



Neutral Citation: [2023] UKFTT 00409 (TC)

Case Number: TC08814

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

Sitting at Taylor House, London EC1
Appeal reference: TC/2017/07631

TC/2017/08561

TC/2018/00101

TC/2018/02032

TC/2018/04764

TC/2019/00552

TC/2019/00851

TC/2019/02569

CUSTOMS DUTIES – Union Customs Code – importation of plastic coated polypropylene pet food bags – whether classified under heading 3923 (articles for the conveyance or packing of goods, of plastics) or 6305 (sacks and bags of a kind used for the packing of goods)

Heard on: 16 and 17 February 2023

With further written submissions on 17 March
2023

Judgment date: 03 May 2023

Before

**JUDGE GUY BRANNAN
SONIA GABLE**

Between

UFLEX EUROPE LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Michael Firth, of counsel

For the Respondents: Jessica van der Meer, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant appeals against HMRC's decisions that its importation of plastic coated polypropylene pet food bags ("the bags") are liable to customs duty at 7.2% rather than 0%. The customs duty at stake is £937,025.61 and import VAT of £194,564.06, a total of £1,131,590.67.
2. The details of the decisions are set out in the Appendix to this decision. The decisions in question range from 22 May 2017 to 24 April 2019 and the dates of the import of the goods to which HMRC's related range from April 2014 to December 2018.
3. In summary, the Appellant imports the bags which are used to contain dog or cat food. The bags are made from woven polypropylene strips and are coated on the outside with plastic. The issue in this appeal is whether the bags should be classified, as the Appellant contends, under commodity code 3923 29 90 00 ("*Articles for the conveyance of packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics, sacks and bags (including cones) of other plastics*") attracting 6.5% duty with the benefit of preference rates of 0% duty. By contrast, HMRC contend that the bags should be classified under commodity code 6305 33 90 00 ("*Sacks and bags, of a kind used for the packing of goods of man-made textile materials of polythene or polypropylene strip or the like, other*") attracting the full rate of duty of 7.2% and a preference rate of 5.7%.
4. The Appellant also claims that it is entitled to retrospectively claim 0% duty by belated presentation of proof of the GSP certificates due to exceptional circumstances. HMRC reject this claim and say that the Appellant is out of time.
5. After the hearing we asked for further written submissions on the jurisdiction of the Tribunal and in relation to HMRC's alleged discretion regarding late presentation of proof of the GSP certificates.

THE GENERAL INTERPRETIVE RULES ("GIRs")

6. The GIRs are 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, 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: (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character; (b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

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 otherwise requires.”

CUSTOMS CLASSIFICATION HEADINGS AND NOTES

7. The current appeal involves a dispute as to whether the bags fall to be classified under heading 3923 (as the Appellant argues) or under heading 6305 (as HMRC argue).

8. Chapter 39 falls under Section VII (“Plastics and articles thereof, Rubber and articles thereof”) and is entitled “Plastics and articles thereof”.

9. Heading 3923 29 90 00 provides as follows:

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

10. Note 1 to Chapter 39, which is legally binding, provides:

“Throughout the Nomenclature the expression “plastics” means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other

process into shapes which are retained on the removal of the external influence.

Throughout the classification, any reference to ‘plastics’ also includes vulcanised fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.”

11. Note 2 to Chapter 39, which is legally binding, provides:

“This chapter does not cover

...

(p) goods of Section XI (textiles and textile articles);”

12. The Harmonised System Explanatory Notes (“HSENs”), which are not legally binding, for Chapter 39 state:

“Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59. The following products are also covered by this Chapter:

(a) Felt impregnated, coated, covered or laminated with plastics, containing 50% or less by weight of textile material or felt completely embedded in plastics;

(b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change in colour;

(c) Textile fabrics, impregnated, coated, covered or laminated with plastics, which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C;

(d) Plates, sheets and strip of cellular plastics combined with textile fabrics (as defined in Note to Chapter 59), felt or nonwovens, where the textile is present merely for reinforcing purposes.”

13. Section XI of Chapter 63 (HMRC’s preferred Chapter) contains heading 6305:

“Sacks and bags, of a kind used for the packing of goods”

14. The subheading includes “man-made textile materials... of polypropylene strip and the like.”

15. Note 1 to Section XI, which is legally binding, provides:

“This section does not cover:

...

(g) monofilament of which any cross-sectional by mention exceeds 1 mm or strip or the like (for example, artificial straw, of an apparent width exceeding 5 mm, of plastics (Chapter 39)

(h) woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39.”

16. The HSENs for Chapter 63 state at (1):

“Under heading 63.01 to 63.07 made up textile articles of any textile fabric... which are not more specifically described in other Chapters of

Section XI or elsewhere in the Nomenclature. (The expression “made up” textile articles means articles made up in the sense defined in Note 7 to Section XI....”

THE GENERAL APPROACH TO CLASSIFICATION

17. It was common ground that the general approach to customs classification was correctly summarised by the Court of Appeal in *Build-A-Bear Workshop UK Holdings Ltd v HMRC* [2022] EWCA Civ 825 (“*Build-A-Bear*”) at [15], quoting the decision of the Upper Tribunal):

- (1) The GIRs provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code and (unlike the HSEs and CNENs) all have “the force of law” (*Vtech* [16]).
- (2) It is common ground that, in the interests of legal certainty and ease of verification, the decisive criteria for the tariff classification of goods must be sought in their objective characteristics and properties as defined by the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN (*Holz Geenen GmbH v Oberfinanzdirektion Munchen* (Case C-309/98) at [14]).
- (3) The intended use of the goods may be considered as part of the classification analysis where that use is inherent to the goods and that inherent character is capable of being assessed by reference to the objective characteristics and properties of the goods (see *Hauptzollamt Hamburg-St. Annen v Thyssen Haniel Logistic GmbH* (Case C-459/93) ... at [13]).
- (4) Having regard to the objective characteristics and properties of the goods, a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters should be undertaken to determine whether a definitive classification can be reached, in accordance with GIR 1 and GIR 6. If not, then in order to resolve the conflict between the competing provisions, recourse must be had to GIRs 2-5 (see the opinion of Advocate General Kokott in *Uroplasty v Inspector van de Belastingdienst* (Case C-514/04) ... at [42]).
- (5) GIR 3 will apply only when it is apparent that goods are prima facie classifiable under a number of headings (see *Kip Europe SA & Ors and Hewlett Packard International SARL v Administration de douanes* (Cases C-362/07-C363/07) ... at [39] and the wording of GIR 3 itself).
- (6) Classification must proceed on a strictly hierarchical basis, taking each level of the CN in turn. The wording of headings and subheadings can be compared only with the wording of headings and subheadings at the same level (see the opinion of Advocate General Kokott, *Uroplasty* [43]).¹
- (7) The HSEs and the CNENs are an important aid to the interpretation of the scope of the various tariff headings but do not themselves have legally binding force. The content of the HSEs and the CNENs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions (see *Revenue and Customs Commissioners v Honeywell Analytics Limited* [2018] EWCA Civ 579 per Davis LJ ... at [95] and *Invamed* per Patten LJ at [12]).”

¹ “43. Classification must proceed on a strictly hierarchical basis taking each level of the CN in turn. The wording of one heading can be compared only with the wording of another heading; the wording of a first subheading can be compared only with the wording of other first subheadings of the same heading; and the wording of a second subheading can be compared only with the wording of other second subheadings of the same first subheading.” Advocate General Kokott in *Uroplasty* at [43].

THE FACTS

18. It was common ground that the bags were packaging bags for pet food made from woven polypropylene strips (less than 5 mm wide and 1 mm thick) visibly coated on the outside with non-cellular plastic.

The Appellant's evidence

19. Mr Rahul Dubey produced a witness statement and was cross-examined. Mr Dubey was the Head of Quality Control at Uflex Limited, the parent company of the Appellant. We accept Mr Dubey's evidence subject to one reservation as to his views on whether the woven polypropylene involved in the manufacture of the bags was a "textile" – a matter which seemed to us to be more a question of law rather than a question of fact.

20. There were seven stages in the production of the bags:

- (1) Stage 1 - Printing on oriented polypropylene ("OPP").
- (2) Stage 2- Lamination of OPP and polyethylene terephthalate ("PET")
- (3) Stage 3 - Extrusion coating of PET with woven polypropylene
- (4) Stage 4 - Slitting
- (5) Stage 5- Bag Making
- (6) Stage 6 - Packing and Palletisation
- (7) Stage 7 – Shipping

21. Essentially, Stage 1 was a process for applying the graphics layer on biaxially oriented polypropylene (BOPP). (Biaxial orientation gives the film greater strength.) Stage 2 involved taking the BOPP (i.e. the graphics layer) and laminating it with PET with an adhesive. The material is then cured for 36 hours before progressing onto Stage 3. Stage 3 involves taking the BOPP and PET film and adding them to the woven polypropylene fabric. Mr Dubey said that it was a woven fabric and was a plastic rather than a textile. As we have said, whilst we accept that the woven polypropylene was a woven fabric, we do not consider Mr Dubey's view that it was not a "textile" was admissible – it was an expression of opinion on a legal issue rather than evidence of fact. Mr Dubey accepted that the woven polypropylene was a key element of the bags. Stage 4 involved cutting and trimming the material to an appropriate size for bag-making.

22. Stage 5 involved actually forming the bag. The finished roll of material was mounted on a tube-making machine where a side gusset is made and at the same time the back-seal is also made through a hot-melt adhesive. This produced a side-gusseted tube which was mounted on a core which was approximately 1.2-1.5m in diameter. The tube is further processed on a pinch-making machine which involve the pinch area being cut through and then hot air sealing to seal the bottom of the bag.

23. When the bag was on the roller, the ambient temperature was between 25-30° C. When the bottom of the bag was being sealed the temperature applied was 450-500° C.

24. A finished bag would contain 10-18 kg of pet food.

25. The bags arrived in the UK as a finished product.

26. The bags were made of woven polypropylene strips of a width of 3 mm which were less than 1 mm thick. It was the plastic coating that effectively held the woven polypropylene together – without it the woven polypropylene would disintegrate or come apart.

HMRC's evidence

27. Mr Neil Dore, a classification technical officer of HMRC, also produced a witness statement and was cross-examined by Mr Firth. Mr Firth asked Mr Dore whether his witness statement essentially contained his opinion on how the bags should be classified for customs purposes. Mr Dore confirmed this. Mr Firth asked no further questions and there was no re-examination.

28. There were some elements of Mr Dore's witness statement which did not seem to us to involve questions of opinion. For example, Mr Dore concluded that the bags were made of woven polypropylene strips that were less than 5 mm wide and less than 1 mm thick and were visibly coated on the outside with non-cellular plastic. It did not seem to us that that statement was controversial.

29. Mr Dore also observed that the Appellant had incorrectly classified imported goods under Chapter 49 of the tariff (classification code 4911109000) attracting a 0% duty. Again, we did not consider the statement to be controversial and the Appellant accepted that it had incorrectly classified the bags under Chapter 49.

30. We accept Mr Dore's evidence in the preceding two paragraphs. Mr Dore also gave evidence in his witness statement about the process by which the current decisions had been made. We do not consider that relevant for present purposes. We also accept the rest of Mr Dore's witness statement to the extent that it commented on the correct classification of the bags represented opinion evidence which was not admissible.

Specimen bag

31. We were each provided with a specimen bag which, we were told, was typical of the bags relevant to this appeal. The bags were visibly coated with plastic on the outside and the woven polypropylene fabric was clearly visible on the inside.

(i) Outside of specimen bag



(ii) Inside of specimen bag



THE CLASSIFICATION ISSUE

The Appellant's submissions – summary

32. Mr Firth, appearing for the Appellant, submitted that the bags fell within Heading 3923 as:

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

33. The essential dispute between the parties, according to Mr Firth, arose from the fact that the notes applicable to Chapter 39 stated that the Chapter did not cover goods falling within Section XI (which included heading 6305 – HMRC's preferred heading), whereas the notes to Section XI stated that the Section did not apply to articles of woven fabrics coated or laminated with plastic of Chapter 39.

34. The effect was that the classification had to be determined under GIR 1 because the notes applicable to Chapter 39 and to Section XI prevented the bags being classifiable under both headings. For that reason GIR 3 did not apply. Mr Firth noted that GIR 1 contained the words “provided the Notes do not otherwise require.” In this case, the relevant Notes did otherwise require and it was, therefore, not possible for the bags to be classified under GIR 3 because the relevant headings and the notes to those headings effectively determined which heading applied. GIR 3 was, therefore, excluded.

35. Mr Firth submitted that articles of woven fabrics laminated with plastics, such as the bags, fell outside of Chapter 63 and, therefore, within Chapter 39.

36. Mr Firth relied on a general principle of interpretation, applicable in EU law, that the general gave way to the specific – “*lex specialis derogat legi generali.*” (*RCI Europe v HMRC C-37/08* at [49] and [74]). Thus, he submitted a general provision saying that Chapter 39 did not apply to anything within Section XI must give way to the specific provision stating

that Section XI did not apply to articles of woven fabrics laminated with plastics within Chapter 39. Otherwise, Note 1(h) to Section 11 would be rendered redundant.

37. This interpretation was, Mr Firth contended, supported by the HSEs for Chapter 39 quoted at paragraph 12 above (“*Otherwise the classification of plastics and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59.*”). It was, therefore, clear that these explanatory notes took the view that combinations of plastics and textiles were governed by Note 1(h) which said that those articles did not fall within Section XI. In this context, Mr Firth argued that the words in subparagraph (b) of the above HSEs did not assist HMRC. Subparagraph (b) provided:

“The following products are also covered by this Chapter:

... (b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour....”

38. The introductory wording, Mr Firth said, made it clear that this was not an exhaustive list of what was covered by Note 1(h). Paragraph (b) applied to “textiles” not to finished articles. Moreover, the HSEs were not indicating that goods not within points (a) to (d) must be excluded from Note 1(h). Thus, a fabric coated only on one side in plastic could fall within Note 1(h). The specific reference to being coated on both sides in subparagraph (b) derived from Note 2 to Chapter 59. In addition, Mr Firth noted that the HSEs were non-legally binding and were only an aid to interpretation (*Build-a-Bear* at [15 (7)]).

39. To the extent that it was necessary to look at the “essential character” of the bags (and Mr Firth submitted that this was the wrong test to apply in relation to GIR 1), their essential character was that they were plastic. The woven polypropylene layer had no structural integrity of its own, as Mr Dubey’s evidence demonstrated. It could not therefore properly be regarded as a textile. In any event, the essential character of the bags was that they were plastic bags – they had the look and feel of a plastic bag, they were made of woven polypropylene (a plastic) and they were coated in plastic layers on the outside.

40. Next, Mr Firth submitted that Note 1(g) (which, like Note 1(h), excluded items from Section XI), provided no support for HMRC’s case. If Note 1(h) was limited to strips of particular dimensions, it would have said so. Note 1(g) was concerned only with the classification of the monofilament (i.e. the strands of fibre themselves) whereas the present appeal concerned not the classification of the strands of fibre but of the finished article. In any event, the fact that Section XI did not cover strips of monofilament over 5 mm did not mean that strips of less than 5 mm were covered by Section XI.

HMRC’s submissions – summary

41. Ms Van der Meer, appearing for HMRC, submitted that even on the Appellant’s own case the objective characteristics and properties of the bags were:

- (1) bags intended for packing dry pet food;
- (2) made up of woven polypropylene strips less than 5 mm wide and 1 mm thick. The woven polypropylene strips were created by laminating together 72 GSM woven fabric (textile) with a plastic film. The bags were only coated with non-cellular plastic on one side i.e. the outside; and
- (3) they were in a finished state that was ready for use.

42. Therefore, Ms van der Meer submitted that the bags were of a kind used for packing and were made of woven polyethylene fabrics. They could best be described as a plastic-textile woven combination which retained the essential character of a textile.

43. Ms van der Meer disagreed with the way in which the Appellant framed the dispute (i.e. a conflict between Section XI Note 1(h) and Chapter 39 Note 2).

44. Instead, Ms van der Meer submitted that the dispute was about the objective properties and characteristics of the bags. The starting point was whether these were bags which were “woven fabrics coated or laminated with plastics” (as the Appellant contended) or whether they were polyethylene woven fabrics – a plastic and textile combinations whereby the essential character of textile used for packing remains (as HMRC contended). In other words, the question was whether the bags had the essential characteristic of a plastic rather textile.

45. Ms van der Meer also referred to Chapters 56 and 59 which, she argued supported her submission that woven textile fabrics did not fall within Note 1(h) – that note referred to fabrics where the essential character of the article was plastic.

46. The Appellant, in Ms van der Meer’s submission, had confused the situation where the bags could arguably be classified under two headings (and thus GIR 3 would apply) with the situation where there was a simultaneous application of two rules (one general and one specific) which leads to a conflict. Ms van der Meer submitted that the bags could be classified under GIR 1 and 6 immediately. Heading 6305 referred to “Sacks and bags” and provided a more precise description of the goods in question.

47. Moreover, Ms van der Meer submitted that Note 1(h) applied to articles made from larger filaments of woven polypropylene (i.e. more than 5 mm in width and more than 1mm thick) and therefore that Note 1(h), on HMRC’s case, was not redundant.

48. HMRC’s secondary position, was that the bags were a textile and plastic combination and under GIR 3 HMRC’s classification was the most appropriate.

49. Moreover, the Appellant’s framing of the dispute ran contrary to the principles of interpretation that apply to customs classification. The Appellant was relying on a Chapter explanatory note against a Section explanatory note. *Build-a-Bear* at [15 (6)], however, was authority for the proposition that classification:

“must proceed on a strictly hierarchical basis, taking each level of the CN in turn. The wordings of headings and subheadings can be compared only with the wording of headings and subheadings at the same level.”

50. Therefore, in there was no need to revert to *lex specialis*; it was only necessary to have regard to the GIRs and to the general approach to customs classification.

51. As regards Chapter 39, the Chapter Notes at 1 state that any reference to “plastics” does not “apply to materials regarded as textile materials of Section XI.”

52. The Chapter Notes to Chapter 39 also state at 2(p) that: “This chapter does not cover: goods of Section XI (textiles and textile articles).” This was, Ms van der Meer submitted, consistent with the principle that Chapter 39 was concerned with goods that retained the essential character of plastics.

53. In Ms van der Meer’s submission the bags were textiles. A textile was something that was woven. In layman’s terms the bags contained a woven fabric which would be regarded as a “textile”.

54. Ms van der Meer contended that this was reinforced by the HSEs to Chapter 39 set out at paragraph 12 above. The HSEs sought to ensure that plastic-textile combination

products, where the essential character of that product has become that of plastic, were covered by Chapter 39 because it can be considered a plastic. Section XI envisaged a woven fabric made from plastic and its wording recognised that plastic materials could be classified as textiles.

55. In relation to Heading 6305, Ms van der Meer observed that the Section Notes at 1(h) state that Section XI:

“does not cover woven, knitted, crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics and articles thereof, of Chapter 39.”

56. Ms van der Meer submitted that this Note was compatible with the provisions of Chapter 39 Note 2(p) because it marked the dividing line for plastic-textile combinations. Those “woven... fabrics... coated... or laminated with plastics” to such a degree that their essential character has become plastic are covered by Chapter 39 as it relates to plastics. This interpretation, she argued, aligned with the HSEs and was supported by other Section Notes. In particular, Section Note 1(g) made it clear that section IX “does not cover monofilament of which any cross-sectional dimension exceeds 1 mm or strip or the like of an apparent width exceeding 5 mm, of plastics (Chapter 39)...” Those packages made up with monofilament (single strand man-made fibre) greater than 1 mm in cross-sectional dimension or exceeding 5 mm in apparent width fall within classification 3916. That was because, Ms van der Meer submitted, their essential character had become that of plastic, rather than textile.

57. Ms van der Meer argued that HMRC’s analysis was reinforced by the fact that the headings throughout Chapter 63 allowed for materials made from “polyethylene or polypropylene strip” and “polypropylene or polyethylene woven fabrics”. This recognised that these plastic-textile combination products had retained the essential character of textiles. There was no single heading for plastic-textile combinations; what determined a plastic-textile combination’s classification were its objective characteristics and properties and the GIRs.

58. The bags were properly classified, in Ms van der Meer’s submission, to Chapter 6305 because:

(1) the bags were woven polyethylene fabric (comprising polyethylene strips) laminated on one side. Subheading 6305 33 9000 (“*Sacks and bags, of a kind used for the packing of goods of polyethylene or polypropylene strip or the like*”) provided the most specific and accurate description, in accordance with Rule 3 of the GIRs. This contrasted with subheading 3923 29 9000 (“*Articles for the conveyance of packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics, sacks and bags (including cones) of other plastics*”).

(2) This was consistent with the Chapter 63 HSEs: the bags were designed for intermediate bulk pet food (of 18 kg) and used “for the packing of goods for transport, storage and sale”.

59. The nature of the bags – woven polypropylene strips of a width of 3 mm and less than 1 mm thick, laminated on only one side – meant it fell squarely within Section XI and was expressly excluded from Chapter 39 by Note 1(g) of Section XI and Note 2 to Chapter 39.

60. Chapter 39 (and Heading 3923 in particular) were not appropriate for the bags because:

(1) The headings in Chapter 39 give a strong indicator that this is not the correct classification, as pet food packaging was not *per se* plastic.

(2) The pet food packaging was a woven polyethylene fabric laminated on one side. It was therefore excluded from Chapter 39 because it could, without fracturing, be bent manually around a cylinder of a diameter of 7 mm at a temperature between 15 and 30°C. Accordingly, it did not meet the paragraph (c) criterion of the Chapter 39 HSEs entitled “Plastics and textile combinations”.

(3) The bags were excluded from meeting criterion (b) of Chapter 39 of the HSEs because the bags were not “completely embedded” or “entirely coated or covered on both sides” with plastic looking at the objective properties of the bags, the result of the laminating is a material that consists of woven strips of polypropylene less than 5 mm wide and 1 mm thick. These strips would be classifiable under heading 5404; woven into a fabric they may be classifiable under heading 5407 but as a resulting textile fabric has been coated or laminated plastic on one side, it can be classified under heading 5903. A made-up final product of this material that retains the essential character of textile and is used for packing is classifiable within Section XI (Textiles and textile articles), as per Section Note 7.

DISCUSSION OF THE CLASSIFICATION ISSUE

61. Taking account of the approach to classification set out in *Build-A-Bear* (at paragraph 17 above) we have found, first, that the objective characteristics of the bags are that they are made from woven polypropylene laminated in plastic on one side and that they are intended to be used for storing pet food.

62. The next step is to undertake a combined examination of the wording of the headings and the explanatory notes to the relevant sections and chapters in order to determine whether a definitive classification can be reached, in accordance with GIR 1 and GIR 6. Although we have already set out the relevant headings and notes, we repeat them here for ease of reference.

63. The relevant competing headings for the bags are:

“Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics” (3923)

And

“Sacks and bags, of a kind used for the packing of goods” (6305)

64. It seems to us that, looking simply at the headings, the bags could be covered by both headings.

65. The Notes to Chapter 39, however, draw a boundary. The Notes to Chapter 39 relevantly provide:

“1. “Throughout the Nomenclature the expression “plastics” means those materials of headings 3901 to 3914 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence.

Throughout the classification, any reference to ‘plastics’ also includes vulcanised fibre. *The expression, however, does not apply to materials regarded as textile materials of Section XI.*”

And

“2. This chapter does not cover

...

(p) *goods of Section XI (textiles and textile articles)...*” (emphasis added)

66. It is clear from this that textile materials and textile articles within Section XI are excluded from Chapter 39.

67. On the other hand, Note 1 of Section XI also draws a boundary by excluding from Chapter 63 certain items falling within Chapter 39. The relevant part of the Note reads as follows:

“1. This section does not cover:

...

(g) monofilament of which any cross-sectional by mention exceeds 1 mm or strip or the like (for example, artificial straw, of an apparent width exceeding 5 mm, of plastics (Chapter 39)

(h) *woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39.*” (emphasis added)

68. We accept Mr Firth’s submission that the combined effect of the Notes to Chapter 39 and Chapter 63 is, for present purposes, effectively to exclude the operation of GIR 3. In other words, in respect of items falling within the Notes to Chapter 39 and woven fabrics falling within Note 1(h) to Section XI, the Notes set up a mutually exclusive regime. Either the bags fall within Chapter 39 or within Chapter 63, but they cannot, we think, fall within both.

69. In this context, we reject Ms van der Meer’s submission that Section Notes take precedence over Chapter Notes. It is true that classification must proceed on a strictly hierarchical basis, taking each level of headings in turn, however GIR 1 seems to us to provide that these headings must be read in conjunction with the “relative” Section and Heading Notes considered simultaneously.

70. Ms van der Meer also sought to draw a distinction between Chapter 39 and Chapter 63 on the basis that the former applied only to articles whose essential characteristic was that of plastic whereas the latter applied to textile materials. The bags, she argued, were made from woven polypropylene and this was a textile.

71. We disagree. That the articles in question must be “of plastic”, in order to fall Chapter 39, is clear enough. In this case, the bags are entirely made of plastic. They are coated in plastic and polypropylene is a plastic. Moreover, in applying GIR 1 there is no “essential characteristic” test. The correct test is to look at the objective characteristics and properties of the item in question. Note 1(h) to Chapter 63 is drafted in unambiguous terms and the bags fall within that Note and are therefore excluded from Chapter 63.

72. It seemed to us that HMRC ran into some difficulty in defining “textiles”, borrowing from and referring to other Chapters (e.g. Chapters 54 and 54) which were inapplicable in the present case. That is not, in our judgment, a legitimate approach to classification. A roving review of the language of different and inapplicable Chapters is not the methodology adopted by the Court of Appeal in *Build-A-Bear* at [15] or by Advocate General Kokott in *Uroplasty* at [43].

73. At one point, Ms van der Meer suggested that a textile was something that was woven. However, Note 1(h) clearly contemplates that woven fabrics coated in plastic fall within Chapter 39. On Ms van der Meer’s definition of a textile, articles within Note 1(h) (i.e. “woven...fabrics”) would also be textiles, which seems to make little sense.

74. We also agree with Mr Firth’s submission that Note 1(h) to Section XI is more specific in its terms than Notes 1 and 2 to Chapter 39. Accordingly, applying the principle “*lex specialis derogat legi generali*”, Note 1(h) should prevail.

75. HMRC also relied on Note 1(g) to Section XI, set out in paragraph 15 above, arguing that Note 1(h) only applied to articles made up of plastic strips greater in length than 5 mm. We reject that argument. Note 1(g) is concerned with the classification of the monofilament used for the making of the woven polypropylene (i.e. the strands of fibre which make up the woven polypropylene fabric). This appeal, however, involves the finished article, i.e. the bags. As Mr Firth observed, in contrast, Note 1(h) specifically refers both to the fabric and “articles thereof”. Furthermore there is nothing in the wording of Note 1(h) which suggests that it is limited to strips of particular dimensions. If had been any such limitation we would have expected it to be stated explicitly.

76. Furthermore, we are not persuaded that the HSEs relating to Chapter 39, quoted at paragraph 12 above, have the effect of limiting the scope of Heading 3923. The HSEs refer to the classification of “plastics and textile combinations being essentially governed” by Note 1(h) to Section XI. We consider that the bags are indeed a combination of plastic and a plastic textile or fabric. The HSE then states: “The following products are *also* covered by this Chapter” (emphasis added) before giving a list of specific and disparate products that fall within Chapter 39. It seems to us that the use of the word “also” indicates that the list that follows is a non-exclusive list and the failure of an article to fall within that list does not, of itself, exclude it from Chapter 39. Indeed, the word “also” suggests that the subparagraphs (a)-(d) that follow are in addition to the plastics and textile combinations which are governed by Note 1(h). The HSEs are, of course, non-binding but are a guide to interpretation of the relevant Chapter headings.

77. Finally, we reject Ms van der Meer’s argument that the bags were “textiles” because they were made up in part from woven polypropylene strips. However, the evidence of Mr Dubey was that the woven polypropylene from which the bags were made had no structural integrity of its own and would disintegrate without the plastic coating. In those circumstances, it seems hard to see how the woven polypropylene from which the bags were made could be described as a “textile”.

78. For these reasons, we consider that the bags are to be classified under heading 3923.

THE GSP CERTIFICATES ISSUE

Background

Proof of origin

79. As we have already mentioned, the Appellant had incorrectly classified imported goods under Chapter 49 of the tariff (classification code 4911109000) attracting a 0% duty. It was common ground that this was an incorrect classification. The error was identified in 2016 when HMRC carried out an assurance audit of the Appellant’s imports. The Appellant did not present goods for inspection but rather HMRC selected the Appellant’s goods for inspection.

80. The Generalised Scheme of Preferences (GSP) allows the UK to offer developing countries lower tariffs on their exports into the UK. Therefore goods imported into the UK from certain developing countries are entitled to reduced or nil rates of duty, known as preference rates. Once a trader establishes the correct Tariff Code for the products, then the place of origin for the product must be checked to see if the product qualifies for preference. When importing under GSP, a GSP Form A has to be completed in the country of origin.

81. A GSP Proof of Origin must be presented within 10 months of the date of issue:

“(5) A proof of origin shall be valid for 10 months from the date of issue in the exporting country and shall be submitted within the said period to the customs authorities of the importing country.” (Council Regulation 2454/93, Article 97K, in the version in force from 1 January 2011 – see Commission Regulation 1063/2010)

82. The GSP certificates were not presented within the relevant time frame as at the time of importation the incorrect classification (under commodity code 4911109000) allowed the Appellant a 0% rate of duty (which we understood not to be a preferential rate), thus rendering the GSP Proof of Origin certificates unnecessary.

83. There is, however, an exception to the 10 month rule:

“(2) Proofs of origin which are submitted to the customs authorities of the importing country after the period of validity mentioned in Article 97k (5) may be accepted for the purpose of applying the tariff preferences, where failure to submit these documents by the final date set is due to exceptional circumstances. In other cases of belated presentation, the customs authorities of the importing country may accept the proofs of origin where the products have been presented to customs before the said final date.” (Article 97n(2))

84. In the present case, the Appellant accepted that in order for the second sentence of Article 97n(2) to apply, the importer must make it known to HMRC within the 10 month period that the goods are being imported under preferential arrangements (*Lane Fouracres Associates v HMRC* [2014] UKUT 67 (TCC) at [42-43]).

85. Article 97n(1) provides:

“Certificates of origin Form A or invoice declarations shall be submitted to the customs authorities of the Member States of importation in accordance with the procedures concerning the customs declaration.”

Jurisdiction

86. Section 13A(2)(a) Finance Act 1994 provides:

(2)A reference to a relevant decision is a reference to any of the following decisions—

(a) any decision by HMRC, in relation to any customs duty or to any agricultural levy of the European Union, as to—

(i) whether or not, and at what time, anything is charged in any case with any such duty or levy;

(ii) the rate at which any such duty or levy is charged in any case, or the amount charged;

(iii) the person liable in any case to pay any amount charged, or the amount of his liability; or

(iv) whether or not any person is entitled in any case to relief or to any repayment, remission or drawback of any such duty or levy, or the amount of the relief, repayment, remission or drawback to which any person is entitled....”

Submissions for the Appellant

87. Mr Firth submitted that appeals to this Tribunal against relevant decisions were made under section 16 Finance Act 1994 – “relevant decisions” being those falling within section 13A(2). In relation to appeals against “ancillary matters” the powers of this Tribunal are limited to a supervisory jurisdiction (section 16(4) Finance Act 1994). He submitted that HMRC’s decision relating to the late acceptance of preference rates went directly to the rate

at which customs duty was charged and, therefore, fell within section 13A(2)(a). Therefore, the Tribunal had full appellate jurisdiction, including the power to substitute its own decision on appeal.

88. Next, Mr Firth submitted that although Article 97n(2) provided that proofs of origin “may be accepted” outside the period of validity this did not give HMRC a discretion. Mr Firth referred to the decision of this Tribunal in *Euro Packaging UK Ltd v HMRC* [2017] UKFTT 160 (TC) at [99] where, in relation to remission of duty, the legislation was framed in terms that “duties may be repaid...” The Tribunal said:

“The CJEU in *Eyckeler & Malt v The European Commission* T-42/96 has held that if the person liable for payment can demonstrate both the existence of a special situation and the absence of deception and obvious negligence on his part, he is entitled to repayment or remission of the amount of duty legally owed.”

89. In *Eyckeler & Malt v The European Commission* the CJEU said:

“[133] The Commission must therefore assess all the facts in order to determine whether they constitute a special situation within the meaning of that provision (see, to that effect, Case 160/84 *Oryzomyli Kavallas and Others v Commission* [1986] ECR 1633, paragraph 16). Although it enjoys a margin of assessment in that respect (*France-Aviation v Commission*, cited above, paragraph 34), it is required to exercise that power by actually balancing, on the one hand, the Community interest in ensuring that the customs provisions are respected and, on the other, the interest of the importer acting in good faith not to suffer harm beyond normal commercial risk. Consequently, when examining whether an application for remission is justified, it cannot simply take account of the conduct of importers. It must also assess the impact of its own conduct on the resulting situation even if it is at fault.

[134] Provided that the two conditions laid down in Article 13 of Regulation No 1430/79 are satisfied, namely the existence of a special situation and the absence of any deception or obvious negligence by the person concerned, the person liable is entitled to reimbursement or remission of the import duties, since to hold otherwise would deprive that provision of its effectiveness (see, as regards the application of Article 5(2) of Regulation No 1697/79, *Mecanarte*, cited above, paragraph 12, Case C-292/91 *Weis* [1993] ECR I-2219, paragraph 15, and *Faroe Seafood and Others*, cited above, paragraph 84).”

90. Mr Firth drew attention to the wording of Article 13 of Regulation 1430/79 which also included potentially discretionary wording:

“Import duties may be repaid or remitted in special situations ... which result from circumstances in which no deception or obvious negligence may be attributed to the person concerned.”

91. Therefore, in Mr Firth’s submission, if “exceptional circumstances” within Article 97n(2) were present, the proofs of origin were required to be accepted and HMRC did not have a discretion to refuse them.

92. Mr Firth argued that there were “exceptional circumstances” for the failure to submit a GSP Proof of Origin within the 10 month period.

93. In this context, “exceptional circumstances” are found where a trader is put in an exceptional situation in relation to other traders carrying on the same activity. In support of

this proposition, Mr Firth cited the decision of the CJEU in *Sohl & Sohlke*, C-48/98 at [73-74] where the court said:

“Therefore, the term 'circumstances within the meaning of Article 49(2) of the Customs code must be interpreted as referring to circumstances which are liable to put the applicant in an exceptional situation in relation to other traders carrying on the same activity. Exceptional circumstances which, although not unknown to the trader, are not events which normally confront any trader in the exercise of his occupation, may constitute such circumstances.”

94. In the present case, the Appellant, in good faith, had applied a classification (albeit an incorrect classification) which meant that 0% duty was due. Mr Firth argued that if the Appellant had known the correct classification at the time, the duty would still have been 0%, applying the preference rate.

95. In relation to the “exceptional circumstances” test, Mr Firth submitted that the Appellant was in a different situation from other traders carrying on the same activity because the fact that the classification it applied incorrectly, but in good faith, gave rise to 0% duty the Appellant therefore had no reason to submit a GSP Proof of Origin to take advantage of the preference.

Submissions for HMRC

96. In her written submissions, Ms van der Meer argued that the tribunal did not have jurisdiction over the GSP certificates issue because the Proofs of Origin for preferential rates did not qualify as a “relevant decision” for the purposes of section 13A Finance Act 1994. Section 13A Finance Act 1994 defined “relevant decisions” over which the Tribunal would have jurisdiction following a decision on review by HMRC. Decisions relating to granting preference rates did not fall within section 13A. Moreover it did not fall within section 13A (2)(iv) because preferential rates were not “relief, repayment, remission or drawback”.

97. Late acceptance of Proof of Origin was also not an “ancillary matter” in accordance with section 16(8) and 16(9) Finance Act 1994 because the decision was not a decision specified in Schedule 5.

98. Because HMRC submitted that the decision as to whether to accept late presentation of Proofs of Origin was a matter of discretion for HMRC (see below) the decision could only be challenged by judicial review proceedings.

99. Ms van der Meer noted that Article 97n(2), by using the word “may” twice, gave HMRC a discretion to determine whether to accept the GSP Proofs of Origin. The French language version used the expression “peuvent être acceptées” reinforcing the view that the use of the word “may” in the English version gave HMRC a discretion. The language was clear and precise and devoid of ambiguity. In accordance with the principles of interpreting EU law, a court should not ignore the clear and precise wording of an EU law provision: see Case C-582/08 *Commission v United Kingdom* [2010] ECR I-07195. Where a provision was clear and precise an interpretation of that provision should not call into question its literal meaning because this would run counter to the principle of legal certainty.

100. Article 97n(2) recognised, first, the possibility that an importer may submit its GSP Proof of Origin out of time if the failure to submit the document within the 10 month period was due to “exceptional circumstances”. Secondly, absent exceptional circumstances, Article 97n(2) allowed HMRC to accept Proofs of Origin out of time where the actual goods have been presented to them for inspection before the 10 month period expired.

101. Ms van der Meer referred to Article 97n(1) and Article 890 which provided that the belated submission of GSP Proofs of Origin must be preceded by putting the customs authority on notice at the time of importation that a claim for preferential origin status would be made.

102. The Appellant, in Ms van der Meer's submission, was responsible for the accuracy of the information given in a customs declaration. In this case, the Appellant was an experienced importer who imported goods under the wrong classification and, incorrectly, benefited from a 0% rate of duty under Heading 4911. The Appellant would have continued to benefit from this 0% rate of duty if the goods had not been subject to an assurance audit. At no time did the Appellant present the bags for inspection. Accordingly, the Appellant clearly fell outside the scope of the second sentence of Article 97n(2).

103. In relation to "exceptional circumstances" the Appellant was attempting to fall within the first sentence of Article 97n(2). However, Ms van der Meer submitted that the Appellant could not rely on assurance audits and the imposition of retrospective change to the customs heading as "exceptional circumstances". The circumstances were not exceptional and HMRC was simply doing its work. The Appellant's submissions were based on the erroneous assumption that heading 3923 was the correct heading.

104. For these reasons, HMRC had chosen to exercise its discretion in not accepting the late presentation of a GSP Form A and Ms van der Meer submitted that HMRC was entitled to reach that decision and acted reasonably in so doing.

Discussion of the GSP certificate issue

105. We accept Mr Firth's submission that the Tribunal has full appellate jurisdiction in relation to this issue. It seems to us that the issue involves "the rate at which any such duty or levy is charged in any case, or the amount charged" for the purposes of section 13A(2)(a) (ii) Finance Act 1994. Accordingly, the issue involves a "relevant decision" and, accordingly, this Tribunal has full appellate jurisdiction.

106. As regards the question whether HMRC has a discretion whether to accept a late Proof of Origin, even if exceptional circumstances are present, we reject HMRC's argument. Instead, we agree with Mr Firth's submissions, based on the reasoning of the CJEU in *Eyckeler & Malt*, which we recognise was given in the context of remission of duty, that HMRC's interpretation would effectively deny Article 97n(2) of its intended effectiveness. Accordingly, we have concluded that if the Appellant can demonstrate that there were exceptional circumstances, HMRC would be obliged to accept a late Proof of Origin.

107. In relation to the substantive issue concerning "exceptional circumstances", Mr Firth's essential argument is that where importer incorrectly claims a 0% rate, with the result that it does not (or does not see the need to) present a GSP Form A within the 10 month period provided for in Article 97K, that should constitute "exceptional circumstances" for the purposes of Article 97n(2). This was, he submitted, not an event which would normally confront any trader, carrying on the same activity, in the exercise of his/her occupation.

108. We reject that submission. It seems to us that the purpose of the "exceptional circumstances" exception in Article 97n (2) does not extend to absolving behaviour which would undermine the fundamental duty of an importer to declare imported goods under the correct heading.

109. Both parties referred to a decision of the First-tier Tribunal in *Euro Packaging Ltd v HMRC* [2017] UKFTT 160 (TC). However, in that decision (which involved the question of remission of duty) the facts were materially different from the present appeal. Consequently, we derived little assistance from that decision.

110. In *Sohl & Sohlke* at [68] and [76] the Court held that problems peculiar to an undertaking, such as the fact that employees have suddenly fallen ill or have been absent on leave, the induction of new employees, problems with the application of a data processing system developed for the purposes of carrying out customs formalities or, in cases involving outward processing, the excessive work involved in the preparation of attributions which ought normally to be prepared by the customs authorities, did not constitute exceptional circumstances. The Court held that circumstances which, although not unknown to the trader, are not events which would normally confront any trader in the exercise of his occupation may constitute exceptional circumstances.

111. In this case, the mistaken application of tariff heading 4911 resulted in the Appellant's failure to submit GSP Form A within the 10 month period. The need correctly to classify goods on importation is a task that confronts every trader carrying on the same kind of business. It seems to us that such an error does not constitute exceptional circumstances.

112. Accordingly, we consider that there were no "exceptional circumstances" for the purposes of Article 97n(2).

CONCLUSION

113. We allow the appeal in respect of the classification issue but dismiss the appeal in respect of the GSP Certificates Issue.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

114. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

**GUY BRANNAN
TRIBUNAL JUDGE**

Release date: 03rd MAY 2023

APPENDIX

Entry Date	Decision Date	C 18 Reference	Appeal Reference Number	Customs Duty	Import VAT	TOTAL
21/05/2014 to 28/06/2014	22 May 2017	C18241208	TC/2017/07631	£33,236.37	£6634.70	£39,871.07
05/11/2014 to 30/12/2014	25 August 2017	C18252248	TC/2017/08561	£40,555.43	£8111.09	£48,666.52
10/09/2014 to 28/10/2014	25 August 2017	C18252277	ditto	£30,540.49	£6108.10	£36,648.59
06/01/2015 to 24/06/2015	15 December 2017	C18258 600	TC/2018/00101	£142,025.30	£28,271.80	£170,297.10
03/07/2015 to 24/09/2015	28 February 2018	C18264007	TC/2018/02032	£102,264.13	£20,452.83	£122,716.96
02/10/2015 to 22/12/2015	28 June 2018	C18269691	TC/2018/04764	£106,727.94	£21,345.59	£128,073.53
05/01/2016 to 29/06/2016	10 January 2019	C18281332	TC/2019/00552	£121,490.96	£24,258.71	£145,749.67
22/05/2016 to 27/01/2017	11 February 2019	C18283835	TC/2019/00851	£158,849.11	£31,734.61	£190,583.72
01/07/2016 to 04/12/2018	24 April 2019	C18288083	TC/2019/02569	£200,335.88	£47,646.63	£248,982.51
	TOTALS			£973,025.61	£194,564.06	£1,131,589.67