sub-heading 9031 49 90: "*Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors – other – other*" and that the classification under sub-heading 8472 90 90 impermissibly restricts the scope of heading 9031 and sub-heading 9031 49 90 and impermissibly extends the scope of heading 8472 and sub-heading 8472 90 90.
7. It is HMRC's view that the iPRO-RC has been properly classified by the Commission and ought properly to be classified under 8472 90 90 as an Office Machine.
8. The Court is requested to determine the validity or otherwise of the Contested Regulation such that the tribunal may determine the appropriate tariff classification of the iPRO-RC.
9. The parties agree that the item as analysed by the Commission was the iPRO-RC as supplied by JCM. The parties and tribunal concur that the Contested Regulation applies.
10. It is agreed that the tribunal has no power to declare the Contested Regulation as invalid. Only the Court has the power to make such a declaration.
11. The tribunal has a real doubt as to whether the classification by the Commission is correct and would be assisted by further clarification from the Court as to the appropriateness of either sub-heading in order to determine the appropriate tariff classification at national level.

#### **EU GUIDANCE AND LAW**

12. The tribunal notes the guidance from the Official Journal of the EU at EU 2012/C 338/01 which states the following:

##### References on determination of validity

15. Although the courts and tribunals of the Member States may reject pleas raised before them challenging the validity of acts of an institution, body, office or agency of the Union, the Court of Justice has exclusive jurisdiction to declare such an act invalid.
16. All national courts or tribunals must therefore submit a request for a preliminary ruling to the Court when they have doubts about the validity of such an act, stating the reasons for which they consider that the act may be invalid.
17. However, if a national court or tribunal has serious doubts about the validity of an act of an institution, body, office or agency of the Union on which a national measure is based, it may exceptionally suspend application of that measure temporarily or grant other interim relief with respect to it. It must then refer the question of validity to the Court of Justice, stating the reasons for which it considers the act to be invalid.

13. The tribunal considers that it has no discretion in this instance and must refer the matter to the Court for a preliminary ruling and (if appropriate) a declaration that the Contested Regulation is invalid.

14. The Court has provided guidance in respect of the Commission's discretion to define the subject matter of tariff headings. For example, in the recent case of *Kubota (UK) Limited and EP Barrus Limited v HMRC* ([2018] EUECJ C-545/16 (22 February 2018)) the Court held that:

23 It must be recalled, as a preliminary point, that according to the Court's settled case-law, the Council of the European Union has conferred upon the Commission, acting in cooperation with the customs experts of the Member States, broad discretion

to define the subject matter of tariff headings falling to be considered for the classification of particular goods. However, the Commission's power to adopt the measures referred to in Article 9 of Regulation No 2658/87 does not authorise it to alter the subject-matter and the scope of the tariff headings (judgment of 4 March 2004, Krings, C-130/02, EU:C:2004:122, paragraph 26, and the case-law cited).

24 In the present case, it is necessary to examine whether the Commission, in having proceeded to make the tariff classification of the vehicle designated in column 1 of the table in the annex to Regulation 2015/221 under subheading 8704 21 91 and not under subheading 8704 10, altered the content of those two tariff subheadings.

25 In that regard, the settled case-law of the Court states that, in the interests of legal certainty and ease of verification, 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 (judgments of 27 April 2006, Kawasaki Motors Europe, C-15/05, EU:C:2006:259, paragraph 38; 29 October 2009, Dinter and Europol Frost-Food, C-522/07 and C-65/08, EU:C:2009:663, paragraph 29, and of 22 December 2010, Premis Medical, C-273/09, EU:C:2010:809, paragraph 42).

26 Furthermore, 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 (judgment of 22 March 2017, GROFA and Others, C-435/15 and C-666/15, EU:C:2017:232, paragraph 40).

#### **Wording of CN Codes 8472, 8472 90 and 8472 90 70 and HS Explanatory Notes**

15. The codes fall within Chapter 84 of Section XVI of the Combined Nomenclature under the main heading: 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.

16. Heading 8472 is expressed as: Other office machines (for example, hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin-sorting machines, coin-counting or -wrapping machines, pencil-sharpening machines, perforating or stapling machines). This heading includes typewriters fitted with a special device for typing address plates in stencil.

17. Sub-heading 8472 90 90 is expressed as: Other. And is expressed to include the machines as described in HS Explanatory Note to heading 8472.

18. The HSEN states (inter alia) that:

This heading covers all office machines not covered by the preceding three headings or more specifically by any other heading of the Nomenclature

The term "office machines" is to be taken in a wide general sense to include all machines used in offices, shops, factories, workshops, schools, railway stations, hotels, etc., for doing "office work" (i.e. work concerning the writing, recording, sorting, filing etc., of correspondence, documents, forms, records, accounts, etc.).

Office machines are classified here only if they have a base for fixing or for placing on a table, desk, etc. The heading does not cover the hand tools, not having such a base, of Chapter 82.

19. The notes to Section XVI include[d] the following provisions:

At note 1:

*“This section does not cover:*

*[...]*

*(m) articles of Chapter 90*

At note 3:

*“Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function”.*

At note 4:

*“Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by transmission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in Chapter 84 or 85, then the whole falls to be classified in the heading appropriate to that function”*

### **Wording of CN Codes 9031, 9031 49 and 9031 49 90 and HS Explanatory Notes**

20. The codes fall within Chapter 90 of Section XVIII of the Explanatory Notes to the Combined Nomenclature under the main heading: Optical, photographic, cinematographic, measuring, checking, precision, medical or surgical instruments and apparatus; clocks and watches; musical instruments; parts and accessories thereof.

21. Heading 9031 is expressed as: Measuring or checking instruments, appliances and machines, not specified or included elsewhere in this chapter; profile projectors.

22. Sub-heading 9031 49 90 is expressed as: Other. Other.

23. The HSEN states (inter alia) that:

This heading covers measuring or checking instruments, appliances and machines, whether or not optical.

This heading also covers optical type measuring and checking appliances and instruments, such as:

[...]

The apparatus and instruments mentioned above remain classified in this heading whether or not they are suitable for mounting on machines.

### **General Interpretative Rules**

24. The General Interpretative Rules provide the following:

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 their essential character insofar as this criterion is applicable.

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

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

5 In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein:

[... NA...]

[...NA...]

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.

25. It is to be noted that the application of the GIR's and the headings and sub-headings is legally binding. The application of the explanatory notes is not. Accordingly, the GIR's take precedence. It is confirmed in the Contested Regulation that the Committee applied GIRs 1 and 6 during its classification process.

26. It has also been confirmed by the Court that although the explanatory notes (to the Combined Nomenclature or to the Harmonised System) can assist in the application of a particular CN heading, ultimately it is the CN heading which is decisive. If the relevant notes unnecessarily restrict the application of a heading, or seek to alter the goods that are included within it, the CN heading must take precedence (see for example in *Kawasaki Motors Europe Case C-15/05* §37).

#### **BACKGROUND TO THE EU COMMISSION'S CLASSIFICATION OF THE IPRO-RC**

27. The history to the Contested Regulation is that in January 2012 Germany issued a BTI classifying a bank note validator machine to CN sub-heading 8472 90. In February 2012 the UK issued a BTI ruling for a bank note validator and recycler, classifying it to subheading 9031 49 90. In

light of these apparently contradictory BTI rulings, Germany requested that the European Commission Customs Code Committee (“the Committee”) provide a consistent classification.

28. It is understood that the matter was initially discussed by the Committee in June 2015 and was discussed for a final time at a meeting in February 2016. The vote on the draft Regulation took place by means of the Commission’s written procedure and the voting period was from 11 July 2016 to 10 August 2016. At that time, 27 of 28 member states voted for classification under the CN subheading 8472 90 90. The United Kingdom remained of the view that the iPRO-RC ought to be classified under sub-heading 9031 49 90 and did not vote in the favour of the classification under sub-heading 8472 90 90.

29. HMRC has since adopted the view that sub-heading 8472 90 is the correct classification code and supports the reasoning of the Committee as recorded in the Contested Regulation (as set out below).

30. The product is described in the Contested Regulation as:

An apparatus consisting of a bank note validator and cash boxes (so called ‘note float unit’) with total dimensions of approximately 10 × 24 × 44 cm.

The bank note validator uses optical scanning technology to check the authenticity of bank notes according to predefined specifications.

Bank notes that are approved by the validator pass to a cash box. When this cash box has reached its capacity (generally 30 bank notes), the bank notes are automatically sorted and distributed towards other cash boxes with a capacity of generally 300 bank notes.

The apparatus is used, for example, in gaming, vending, parking machines etc. to pay for the service or for the product obtained.

The apparatus is also capable of dispensing bank notes.

The apparatus is always connected to a so-called ‘host-controller’ (not present upon presentation) which regulates the predefined bank note specifications and the bank note flow to the different cash boxes

An image of the product was included within the Contested Regulation. JCM accepts that this product is the same as the iPRO-RC supplied by it.

31. Reasons for the classification

Classification was determined by the Committee by reference to general rules 1 and 6 for the interpretation of the Combined Nomenclature and by the wording of CN codes 8472, 8472 90 and 8472 90 70.

Classification under heading 9031 as a measuring or checking instrument was excluded, because the apparatus is more than a checking instrument covered by that heading.

The Committee concluded that, in addition to checking the authenticity of bank notes, the apparatus also carries out other functions such as sorting and distributing bank notes between different storage boxes and dispensing bank notes. All the functions carried out by the apparatus are covered by heading 8472 and is therefore to be classified under CN code 8472 90 70 as an office machine.

#### **NATURE OF THE PRODUCT AS DETERMINED BY THE TRIBUNAL (FINDINGS OF FACT)**

32. The iPRO-RC is described as and performs the functions of a bank note validator and recycler. It is designed for installation in a variety of host devices such as self-service checkouts, vending machines, ticketing and gaming machines. The iPRO-RC will usually sit within the casing of the host device and will be connected to it via electronic cabling, it is otherwise independent of it.

33. Its functions are to: (i) validate and accept/reject bank notes, (ii) store bank notes in a recycle compartment or cash box and (iii) when required by the host device, pay out notes stored in the recycling compartment.

34. There are three key component parts to the iPRO-RC all housed in a chassis. The whole device is then installed into the host device. These key components are: (i) the verification unit, (ii) the recycle unit and (iii) the cashbox. The iPRO-RC cannot act independently from the host device though it does have some autonomous features.

35. The verification unit sits at the top of the chassis and its “mouth” is the only part of the iPRO-RC which is visible to users of the host device. When a customer using the host device wishes to make payment using a bank note the note is slid into the opening of the “mouth” and the iPRO-RC is activated.

36. The bank note entered is drawn into a scanning head on rollers. The scanning head consists of a number of optical and magnetic sensors and a microcontroller. The note passes through the optical sensors which consist of different LEDs and a photodiode (a semiconductor device that converts light into an electrical current). In essence, light of different frequencies is shone through the banknote and received by sensors. An image is generated from the input from the sensors.

37. In addition to the optical element there is a magnetic sensor used to identify if the bank note contains ferromagnetic particles in the ink or magnetic stripe. The magnetic sensor generates a magnetic field which is used to detect predefined parameters of the bank note. If the magnetic field is disturbed, the output signal of the magnetic sensor changes its value and this is also used in the validation process.

38. Through these processes the dimensions of the bank notes are physically measured, the colours of inks and printing are checked, the transparency of the notes (and thereby the material the note is made of) is determined and existence of the required magnetic elements is verified.

39. The data collected from the entered note is then compared to the data sets within the memory of the micro controller. The fact that there are 4 orientations in which a note can enter the device means that each denomination of note can generate 4 distinct images. The micro-controller holds data sets for all 4 orientations of each denomination of note which is accepted meaning that it can recognise and validate a note irrespective of how it is entered. These data sets are taken from both unused and used banknotes and regularly updated to ensure maximum accuracy. The data sets are held in a micro controller and are updated via a data transfer either by upload via USB or serial port. The iPRO-RC cannot itself be connected to the internet thus new data sets will be uploaded via the host device being connected to the internet or it can be done manually during maintenance or otherwise when the device is attended.

40. If the detected points measured match the parameters that have been stored in the micro controller and are within the predefined tolerances, the denomination and authenticity of the bank note will be reported to the host controller which will then communicate whether it is an accepted denomination.

41. Where the note is not accepted it will be rejected and returned to the customer.

42. Where the note is accepted it is taken into the “transport pass” where it is held in escrow as the host device determines whether to transfer the note to the recycler or the cash box. The transport pass consists of a number of mechanical rollers that move the note down the back of the scanner unit and into the recycler or onwards down to the cash box.

43. If the bank note is sent to the cash box it will be irretrievable by the iPRO-RC and inaccessible to the host device. The bank notes are not stored by denomination in the cash box; and the bank notes in the cash box can be removed only manually when the cash box is emptied. The cash box is at the bottom of the chassis.

44. Where the host device determines that the bank note be sent to the recycler, it will be stored there by denomination. As and when the host device determines that a note is required to be paid out, the host device controller will communicate with the micro controller in the iPRO-RC which will then extract notes from the storage area of the recycler identified by the host controller.

45. Notes are recycled on a last in first out basis. The exiting notes will not be completely revalidated but the scanner head will measure the dimensions of the note and compare those measurements to the data held in the micro controller to ensure that the instructions of the host device controller are being followed and that the correct note is being dispensed. If the measurements of the first note selected are not verified as matching the desired pay-out, the incorrect note is moved to the cash box and the next note is selected. If that too is incorrect the machine will notify the host controller to cancel the transaction.

46. The iPRO-RC counts the notes but will not maintain any record of the number of notes held. All of this information is held within the host device controller.

47. The iPRO-RC cannot be used as a stand-alone device it needs to be connected to an external host device and controller and will usually be housed within the host device i.e. the self-service check out, ticket machine etc.

48. The Appellant's customers are usually original equipment manufacturers who install the iPRO-RC within the host devices wherever the host device needs to accept and verify notes.

49. The iPRO-RC is not suitable for use in banking auto teller machines.

50. The Appellant company's marketing of the iPRO-RC places particular emphasis on the recycling capability, for example:

“reduce operational costs and keep customers happy with the amazing new iPRO-RC from JCM Global. iPRO-RC has two large capacity chambers with Roller Friction Recycling Technology holding recycled notes for instant pay-outs, keeping your equipment running and your customers happy. Plus, iPRO-RC has JCM Global's anti-stringing technology, proven note acceptance and lockable removable cash box”.

51. On the evidence, the tribunal accepted that the only difference between the iPRO and the iPRO-RC is the recycler, the marketing material for the iPRO markets more specifically the “*proven note acceptance*” technology.

52. On the basis of the examination of the iPRO-RC itself, the Tribunal finds that the intended use of the iPRO-RC is to validate by measurement and accept banknotes with a view to securely storing them or paying them out at the direction of the host controller.

#### ARGUMENTS OF THE PARTIES

##### JCM

53. JCM contends that that the Contested Regulation is invalid on the grounds that:

(1) In its view, the properties of the machines referred to in the conflicting German and UK BTIs referred to the Committee had not been properly communicated to the Commission. In particular, the description of the apparatus in the German BTI described its principal function as that of counting money. JCM does not agree that ‘*counting money*’ represents the principal function of the machine.

(2) The minutes of the Committee describe the machines as banknote readers.

(3) Classification under heading 8472 90 90 ignores the terms of note 1(m) to Section XVI of the CN which provides that Section XVI (into which Chapter 84 and heading 8472 falls) excludes from Chapter 84 articles also classified under Chapter 90.

(4) The terms of note 3 to Section XVI (also applicable to the interpretation of Chapter 90 by virtue of note 3 to Chapter 90) provide that: “*unless the context otherwise requires, composite*

*machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complimentary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function” had not been correctly applied in determining the applicable CN heading.*

(5) The terms of note 4 to Section XVI (also applicable to the interpretation of Chapter 90 by virtue of note 3 to Chapter 90) providing (so far as is relevant): “*where a machine (including a combination of machines consists of individual components ... intended to contribute together to a clearly defined function covered by one of the headings in [Chapter 90/Section XVI] then the whole falls to be classified in the heading appropriate to that function*” did not appear to have been correctly applied.

(6) In JCM’s view, the Contested Regulation did not appear to classify the machine taking proper account of the non-binding explanatory notes HSEN” In particular:

(a) The HSEN to CN heading 9031 which provides: “this heading includes measuring or checking instruments, appliances and machines, whether or not optical”; “this heading also covers optical type measuring and checking appliances and instruments ... [and] remain classified in this heading whether or not they are suitable for mounting on machines;

(b) The HSEN to CN heading 8472 which provides: “this heading covers all office machines not covered by the preceding three headings or more specifically by any other heading of the Nomenclature. The term “office machines” is to be taken in a wide general sense to include all machines used in offices, shops, factories, workshops, schools, railway stations, hotels etc. for doing “office work” (i.e. work concerning the writing, recording, sorting filing, etc., of correspondence, documents, forms, records, accounts etc.) Office machines are classified here only if they have a base for fixing or for placing on a table, desk etc. The heading does not cover the hand tools, not having such a base of Chapter 82. ... The heading includes (inter alia): (4) coin sorting or coin counting machines (including bank note counting and paying out machines). ... (5) Automatic banknote dispensers, operating in conjunction with an automatic data processing machine, whether on-line or off-line”

(7) JCM contends that when the HS explanatory notes are properly considered the appropriate classification of the iPRO-RC is within heading 9031 with the consequence that classification under 8472 invalidly extends the scope of heading 8472 and invalidly reduces the scope of 9031.

## **HMRC**

### ***Submissions regarding the test for invalidity of a regulation***

54. HMRC contend that the Contested Regulation is valid. Furthermore, it is HMRC’s view that the Customs Code Committee followed due process in reaching the conclusions that it did, that it considered and applied the right tests in respect of classification, that it considered the detailed operation and maintenance manual appropriate to JCM’s product (the iPRO-RC) and that there is no basis for the Court to interfere with the decision reached by the Committee.

55. Although HMRC originally classified the iPRO-RC under heading 9031, HMRC is mindful of the requirement for Member States to adopt a consistent approach to tariff classification within the EU community. Accordingly, HMRC now accepts the views of the Committee, the Commission and the 27 other Member States that have taken the view that the appropriate tariff classification is under heading 8472.

56. HMRC does not agree that a reasonable doubt can arise as to the validity of a regulation on the basis only of a difference of opinion as to the correct tariff classification. In the circumstances of this

case, the Committee (as appointed by the EU Commission) considered the apparatus in question and applied the aids to interpretation under the respective CN headings, in particular the GIR's, appropriately in order to reach a considered opinion as to the correct classification.

57. The Court has held that a regulation may only be declared invalid where the Commission has made an *error* (per *Union de Pequenos Agricultores v Council Case C-500/00*) or '*manifest error*' where the dispute concerns classification at the eight digit subheading level (per *Cabletron Systems Ltd Case C-463/98*). It is HMRC's view that no such error (manifest or otherwise) has been evidenced in this instance so as to render the regulation invalid. Notably, it is HMRC's view that it is not sufficient that a party (or indeed the tribunal or courts) has a different view as to how the codes may be applied so as to evidence an error, there must have been an error in the way in which classification has been determined by the Committee and Commission.

#### ***Submissions on the substantive issues***

58. In the event that the question of 'error' is wider than proposed above, it remains HMRC's contention that classification under heading 8472 would be correct in any event. In its view, classification under heading 9031 would impermissibly expand the scope of that heading and would have the consequence of reducing the expressly wide scope of heading 8472.

59. It is clear from the specific wording of heading 8472 that machines that perform 'office' tasks are intended to be classified under that heading. Further, the heading is broad in its application covering any type of office (which may, by definition, include offices such as ticket offices at stations, booking offices, administrative offices and payment booths).

60. The types of tasks contemplated to be undertaken by a machine in such situations is also broadly described in the HS Explanatory Notes and is non-exhaustive (see paragraph [18] above).

61. It is HMRC's view that apparatus that has taken over functions that might otherwise have been undertaken manually within an office environment are intended to be included under heading 8472. The machine accepts notes as payment from consumers, determines their validity, stores them within the body of the machine (either to be recycled and paid out again as change when higher denomination notes are entered into the machine that exceed the charge for the goods or services provided by the host machine or held in the cashbox for collection manually from the apparatus) The iPRO-RC rejects notes that are invalid and 'spits' them back out to the consumer and stores excess notes (that are not required in the recycling chamber) in the safety deposit box which can be removed from the iPRO-RC. It is HMRC's view that such tasks are akin to those that would have been traditionally provided by staff in a booking office, casino, shop or similar environment where payments for goods and services need to be processed (including the inspection of notes, verification of such notes and the safe storage of bank notes for future payments out or for banking). As such, the description of the apparatus as an "*office machine*" is more appropriate than a description confined to the technical functioning of one component part of the overall machine.

62. In assessing the objective characteristics of the device as a whole, it is HMRC's view that it functions as an office machine as prescribed under heading 8472 and HSEN applicable thereto. Furthermore, the list of machines within the HSEN are legally binding as they are expressly referred to in the sub-heading 8472 90 90. Such classification would also be consistent with the types of services and solutions offered to customers by JCM and the intended use of its products (for example: processing payments for tickets at ticket machines at stations, paying for parking in a car park via a machine, paying for products in a supermarket via a machine, paying for products from a vending machine – all without the need for *time-consuming* and *labour intensive* money handling). It is HMRC's view that the tasks performed mechanically by the iPRO-RC, and the principal part of its inherent characteristics, is that of mechanically undertaking tasks that were traditionally undertaken by staff in an office environment (particularly where an office is defined to include shops, stations etc.) The machine's inherent characteristics are much more akin to those of an '*office machine*' as contemplated and described within the CN and the HSEN rather than being limited to the optical

verification of bank notes alone or even principally. (Per *GROFA and Others*, C-435/15 and C-666/15, EU:C:2017:232, such characteristics ought properly to be considered as part of the classification process).

63. It is HMRC's contention that classification under heading 9031 broadens the scope of that heading unnecessarily, impermissibly and beyond reasonable bounds in respect of the iPRO-RC and all the composite tasks that it performs. Further, such classification ignores the wording of the HSEN, "*unless the context otherwise requires ...*". It is HMRC's view that such words must be interpreted to mean (in this context) that the narrow definition under 9031 and the principal action of one of its component parts is not to apply where it is clear that classification under a more appropriate heading is, as a consequence, to be ignored. Such an outcome, in itself, ignores the approach to classification under the GIR. Again, the headings and GIR are to take precedence over the HSEN, which in itself contemplates exceptions in any event given the wording "*unless the context otherwise requires*".

64. The CN specifically contemplates automatic teller machines as falling within the heading '*office machine*'. It would be at odds with that approach to include such a machine within the category of an '*office machine*' but not JCM's iPRO-RC. It is HMRC's contention that the iPRO-RC is more akin to an ATM or other types of defined office machine, than it is to a machine solely developed for the purpose of measuring and checking. Further, other member states have classified apparatus that counts money under CN heading 8472 (see for example BTI ref DE2993/17-1 dated 24 April 2017 and DE123/17-1 dated 12 June 2017) and such approach to the iPRO-RC would achieve greater consistency.

65. HMRC agree with the Commission that the iPRO-RC cannot be classified under heading 9031 as the iPRO-RC is *more than a checking machine*.

66. HMRC consider that some further clarity from the Court around the scope and application of heading 8472 would be of assistance in the circumstances of this case and generally. In particular, heading 8472 appears to allow for a wide application and the HSEN expresses a wide application. However, the HSEN also makes reference to the machine requiring "*a base for fixing or for placing on a table, desk, etc.*" But expressly excludes hand tools "*not having such a base*".

67. JCM relies on the HSEN to say that the iPRO-RC cannot be an "office machine" as it cannot be affixed to or placed upon a desk. HMRC does not consider that the wording of the HSEN has the intention of such a restriction over the wider heading and sub-headings within 8472.

68. With the exception of the list of example "*office machines*" referred to above, the Court is not bound by the HSEN and so may disregard it. In any event, it is HMRC's view that the wording in issue can only reasonably be construed so as to mean that the machine must have a base for fixing *to something*, but is not limited to being fixed to a desk or table.

69. HMRC consider that the intention may have been simply to distinguish machines within 8472 from hand tools more generally under Chapter 82. Furthermore, such a narrow interpretation is in conflict with other examples given in the notes to heading 8472 such as ATMs, which are most commonly built in and would not be affixed to or stood on a desk.

70. It is HMRC's view that the iPRO-RC is more akin to an ATM type machine, clearly within the contemplation and remit of heading 8472, and ought therefore to be properly classified as an '*office machine*'.

71. Taking into account the Court's previous guidance, it is HMRC's view that the Commission has acted in co-operation with the other Member States in seeking to classify the iPRO-RC and has used its broad discretion appropriately to define the subject matter of the tariff classifications and classification of the iPRO-RC. In so doing, the Commission has not (in HMRC's submission) altered the subject matter or scope of the tariff headings. On the contrary, it is HMRC's view that the alternative classification under heading CN 9031 would alter its subject matter and scope impermissibly beyond measuring and checking machines. The intended use of the product is much

broader than measuring and checking and the machine performs overall tasks that would traditionally have been performed manually in an office environment within the broad definition of office under the heading. The inherent characteristics and features that appeal to its market are not just verification and checking, but money management as a whole and automation of otherwise labour-intensive tasks in circumstances where staff would otherwise be required to check and handle money, safely store it and interact with consumers.

72. Accordingly, it is HMRC's view that the Court would be right to uphold the Contested Regulation as being valid and confirm that the iPRO-RC is properly classified under sub-heading 8472 90 70.

#### VIEW OF THE REFERRING TRIBUNAL

73. The Tribunal takes the view that HMRC's position on the applicability of note 1(m) must be wrong. If the Committee classified the class of banknote validators under 8472 without reference to the terms of note 1(m) that would, of itself, appear to be a ground of potential invalidity.

74. Note 1(m) clearly provides that classification under Chapter 90 takes precedence over Chapter 84 with the consequence that consideration of the provisions of Chapter 90 should have been the starting point for classification of the iPRO-RC. From the minutes of the Committee it is certainly not apparent that consideration was given to classification under Chapter 90 before moving on to Chapter 84.

75. The notes to Section XVI and Chapter 90 provide that "*unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complimentary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function*".

76. On the basis of the finding of facts above, the tribunal is of the view that it is clear that the iPRO-RC is a composite machine consisting of two machines or at the least components performing complementary functions: scanning head and micro controller validating/measuring/checking and the recycler and, on the face of it, note 3 to Section XVI and thereby Note 3 to Chapter 90 require an assessment of the principal function.

77. Note 4 to Section XVI and note 3 to Chapter 90 provide that where the component elements contribute together to a clearly defined function covered by one of the headings in [Chapter 90/Section XVI] then the whole falls to be classified in the heading appropriate to that function.

78. Again, it is not obvious from the meeting minutes that the Committee considered or determined the function or principal function of the machine they were examining (if indeed they examined a specific machine at all). HMRC contend that the function of the iPRO-RC is automated cash handling and do so by reference to the marketing material for the iPRO-RC and the market positioning of the Appellant. They contend that as such it meets the clearly defined function covered in heading 8472. The Appellants contend that the principal function is the bank note validation which, they say, involves optical and magnetic checking and measuring meeting the function covered by heading 9031.

79. The Tribunal has found that the intended use of the iPRO-RC is the validation of bank notes with a view to securely storing them or paying them out at the direction of the host controller. This has been determined by reference to the observable features of the machine. The Tribunal has not taken account of the marketing material or market position of the Appellant in reaching this conclusion on the basis that the intended use of a product is relevant for classification purposes only where 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

80. As to the question of the principal function of the composite machine the Tribunal determines on balance that it is to validate the notes. Without validation of the associated acceptance of the notes all other functionality becomes largely irrelevant or at the least subsidiary.

## ANNEX

The following documents are included herewith:

1. The Court File ✓
2. The iPRO-RC-Operation and Maintenance Manual ✓
3. Customs Code Committee – rules of procedure of the committee ✓
4. Commission Documents [per tabs 14 to 18 of the hearing bundle] ✓