Neutral Citation: [2025] UKFTT 001071 (TC)

Case Number: TC09362

FIRST-TIER TRIBUNAL
TAX CHAMBER

[Taylor House]

Appeal reference: TC/2023/00537

CUSTOMS DUTY – tariff classification – wetsuits imported into the United Kingdom by the Appellant – neoprene wetsuits covered with textile – the Harmonized Commodity Description and Coding System developed by the World Customs Organisation ('the Harmonized System') – the Explanatory Notes to the Harmonized System ('HSENs') – method of classification – the General Rules for the Interpretation of the Harmonized System ('GIRs') – rule 3(b) of the GIRs – the essential character of a wetsuit – what the primary constituent material of a wetsuits is – the relationship between the tariff notes and the GIRs – the relevance of Commission Regulation (EC) 2345/2003 concerning the classification of certain goods in the Combined Nomenclature – Sola Wetsuits & Leisurewear Ltd v C & E Comrs – Appeal allowed

Heard on: 24 October 2024
Judgment date: 28 November 2024

Before

JUDGE NATSAI MANYARARA
MICHAEL BELL

Between

O'NEILL WETSUITS LTD

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kevin Starr, Hexagon Consulting Limited

For the Respondents: Mr Edward Waldegrave of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. The Appellant ('O'Neill Wetsuits Limited') appeals against an Advanced Tariff Ruling ("**ATaR**") certificate 600004759 issued by HMRC on 27 October 2022, confirming the proper classification of certain neoprene wetsuits ("the Wetsuits") imported by the Appellant into the United Kingdom under the Tariff of the United Kingdom ("**the UK Tariff**").

2. An ATaR is legal confirmation of goods classification. Primary legislation for advance tariff classification, and advance origin rulings, is contained in the Taxation (Cross-Border Trade) Act 2018 ("**the TCBTA**"). The ATaR was made with reference to rule 3(b) of the General Rules for the Interpretation of the Harmonized Commodity Description and Coding System ("**the GIRs**"). The GIRs are contained in Part 2 of the UK Tariff and are the rules that govern the classification of goods under the Harmonized Commodity Description and Coding System ("**the Harmonized System**") developed by the World Customs Organisation ('**WCO**'). The Harmonized System classifies goods using six-digit commodity codes. The EU and UK systems add further sub-divisions resulting, in the case of the UK Tariff, in ten-digit commodity codes. A description is associated with each commodity code.

3. Rule 3(b) of the GIRs provides that 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 rule 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. Rule 3(b) is commonly referred to as "the tie-breaker rule".

4. The reason why rule 3(b) was applied to the Wetsuits in this appeal is because they comprise of different materials. Wetsuits are manufactured from cellular neoprene material comprising of single and double-lined panels, with textile to the surface of the neoprene. The Wetsuits with which we are concerned in this appeal are those where the majority of the panels are double-lined ("double-sided"), notwithstanding the fact that some of the panels of the Wetsuits are single-lined panels. For ease of reference, we shall refer to these as "double-sided" or "double-lined" Wetsuits. The major component of the Wetsuits is the neoprene. The Wetsuits are full suits intended to cover the upper and lower torso, and include several shaped panels stitched together.

5. The commodity code which HMRC contend applies to the Wetsuits is "6113 0010 00". Heading 6113 of the UK Tariff applies to "garments made up of knitted or crocheted fabrics of Heading 5903, 5906 or 5907". Commodity code 6113 0010 00 is defined with reference to Heading 5906, which applies to "rubberised textile fabrics other than those of Heading 5902". The commodity code which the Appellant contends applies to the Wetsuits is "4015 9000 00". Heading 4015 applies to "articles of apparel and clothing accessories (…), for all purposes, of vulcanised rubber other than hard rubber". If HMRC's position is correct, the equivalent duty rate applicable to the Wetsuits would be 8%. If the Appellant's position is correct, the duty rate applicable to the Wetsuits would be 4%.

ISSUE(S)

6. The issue in the appeal concerns what the correct classification of the Wetsuits is under the UK Tariff. This requires consideration of: (i) what the "constituent materials" forming the Wetsuits are; (ii) what the "essential character" of the Wetsuits is; and (iii) whether the textile element of the material used to make the Wetsuits is "present merely for reinforcing purposes".

BURDEN AND STANDARD OF PROOF

7. Section 16(6) of the Finance Act 1994 ('FA 1994') provides that the burden of proof is on the Appellant to show that the decision is incorrect and that the commodity code advanced by the Appellant is the appropriate one.

8. The standard of proof is the civil standard; that of a balance of probabilities.

AUTHORITIES AND DOCUMENTS

9. The authorities to which we were, specifically, referred by the parties were:

(1) *R & C Comrs v Flir Systems AB* [2009] EWHC 82 (Ch) ('*Flir Systems*');

(2) *Hasbro European Trading BV v HMRC* [2018] EWCA Civ 1221 ('*Hasbro*'); and

(3) *Sola Wetsuits & Leisurewear Ltd v C & E Comrs* (2002) Decision C00170 ('*Sola Wetsuits*').

10. The documents to which we were referred to were: (i) the Hearing Bundle consisting of 399 pages; (ii) the Authorities Bundle consisting of 67 pages; (iii) HMRC's Skeleton Argument dated 3 October 2024; (iv) the Appellant's Skeleton Argument (undated); (v) printouts of the UK Integrated Online Tariff (commodity code 6113 0010 00, Heading 5906 and commodity code 4015 9000 00); (vi) a printout of s 16 FA 1994; (vii) a printout of Schedule 7 of the TCBTA; and (viii) a Table setting out the metrics of various wetsuits imported by the Appellant ("the Table").

BACKGROUND FACTS

11. The Appellant is a UK private limited company which supplies wetsuits and was incorporated on 8 July 1999.

12. On 18 December 2021, the Appellant made an application to HMRC for an ATaR, under s 24 of the TCBTA. Section 24 provides for the establishment of a system by which applications can be made for rulings as to the classification of particular goods under the UK Tariff. In the application, the Appellant sought a ruling on what was described as a "*WET-SUIT.STYLE Ref: 5337*". The Appellant invited HMRC to agree that the Wetsuits should be classified under commodity code 4015 9000 00 of the UK Tariff.

13. HMRC responded to the application by an ATaR issued on 31 January 2022 ("**the January 2022 ATaR**"). HMRC rejected the Appellant's proposed classification of the Wetsuits. HMRC's view was that the Wetsuits should be classified under commodity code 6113 0010 00 of the UK Tariff.

14. On 2 August 2022, a meeting was held between the Appellant, its agent and HMRC. At the meeting, Commission Regulation (EC) No 2345/2003, of 23 December 2003, concerning the classification of certain goods in the Combined Nomenclature ("**the European Regulation**") was discussed. The European Regulation classified double-sided wetsuits to commodity code 6113 0010 00. The Appellant's representatives were also made aware of the *Sola Wetsuits* decision, which had been successful in arguing against HMRC's classification of wetsuits under Heading 6113.

15. The Appellant's agent recognised that the European Regulation had not been referred to in the January 2022 ATaR. A discrepancy was also identified with customs' methodology as wetsuits had been classified with reference to rule 1 and rule 6 of the GIRs, without reference to rule 3(b) (as the European Regulation recommended). The Appellant's agent considered that the January 2022 ATaR, and other rulings by customs, had undermined the European Regulation.

16. On 3 October 2022, HMRC sent a right to be heard letter to the Appellant. The letter stated that HMRC intended to revoke the January 2022 ATaR, as it should have contained a reference to rule 3(b) of the GIRs. The letter gave the Appellant 30 days in which to provide representations, further evidence or arguments.

17. On 10 October 2022, the Appellant's agent made further representations. The representations stated that the textile layers on the Wetsuits have no use in terms of the primary function (i.e., keeping the wearer warm). Rather, the outer surface textile is there to improve durability, whilst the textile lining (i.e., the inner layer) aids comfort.

18. On 11 October 2022, HMRC revoked the January 2022 ATaR.

19. On 27 October 2022, HMRC issued another ATaR ("**the October 2022 ATaR**") (i.e., the decision under appeal). The reasons given for HMRC's classification of the Wetsuits under commodity code 6113 0010 00 differed, slightly, in the October 2022 ATaR from those given in the January 2022 ATaR. In particular, the October 2022 ATaR included specific reference to rule 3(b) of the GIRs.

20. On 14 November 2022, the Appellant requested a review of the October 2022 ATaR. HMRC undertook a review and concluded that the October 2022 ATaR should be upheld. The review conclusion was notified to the Appellant by a letter dated 22 December 2022.

21. On 19 January 2023, the Appellant appealed to the First-tier Tribunal ('the FtT') against the October 2022 ATaR.

RELEVANT LAW

22. The relevant law, so far as is material to the issues in this appeal, is as follows:

23. Section 8 of the TCBTA requires HM Treasury to make regulations establishing the UK Tariff. Section 8 of the TCBTA provides that:

> "**8 The customs tariff**
>
> (1) The Treasury must make regulations establishing, and maintaining in force, a system which—
>
> (a) classifies goods according to their nature, origin or any other factor,
>
> (b) gives codes to the goods as so classified,
>
> (c) specifies the rate of import duty applicable to goods falling within those codes (whether by a formula or otherwise), and
>
> (d) contains rules for determining the amount of import duty applicable to those goods.
>
> (2) This system is referred to in this Part as the customs tariff.
>
> (3) The customs tariff may provide for the amount of any import duty applicable to any goods falling within any code to be determined by reference to either or both of the following—
>
> (a) the value of the goods, and
>
> (b) the weight or volume of the goods or any other measure of their quantity or size.
>
> (4) The customs tariff may include provision as to the meaning of any expression used in it.
>
> …"

24. In fulfilment of this requirement, the Treasury has made the Customs Tariff (Establishment) (EU Exit) Regulations 2020 SI 2020/1430 ("**the 2020 CT Regulations**"). The 2020 CT Regulations, materially, provide that:

> "**1.** …

2.— Establishment of the customs tariff

(1) The customs tariff is established as a system which consists of the following elements.

(2) Element 1: the classification of goods according to their description as specified in the **Goods Classification Table** under the following divisions—

(a) sections;

(b) chapters within a section;

(c) where applicable, sub-chapters;

(d) headings within a chapter or sub-chapter; and

(e) where applicable, levels of sub-headings within a heading.

(3) Element 2: the codes ("**commodity codes**") set out in the Goods Classification Table as applicable to the goods as so classified.

(4) Element 3: for goods falling within a commodity code set out in the Tariff Table, the rate of import duty specified in that table as applicable to those goods in a standard case ("the standard rate of import duty").

(5) Element 4: for determining the amount of import duty applicable to those goods where the standard rate of import duty applies, the rules of calculation specified in Part Four of the Tariff of the United Kingdom under the heading of "General Rules".

(6) In paragraph (4), *"Tariff Table"* means the table so named in Annex II of Part Three of the Tariff of the United Kingdom.

"The customs tariff" is defined in section 8(2) of the Taxation (Cross-border Trade) Act 2018.

3.— Rules of interpretation

(1) For the purposes of determining the commodity codes within which goods most appropriately fall, the rules of interpretation contained in the following have effect—

(a) Part Two (Goods Classification Table Rules of Interpretation) of the Tariff of the United Kingdom; and

(b) notes to a section or chapter of the Goods Classification Table.

(2) In paragraph (1), *"commodity codes"* has the meaning given by regulation 2(3)."

25. For present purposes, the material part of the UK Tariff is the "Goods Classification Table", which is found in Annex I, Part 3 of the UK Tariff. The Goods Classification Table classifies goods using ten-digit "commodity codes". The classifications in the Goods Classification Table are grouped together under "Sections", "Chapters", and "Headings". The first two digits of a commodity code denote the Chapter concerned, and the next two denote the relevant Heading.

26. Of relevance to this appeal, commodity code "4015 9000 00" of the UK Tariff is associated with the following descriptions:

"Section VII: Plastics and articles thereof; rubber and articles thereof

Chapter 40: Rubber and articles thereof

Heading 4015: Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber

Subheading 4015 9000: Other"

27. Commodity code "6113 0010 00" of the UK Tariff is associated with the following descriptions:

"Section XI: Textiles and textile articles

Chapter 61: Articles of apparel and clothing accessories, knitted or crocheted

Heading 6113: Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907

Subheading 6113 0010: Of knitted or crocheted fabrics of heading 5906"

28. Commodity code 6113 0010 00 is defined with reference to Heading 5906, which in turn is defined with reference to Heading 5902. The descriptions associated with Headings 5902 and 5906 in the UK Tariff are as follows:

"Section XI: Textiles and textile articles

Chapter 59: Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use

Heading 5902: Tyre cord fabric of high-tenacity yarn of nylon or other polyamides, polyesters or viscose rayon

Heading 5906: Rubberised textile fabrics, other than those of heading 5902."

29. The expression "rubberised textile fabric" is defined in Note 5 to Chapter 59 of the UK Tariff (as it stood at the time of the October 2022 ATaR). The definition is as follows:

"(a) textile fabrics impregnated, coated, covered or laminated with rubber:

- weighing not more than 1,500 g/m^2; or

- weighing more than 1,500 g/m^2 and containing more than 50% by weight of textile material;

...

This heading does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 5811"

30. The effect of the final part of Note 5 is to exclude from the scope of Heading 5906 rubberised textile fabric "where the textile fabric is present merely for reinforcing purposes".

31. Paragraph 3 of the 2020 CT Regulations provides that for the purposes of determining the commodity codes within which goods most appropriately fall, the rules of interpretation found in (i) Part 2 of the UK Tariff; and (ii) the Notes to a Section or Chapter of the Goods Classification Table have effect. The first six rules of interpretation found in Part 2 of the UK Tariff are the GIRs.

32. The GIRs which are of relevance to this appeal are as follows:

"**PART TWO – GOODS CLASSIFICATION TABLE RULES OF INTERPRETATION**

SECTION 1

Classification of goods in the Goods Classification Table shall be governed by the following Rules.

General Interpretive Rules

Rule 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.

Rule 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.

Rule 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.

33. The WCO has published the Harmonized System Explanatory Notes ("**HSENs**"), which are applicable when considering the interpretation of the various tariff "Headings", and constitute a means of ensuring the uniform application of the Common Customs Tariff. The GIRs are identical to the HSENs. The HSENs which are relevant to this appeal provide that:

"40.15 – Articles of apparel and clothing accessories (including gloves mittens and mitts), for all purposes, of vulcanised rubber, other than hard rubber

This heading covers articles of apparel and clothing accessories (including gloves, mittens and mitts) e.g., protective gloves and clothing for surgeons, radiologists, divers, etc., whether assembled by means of an adhesive or by sewing or otherwise obtained. These goods may be:

(1) Wholly of rubber.

(2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, other than those falling in **Section XI** (see Note 3 to Chapter 56 and Note 5 to Chapter 59) ...

(3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character"

59.06

…

Exclusion Note (h) – Rubberised fabrics made up as described in Part (II) of the General Explanatory Note to Section XI (generally Chapters 61 to 63).

61.13 - Garments, made up of knitted or crocheted fabrics of heading 59.03, 59.06 or 59.07.

With the exception of babies' garments of heading 61.11, this heading covers all garments made up of knitted or crocheted fabrics of heading 59.03, 59.06 or 59.07, without distinction between male or female wear.

...

It should be noted that articles which are, prima facie, classifiable both in this heading and in other headings of this Chapter, excluding heading 61.11, are to be classified in this heading (see Note 8 to this Chapter).

Furthermore, the heading does not include:

(a) Garments made from the quilted textile products in the piece of heading 58.11 (generally heading 61.01 or 61.02). See Subheading Explanatory Note at the end of the General Explanatory Note to this Chapter.

(b) Gloves, mittens and mitts, knitted or crocheted (heading 61.16) and other clothing accessories, knitted or crocheted (heading 61.17)."

34. In relation to the decision under appeal, and the jurisdiction of the FtT, FA 1994 provides that:

"13A— Meaning of relevant decision

(1) This section applies for the purposes of the following provisions of this Chapter.

(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; …"

"**16. Appeals to a tribunal**

…

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal."

35. The FtT has power to review decisions of HMRC in a number of administrative areas, which are specified in Schedule 5 FA 1994. These decisions are referred to, collectively, as "ancillary matters". Section 16(4) FA 1994 confers a limited jurisdiction on the FtT to examine the reasonableness of ancillary decisions, but with very limited powers to give effect to such findings. An ATaR, however, constitutes a "relevant decision" pursuant to s 13A(2) FA 1994 because it is a decision by HMRC as to the rate at which customs duty is charged, and is not an ancillary matter. This means that the FtT has full appellate jurisdiction, pursuant to s 16(5) FA 1994.

THE APPEAL HEARING

36. At the commencement of the appeal hearing, Mr Starr submitted that whilst the Appellant had not provided any witness statements of witnesses to be called during the hearing, a presentation would be given by Mr Thomas Copsey. He added that the presentation

had already been given to HMRC at the meeting that took place on 2 August 2022. Mr Waldegrave expressed no objections to the presentation to be given by Mr Copsey. Mr Waldegrave then handed up copies of the relevant parts of the UK Integrated Online Tariff, s 16 FA 1994 and Schedule 7 to the TCBTA. A double-sided wetsuit of the type whose classification was in dispute was also exhibited by HMRC.

37. Both representatives were in agreement that the following matters were not in issue between the parties:

(1) The Wetsuits are "articles of apparel".

(2) The neoprene element of the panels on the Wetsuits constitutes "vulcanised rubber".

(3) The textile layers on the panels used to make the Wetsuits constitute "knitted fabric".

(4) The single-sided wetsuits fall under Heading 4015 of the UK Tariff.

38. Whilst Mr Starr accepted that the Wetsuits should be classified according to the material which conveys the "essential character" of the Wetsuits by the application of rule 3(b) of the GIRs, he also submitted that the Wetsuits could be classified with reference to Note (3) of Heading 40.15 of HSENs, without the need to go on to consider rule 3(b) of the GIRs.

39. We then heard the presentation from Mr Copsey.

Appellant's evidence and submissions

40. Mr Copsey has worked for the Appellant for 18 years, selling and handling wetsuits. During his presentation, he addressed the inherent confusion about how the Wetsuits are made. He stated that:

(1) Wetsuits are made from synthetic rubber which was produced in the 1930s. The principle has not changed since the 1950s, except that where petroleum oil was once used, the constituent materials are now mined.

(2) Neoprene is rubber that is produced by polymerisation of chloroprene. The neoprene is baked in an oven to effectively impregnate the rubber with bubbles, to give it insulation. This creates a block of neoprene foam. The neoprene block taken out of the oven is then sliced into varying thickness (typically between 2mm and 6mm), depending on the degree of insulation required. Fabric is then glued to one or both sides of the sliced neoprene, which is then single or double-sided (i.e., the lining). Partial lining is used for ultimate efficiency and warmth. The air bubbles in the foam create insulation and a barrier.

(3) Single-sided wetsuits are more efficient and are easier to put on and take off due to the internal lining. Double-sided wetsuits are laminated with fabric to ease putting on and taking off the wetsuit, with the external textile layer providing protection from abrasive surroundings whilst wearing the wetsuit. Some wetsuits are a combination of both, as is the case with the Wetsuits under consideration. The disadvantage of the fabric coating is weight, which reduces durability.

(4) The internal area of the Wetsuits relevant to this appeal is fully lined and the external area has panels on the whole suit, except the chest area and the lower back, which have pure neoprene to the exterior surfaces but lining to the interior surface.

41. Under cross examination by Mr Waldegrave, Mr Copsey said this:

(1) The Wetsuits are comprised of panels made of neoprene, with textile layers. The textile layers are 90% polyester and 9% to 10% spandex. The panels are sewed or glued together. There are only two lined panels on a single-sided wetsuit (to the chest and lower back areas). The figures included in the Table setting out the metrics of wetsuits refer to the thickness of the Wetsuits.

(2) The percentage of neoprene used depends on the thickness of the wetsuit. It could be 70% neoprene and 30% textile, or 65% neoprene and 35% textile.

(3) Children's wetsuits are made up of 12 to 15 panels and adult wetsuits are made up of up to 30 panels. The Wetsuits relevant to this appeal are made up of 15 to 20 panels. The Wetsuits have neoprene only in the areas covering certain parts of the torso (chest and lower back).

42. In re-examination by Mr Starr, Mr Copsey stated that the ratio between fabric and neoprene varies depending on the type of wetsuit.

43. Mr Starr's submissions can be summarised as follows:

(1) The starting point in any classification must be the Tariff Notes relevant to the product under consideration. In the circumstances of this appeal, the relevant Notes are those that relate to Heading 4015, as this is *prima facie*, where the Wetsuits fall to be classified.

(2) The primary material used in the manufacture of the Wetsuits is neoprene, which is then covered on one side or both sides with textile. The textile covering the outer surface of the Wetsuits is for reinforcement purposes only, as the neoprene has a propensity to tear. The optional textile covering on the inner surface exists to provide a degree of additional comfort and is not essential to the function of the Wetsuits.

(3) The overriding consideration when assessing "essential character" must be the roles of the constituent materials in relation to the use of the Wetsuits. The function of the Wetsuits is to keep the wearer warm in cold water and it is only the neoprene that achieves this. On this basis alone, the Wetsuits must be classified under Heading 4015.

(4) In accordance with Note 3 of the GIRs, "articles of rubber" with textile coverings must be classified according to their essential character. The term "essential character" is only used in conjunction with rule 3(b) of the GIRs and it follows that Note (3) of the HSENs to Heading 40.15 precludes classification of the Wetsuits under rule 1 and rule 6 of the GIRs.

(5) Classification must fall to the material that enables the Wetsuits to fulfil their primary purpose; that is to keep the wearer warm in cold water. It is the neoprene alone that performs this function. The Wetsuits must be classified as "an article of apparel of vulcanised rubber", under Heading 4015 of the UK Tariff.

44. Mr Starr also addressed the problems with HMRC's classification of the Wetsuits under Heading 6113, as follows:

(1) The Binding Tariff Information ('**BTI**') showed that the United Kingdom previously issued rulings for double-sided wetsuits under Heading 6113, with the means of classification listed as rule 1 and rule 6 of the GIRs (without recourse to rule 3(b)), and the Notes in Headings 59.06 and 40.08 of the HSENs.

(2) Categorising the material composition of the Wetsuits as "rubberised textile" would be misguided.

(3) The European Regulation begins by referring to Chapter 59, in order to classify the material that the Wetsuits are made from, and not the Wetsuits themselves. Having established, by reference to Note 5 to Chapter 59 and the additional Notes in Heading 40.08, the European Regulation then proceeds to state that a wetsuit made with textile must be classified as an "article of textile" under Heading 59.06 on the basis that the textile covering "constitutes more than just reinforcement". This then gives rise to the result that wetsuits must be classified as an "article of apparel of textile" under Heading 6113 of the UK Tariff. An unworked piece of fabric is, however, different from a finished article such as a wetsuit.

(4) The Notes to Chapter 59 show that the Heading does not apply to sheets or strips of cellular rubber combined with textile fabric where the textile is present merely for reinforcing purposes. The limiting nature cannot, therefore, be used as a basis for classifying a wetsuit under rule 1 and rule 6 of the GIRs as it is clear that the scope of the Note does not extend to finished articles. The European Regulation seeks to bypass this problem by referring to rule 3(b) of the GIRs, which can only be engaged when it is not possible to classify a product under rule 1 and rule 6 of the GIRs. The effect of rule 3(b) is to render all Tariff Notes redundant.

(5) The term "essential character" is inextricably linked to rule 3(b) and can only be considered in accordance with the HSENs. The Notes to Heading 40.08 become redundant once rule 3(b) is engaged.

(6) The Tribunal in *Sola Wetsuits* rightly concluded that the scope of Heading 40.08 did not extend to products that, *prima facie*, fall within Heading 40.15.

HMRC's evidence and submissions

45. We heard oral evidence from Ms Elizabeth Earwicker (HMRC Senior Policy Advisor) and Mr Mark Richard Rose (HMRC Tariff Classification Officer).

46. Ms Earwicker is a Senior Policy Advisor at HMRC. She has been employed by HMRC since August 1986 and has been working as a Senior Policy Advisor for eight years. She became involved in this matter when Senior Officer Joanne Goudie asked her to support Higher Officer Neil Dore with a trader meeting involving Appellant and its agent. In her oral evidence, Ms Earwicker adopted the contents of her witness statement, dated 12 October 2023, as being true and accurate. She was not asked any further questions in examination-in-chief by Mr Waldegrave, other than to identify various exhibits to her witness statement.

47. In her witness statement, Ms Earwicker states that the notes to the meeting that took place between the Appellant and HMRC in August 2022 show that there was a fundamental difference between how Mr Starr thought a wetsuit should be classified within Chapter 40, which covers rubber articles where the majority of panels that make up the wetsuit are made from neoprene covered on both faces with a knitted fabric. She states that, in her view, the Wetsuits should be treated as a "textile", relevant to Chapter 61, which covers "articles of apparel and clothing accessories, knitted or crocheted fabrics". This view, she states, is borne out by the Harmonized System. She adds that the Section and Chapter Notes of the UK Tariff are legally binding, and that the HSENs provide guidance on each Heading to ensure all WCO contracting parties that sign up to use the Harmonized System are consistent.

48. Ms Earwicker explained her approach to determining classification of the Wetsuits under the UK Tariff, stating that she first considers where a sheet of the material which makes up a wetsuit is classified. This is because most Chapters have the raw materials described at the beginning, semi-manufactured products in the middle and "made-up" articles of those materials at the end. Therefore, if a sheet of the material is classified within a certain

Chapter, then a "garment" made up of that material will also be classified there. Using this logic, if a neoprene sheet covered on one face is classified within Chapter 40, specifically under Heading 4008 (which covers plates, sheets, strip rods and profile shapes, of vulcanised rubber other than hard rubber), so will a garment made up from these sheets be classified within the same Chapter; specifically under Heading 4015 (which covers articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber).

49. Equally, if a textile sheet made up of neoprene covered on both faces with a "knitted" fabric is classified within Heading 5906 (which covers rubberised textile fabrics other than those of Heading 5902), a "made up" article made into a garment from this fabric will be classified within Chapter 61, as Chapter 59 covers impregnated, coated, covered or laminated textile fabrics. She explains that Chapter 40, Note 2(a), states that goods of Section XI (textiles and textiles articles) are not covered in the Chapter. She adds that Section XI Note 1(ij) relates to "woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated or laminated with rubber, or articles thereof" of Chapter 40 are not covered in this Section.

50. She further adds that having identified the Heading for the neoprene and textile combination, she considers where a garment made from this is classified. She explains that Chapter 61, specifically Heading 6113, covers "garments made up of a knitted, or crocheted, fabrics of Headings 5903, 5906 or 5907". Thus, in her view, one must first see where a sheet of the material is first classified to understand where the made up garment would be classified. Her view is that the European Regulation cited rule 3(b) when considering wetsuits as there is a mixture of neoprene panels that make up the wetsuit; some with textile covering on one face and others covered on both faces. Thus, there are two competing Headings: "4008" and "5906". Because the majority of the panels are made up of materials of Heading 5906, the "essential character" is deemed to be that of a textile material and, therefore, such a made up garment would be relevant to Heading 6113. She adds that a wetsuit made up of all the same panels would not invoke rule 3 of the GIRs as it is only because of the two competing Headings that the rule requires to be invoked.

51. In conclusion, Ms Earwicker states that goods made up entirely of neoprene covered on both faces would be classified within Heading 6113, and goods made up entirely of neoprene covered on one face would be classified using the same GIRs within Heading 4015.

52. She was not cross-examined by Mr Starr.

53. In response to questions for the purposes of clarification, Ms Earwicker stated that the conclusion that the Wetsuits are laminated textile arises as a result of the fact that another layer is applied to the Wetsuits using glue to bond the neoprene with a layer of textile. She added that, in her view, there was no difference between laminated textile fabrics and lamination using rubber.

54. We then heard from Mr Rose.

55. Mr Rose has been employed by HMRC since 2002 and has been working as a Tariff Classification Officer for five years. In his current role, he works as part of a team responsible for classifying goods within the UK Tariff. He provides tariff rulings to importers and their representatives, as well as tariff classification advice to HMRC and the UK Border Agency to determine the duty liability of imported goods in cases where traders are unclear as to what tariff classification they should adopt.

56. In his oral evidence, Mr Rose adopted the contents of his witness statement, dated 20 October 2023, as being true and accurate. He was not asked any further questions in examination-in-chief by Mr Waldegrave. In response to questions for the purposes of

clarification, Mr Rose stated that Heading 4008 was relevant to single-sided wetsuits and Heading 5906 was relevant to double-sided wetsuits. He added that the Wetsuits cannot be classified under rules 1 and 6 of the GIRs, without reference to rule 3(b). This was because the same fabric/materials had not been used throughout.

57. Under cross-examination from Mr Starr, Mr Rose re-iterated that he was of the view that it was necessary to consider rule 3(b) of the GIRs given the use of different types of material within the Wetsuits.

58. In his submissions, Mr Waldegrave took us through the background chronology and the relevant law, which we will not repeat here. Mr Waldegrave's submissions can be summarised as follows:

(1) The Appellant criticises the decision-making process by HMRC. The FtT does not, however, have jurisdiction to consider the process by which HMRC made the decision as the FtT is considering a "relevant decision" and has full appellate jurisdiction in this respect.

(2) The classification of goods is taken from the Harmonized System and the HSENs provide further guidance, but do not have the force of law. The HSENs should, however, be taken into account as being informative, but not determinative. Paragraph 1 of Schedule 7 to the TCBTA removes the legal force of the European Regulation. The European Regulation is, nevertheless, of assistance because it sets out the European Commission's reasoning, which is of persuasive force.

(3) It is necessary to look at: (i) the description associated with the "Headings" in the UK Tariff; (ii) the Notes to "Sections" and "Chapters"; (iii) the HSENs; and (iv) the European Regulation.

(4) The Wetsuits fall within commodity code 6113 0010 00. This is the effect of: (i) Note b(a) to Chapter 40, which provides that the Chapter does not cover any goods which fall within Section XI; and (ii) Note a(ij) to Section XI, which provides that the Section does not cover goods falling within Chapter 40 (rubber and articles made of rubber). Where neoprene is only on one side of wetsuits, a wetsuit can be considered to be of rubber. Where textile is on both sides, together with neoprene, the wetsuit is made up of textile. As the Wetsuits in this appeal are combined with both "rubber" and "textile", they could be classified as both and the tie-breaker rule (i.e., rule 3(b) of the GIRs) is relevant. Textile is favoured because most of the panels used on the Wetsuits under consideration are textile.

59. In relation to "commodity code 6113 0010 00" (Heading 6113), Mr Waldegrave submits that:

(1) The analysis should begin by considering whether the Wetsuits fall within the terms of commodity code 6113 0010 00. It is not necessary to consider whether the Wetsuits fall within the terms of the titles of Section XI, or Chapter 61. This is because rule 1 of the GIRs provides that *"[t]he titles of Sections, Chapters and sub-Chapters are provided for ease of reference only"*.

(2) As a matter of ordinary language, a Wetsuit clearly constitutes a "garment". This is supported by the fact that, as used in the UK Tariff, the term "garment" has a broad meaning. This is apparent from the Notes to Chapter 61 of the UK Tariff, in which the term "garment" is used in relation to a wide range of clothing, including ski suits, evening dress and clothing for babies.

(3) It is necessary to consider whether the Wetsuits are "made up" of a fabric of the kind referred to in Heading 6113. The expression "made up" is defined in Note g to Section XI. It includes (in Note g(f)) materials being *"[a]ssembled by sewing, gumming or otherwise"*. This definition of "made up" has an exclusion for certain kinds of "piece goods". As a matter of ordinary language, this expression typically refers to lengths cut from a roll of fabric. The exclusion relating to "piece goods" is, therefore, not relevant.

(4) The next question is whether the materials from which the Wetsuits are "made up" constitute "knitted or crocheted fabrics" falling within any of Headings 5903, 5906, or 5907. HMRC's case is that the panels from which the Wetsuits are made fall within Heading 5906. It will be necessary to consider whether the textile element of the material used to make the Wetsuits is "present merely for reinforcing purposes". HMRC accept that there are two relevant requirements which must be satisfied: the material in question must (i) constitute a "knitted or crocheted fabric"; and (ii) fall within Heading 5906.

(5) Where neoprene is covered on one side only, with a textile layer, the textile is - for the purposes of the UK Tariff - to be regarded as present merely for reinforcing purposes. On the other hand, where textile is present on both sides of neoprene, it is to be regarded as present for purposes which go beyond mere reinforcement. On this basis, the exclusion in the final part of Note 5 to Heading 5906 does not apply in relation to the double-sided panels.

(6) To the extent that the Wetsuits are made up of such composite material, classification under Heading 6113 is required. HMRC rely on the HSENs in this regard.

60. In relation to "commodity code 4015 9000 00", Mr Waldegrave submits that:

(1) HMRC do not dispute that the Wetsuits are "articles of apparel". HMRC also agree that the neoprene element of the panels from which they are made constitutes "vulcanised rubber", and not "hard rubber".

(2) The effect of the HSEN for Heading 40.08 is to make clear that rubber combined with textile fabric on both sides is excluded from Heading 40.08 and must be classified under Heading 59.06. Although it is accepted that this HSEN does not directly apply to Heading 4015, HMRC submit that to the extent that a wetsuit is made up of double-sided panels, classification under Heading 4015 is not possible. In other words, the combined effect of the HSEN for Heading 40.08 and Note 5 to Heading 5906 is that the panels covered in textile on both sides are treated as textiles, and not rubber. Products from which they are made therefore fall to be classified under Heading 6113, rather than Heading 4015.

(3) The decision in *Sola Wetsuits* is of limited assistance to the Appellant. In particular, in that case the VAT & Duties Tribunal ('VDT') found that *"the textile fabric is present merely for reinforcing purposes"*, which is not a finding that can be made in this appeal.

61. We are grateful to both representatives for their helpful and succinct submissions. At the conclusion of the hearing, we reserved our decision, which we now give with reasons.

FINDINGS OF FACT

62. The background facts are not in dispute between the parties. We shall not, therefore, refer to the background here. The following facts were either accepted or proved:

(1) The Wetsuits are articles of apparel.

(2) The neoprene element of the panels on the Wetsuits constitutes vulcanised rubber.

(3) The textile layers on the panels constitute fabric.

(4) The neoprene provides insulation, and not the textile.

63. We, therefore, make these findings of fact.

DISCUSSION

64. The Appellant appeals against an ATaR certificate issued by HMRC on 27 October 2022, relating to Wetsuits imported by the Appellant into the United Kingdom.

The UK Tariff

65. The UK Tariff is based on the Combined Nomenclature ('**CN**') of the European Union, and the Harmonized System developed by the WCO. Prior to the United Kingdom's departure from the European Union, tariff classification was performed against the CN, contained in Annex I of the European Regulation. A taxpayer was entitled to request BTI from HMRC, determining the correct commodity code. The BTI was binding between the taxpayer and HMRC - and all other EU customs authorities - for a period of three years. Following the departure of the United Kingdom from the European Union, the BTI system was replaced with the ATaR system. BTIs issued across the EU are no longer legally binding on the United Kingdom; but are often considered to be of persuasive value as the EU is one of the WCO Harmonized System's contracting parties.

66. The UK Tariff is referred to in reg. 1(2) of the 2020 CT Regulations and made under s 8 of the TCBTA (supra). The UK Tariff classifies goods by reference to a number of "Sections", "Chapters" and "Headings", each of which has accompanying notes to aid in interpretation. These notes are contained within the Integrated Tariff, which is laid out in a Statutory Instrument, updated each year. The "Goods Classification Table" is found in Part 3 of the UK Tariff. The Goods Classification Table classifies goods according to their nature, origin or any other factor (s 8(1)(a) of the TCBTA and reg. 2(2) of the 2020 CT Regulations) and gives ten-digit commodity codes to the goods so classified (s 8(1)(b) and reg. 2(3)). These classifications match those used in the CN, which itself is based on the Harmonized System. The first two digits of a commodity code denote the "Chapter" concerned, and the following two digits denote the relevant "Heading".

67. Each Chapter of the UK Tariff follows the same structure. Earlier Headings within a Chapter refer to raw materials and later Headings list articles made up of such materials. For example, the earlier Headings in Chapter 40 are concerned with various forms of rubber, while later Headings are concerned with items made of rubber. We accept that it is implicit in such a scheme that an item can only fall within one of the later Headings in a Chapter if it is made of a material which would fall within one of the earlier Headings. This means that the terms of earlier Headings in a particular Chapter can inform what kind of items can fall within later Headings.

68. The Wetsuits fall to be classified under one of two commodity codes under the UK Tariff: either 4015 9000 00 (if the primary constituent material is considered to be "neoprene") (the Appellant's case) or 6113 0010 00 (if the primary constituent material is considered to be "textile") (HMRC's case). In determining this appeal, we will need to consider the terms of the UK Tariff as it stood on 27 October 2022 (i.e., the date of the ATaR under appeal).

69. Classification of goods in the "Goods Classification Table" within the UK Tariff is governed by the GIRs. Rules 1 and 6 of the GIRs provide that:

> "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:
>
> …
>
> 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."

[Emphasis added]

70. Rule 1 and rule 6 of the GIRs require the same materials the be used throughout the goods, which is not the case in the circumstances of this appeal. Rule 3(a) provides that:

> (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.

71. Rule 3(b) of the GIRs applies if rule 3 (a) fails. Rule 3(b) relates to mixtures of materials. We shall return to rule 3(b) of the GIRs later. It is clear, therefore, that where goods are comprised of mixtures of materials, they cannot be classified with reference to rule 1 and rule 6 of the GIRs.

Sola Wetsuits

72. As is the case in the appeal before us, the issue in *Sola Wetsuits* concerned whether wetsuits covered on both sides with textile fabric should be classified under Heading 40.15 (as the appellant in that appeal maintained), or Heading 61.13 (as the respondents argued). The wetsuits in *Sola Wetsuits* were full suits intended to cover the upper and lower torso, made up of several shaped panels stitched together. It was the appellant's uncontested evidence that wetsuits had to be made of neoprene rubber, and that the suits would not work as wetsuits unless they were made of that substance. The neoprene provides a thermal barrier to heat up the water in the suit. As is the case in the appeal before us, the major component of the wetsuit in *Sola Wetsuits* was the neoprene. The respondent's approach in that appeal was to say that if more than 50% of the wetsuit was double-lined, then it should be classified to Heading 61.13; whereas if less than 50% was double-lined, it should be classified to Heading 40.15.

73. As was HMRC's approach in the appeal before us, the approach followed by the respondents in *Sola Wetsuits* was to look at Chapter 40 and, on seeing that the Notes excluded goods of Section XI, conclude that the textile Chapters of Section XI must be considered first and, only when the relevant goods were excluded from Section XI, could Chapter 40 apply. The respondents considered that the knitting of the yarn produced a textile fabric of Chapter 61, which fell within Section XI.

74. The respondents then considered the make-up of the wetsuits, which were made of several panels each of a combination material of single-lined or double-lined neoprene, and decided that it was necessary to establish where each type of combination material would be classified in order to say whether the goods were of "rubber" or of "textile". The next step adopted by the respondents was to consider the HSENs, which recognise that "cellular rubber" may be presented with textiles for "reinforcement purposes".

75. The review officer in *Sola Wetsuits* gave her opinion that where the cellular neoprene was covered in textile on both sides, it was excluded from Heading 40.08. Having concluded that the material should be classified under Heading 59.06, the combination material being not of rubber but of textile, the review officer then looked to see where goods made up from that material should properly be classified. She referred to Note 7 to Section XI, where the expression "made up" was defined as covering cut, sewn and assembled articles. She concluded that Heading 61.13 specifically covered garments made up of fabrics of Heading 59.06. It was noted by the review officer that the HSENs to Heading 61.13 gave examples of the type of garments included, and that divers' suits were mentioned there. In conclusion, the review officer stated that using rule 1 of the GIRs, she was satisfied that the correct Heading for the wetsuits was 61.13.

76. The main argument on behalf of the appellant in *Sola Wetsuits* was that the material from which the wetsuits were made was, principally, rubber laminated with a textile, and should not be regarded as, principally, a textile. It was further argued that the wetsuits in question could not be classified in accordance with rule 1 of the GIRs, according to the terms of the Headings and the relative Section or Chapter Notes and, accordingly, it was necessary to look at the provisions of rule 2, and of rule 3 in particular.

77. The appellant in *Sola Wetsuits* submitted that Note 2 to Chapter 40, which, as already observed, is headed "rubber and articles thereof", provides that the Chapter does not cover goods of Section XI (textiles and textile articles). The appellant further submitted that Note 9 provided that in Headings 40.01, 40.02, 40.03, 40.05 and 40.08, "plates, sheets and strips" applies only to various forms "…not otherwise cut to shape or further worked". In Heading 40.08, the expression "rods and profile shapes" applies only to such products, whether or not cut to length or surface-worked, but not otherwise worked. It was submitted that if this limitation applies to those particular Headings, then the Explanatory Notes to the Chapter which relate to the same Heading must carry the same restriction, and that a specific note to a specific Heading should not be taken out of context and applied randomly to other goods in a different classification Heading.

78. The appellant relied on, *inter alia*, rule 3(b) of the GIRs. The appellant further submitted that the law as defined in the Chapter Heading Notes made no distinction between single and double-lined neoprene. It was submitted that consistency in the interpretation and classification process should apply. Rule 1 of the GIRs was considered not to be applicable as there was no specific classification available and, therefore, rule 3(b) should apply.

79. The VDT decided the appeal in favour of the appellant, concluding that the wetsuits in question should be classified under Heading 40.15.

The European Regulation

80. The European Regulation was enacted in response to the decision of the VDT in *Sola Wetsuits*. The EU's Customs Code Committee took the view that the wetsuits should properly have been classified under Heading 61.13. The European Regulation was enacted to deal with the classification of products of the following description:

> "Unlined close-fitting garment, covering the whole body from the shoulder to the ankle enveloping each leg separately. With long sleeves. Hemmed at the sleeve ends and at the leg ends. With partial opening at the back reaching down to the waist and fastened by a zip. With a tight fitting collar, fastened at the back by a velcro type strap.
>
> The garment is made up of several panels, assembled by sewing.
>
> The garment is predominantly of cellular rubber panels covered on both faces with a layer of unicoloured knitted textile fabric (man- made fibres). Only a small front chest panel, two of

the four back panels and the panels of the lower sleeves are of an embossed cellular rubber covered only on one face (on the inside of the garment) with a layer of unicoloured knitted textile fabric.

(surf/diving suit)"

81. The European Regulation was discussed during the 316th meeting of the Statistical Nomenclature Section of the Customs Code Committee Textile Sector ("the Committee"), on 25 to 26 June 2003. The Committee discussed the classification of wetsuits, inviting Sola Wetsuits to present their products to the Committee. The Committee was of the view that the wetsuits were most suited to classification within Chapter 61, and issued the European Regulation to regularise the classification across EU member states. The reasons for this classification were given as follows:

"The classification is determined by the provisions of general rules 1, 3 (b) and 6 for the interpretation of the Combined Nomenclature (GIR), by note 7(f) to Section XI, by notes 2(a) to Chapter 40, 4 to Chapter 59, 1 to Chapter 61, and 1(e) to Chapter 95, as well as the wording of CN codes 6113 and 6113 00 10.

The article is made up within the meaning of note 7(f) to Section XI and consists mainly of cellular rubber panels covered on both faces with a layer of textile fabric. These panels of combined materials give the essential character to the garment (GIR 3b).

As the cellular rubber is covered on both faces with a layer of textile fabric, the latter is regarded as having a function beyond that of mere reinforcement, since it confers the essential character of textile to the material. Therefore, the textile fabric being present not merely for reinforcing purposes within the meaning of Chapter note 4, last paragraph, to Chapter 59, it is considered to be the constituent material of the article. (See also the HS Explanatory Notes to heading 4008, third paragraph, and fourth paragraph, (A)).

Thus, the article is a garment made up of knitted fabrics of heading 5906 and, in accordance to note 1 to Chapter 61, is classified in subheading 6113 00 10.

Classification in heading 4015 is excluded within the meaning of GIR 3b as only a minor part of the garment is made of sheets of cellular rubber covered only on one face with a textile fabric being present merely for reinforcing purposes (heading 4008)."

82. Once issued, the European Regulation was binding on all EU Member States. Following the UK's departure from the EU on IP-completion day (i.e., 31 December 2020), the European Regulation no longer has legal effect in the UK, by virtue of para. 1 of Schedule 7 to the TCBTA, as follows:

Schedule 7 Import Duty: Consequential Amendments

1

(1) Any direct EU legislation, so far as imposing or otherwise applying in relation to any EU customs duty, that forms part of the law of the United Kingdom as a result of section 3 of the European Union (Withdrawal) Act 2018 (incorporation of direct EU legislation) ceases to have effect.

(2) Nothing in—

(a) any direct EU legislation, or

(b) section 4(1) of the European Union (Withdrawal) Act 2018 (saving for EU rights, powers, liabilities, obligations, restrictions, remedies and procedures), is to have effect in relation to import duty.

(3) Part 1 of this Act—

(a) contains provisions replacing EU customs duties,

(b) is not retained EU law, and

(c) so far as it contains powers to make or give regulations or public notices, enables provision to be made of a kind corresponding to that which could previously have been made by the legislation ceasing to have effect as a result of sub- paragraph (1).

(4) In this paragraph—

(a) any reference to EU customs duty includes any EU trade duty,

(b) the reference to EU trade duty is to anti-dumping duty, countervailing duty, safeguard duty and any duty imposed in consequence of an international dispute, and

(c) the reference to Part 1 of this Act does not include section 29 or this Schedule.

83. HMRC's position is that the European Regulation is still persuasive.

84. Turning to the circumstances of this appeal:

Consideration

85. The Wetsuits in the appeal before us are described as all-in-one wetsuits designed for surface water sports. The Wetsuits are intended to cover the upper and lower part of the body, reaching from the shoulders to the ankles and enveloping each leg separately, with long sleeves, round turtle style neckline, reinforcement on the knees and a small discreet key pocket to the side of the lower right leg. The Wetsuits also have a zip fastener to the front, across the upper chest. The company name appears to the right front and back chest area. The Wetsuits comprise of neoprene panels, with the majority covered on both sides with a knitted textile. There is an area to the front chest, and a small area to the lower back, where the neoprene is only covered by textile on the inside.

86. The parties have diametrically opposed views as to what the correct classification of the Wetsuits should be. It will be helpful to revisit the descriptions given to the classification of goods and products in the UK Tariff.

87. As considered earlier, HMRC's position is that the Wetsuits fall to be classified under commodity code "6113 0010 00". To recap, the descriptions associated with this commodity code in the UK Tariff are as follows:

"Section XI: Textiles and textile articles

Chapter 61: Articles of apparel and clothing accessories, knitted or crocheted

Heading 6113: Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907

Subheading 6113 0010: Of knitted or crocheted fabrics of heading 5906."

88. As commodity code 6113 0010 00 is defined with reference to Heading 5906, which in turn is defined with reference to Heading 5902, it is necessary to revisit the descriptions associated with Headings 5902 and 5906 in the UK Tariff are as follows:

"Section XI: Textiles and textile articles

Chapter 59: Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use

Heading 5902: Tyre cord fabric of high-tenacity yarn of nylon or other polyamides, polyesters or viscose rayon

Heading 5906: Rubberised textile fabrics, other than those of heading 5902."

89. In further amplification of HMRC's position, Mr Waldegrave submits that Heading 6113 of the UK Tariff applies because: (i) the double-sided panels on the Wetsuits constitute "rubberised textile fabrics", as that expression is defined in the UK Tariff; and (ii) the double-sided panels make up the clear majority of the panels. He adds that the reason why the double-sided panels fall to be regarded as "rubberised textile fabrics" is because the textile fabric is not present solely for the purposes of reinforcing the neoprene - although it may extend the life of the wetsuit - but also to make a Wetsuits more comfortable. On the other hand, where textile is present on both sides of neoprene, it is to be regarded as present for purposes which go beyond mere reinforcement.

90. Mr Waldegrave submits that the correct method to adopt in classifying the Wetsuits is to, firstly, consider the material the product is manufactured from. He submits that the Wetsuits consist of neoprene panels (a synthetic, vulcanised rubber) covered on one or both sides with a "knitted textile". Mr Waldegrave adds that, as a matter of ordinary language, a wetsuit clearly constitutes a "garment". This, he submits is supported by the fact that, as used in the UK Tariff, the term garment has a broad meaning (see notes to Chapter 61 of the UK Tariff in which the term garment is used in relation to a wide range of clothing including ski suits, evening dress, and clothing for babies). Mr Waldegrave did not, however, refer to the Dictionary meaning of the word "garment", but we are satisfied that nothing in this appeal turns on the definition of a garment.

91. Mr Waldegrave further submits that the second stage is to consider whether the Wetsuits are "made up" of a fabric of the kind referred to in Heading 6113. The expression "made up" is defined in Note g to Section XI and it includes (in Note g(f)) materials being "assembled by sewing, gumming or otherwise". He then submits that the third stage is to consider whether the materials from which the Wetsuits are "made up" constitute "knitted or crocheted fabrics" falling within any of Headings 5903, 5906, or 5907. HMRC's case is that the panels from which the Wetsuits are "made up" fall within Heading 5906, which refers to "rubberised textile fabrics, other than those of heading 5902". The meaning of "textile fabric" is given in Note a to Chapter 59. This provides that the expression:

> "applies only to the woven fabrics of Chapter 50 to Chapter 55 and heading 5803 and 5806... and the knitted or crocheted fabrics of heading 6002 to 6006."

92. HMRC's case is then that, in this appeal, the textile layers on the panels fall within Heading 6006, which applies to "other knitted or crocheted fabrics". The expression "rubberised textile fabrics" is defined in Note 5 to Chapter 59 of the UK Tariff. As considered earlier, the definition is as follows:

> "(a) textile fabrics impregnated, coated, covered or laminated with rubber:
>
> - weighing not more than 1,500 g/m^2; or
>
> - weighing more than 1,500 g/m^2 and containing more than 50% by weight of textile material;
>
> ...
>
> (c) fabrics composed of parallel textile yarns agglomerated with rubber, irrespective of their weight per square metre.
>
> This heading does not, however, apply to plates, sheets, or strips of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 5811."

93. The commodity code which the Appellant contends applies to the Wetsuits is "4015 9000 00". The descriptions associated with this commodity code in the UK Tariff are as follows:

> "Section VII: Plastics and articles thereof; rubber and articles thereof
>
> Chapter 40: Rubber and articles thereof
>
> Heading 4015: Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber
>
> Subheading 4015 9000: Other"

94. In essence, the Appellant's case is that the Wetsuits are made of "vulcanised rubber".

95. Mr Starr's position is, in summary, that the primary material used in the manufacture of the Wetsuits is "neoprene", which is then covered on one side or both sides with textile. The textile covering the outer surface of the Wetsuits is for "reinforcement purposes" only as the neoprene has a propensity to tear. The optional textile covering on the inner surface exists to provide a degree of additional comfort and is not essential to the function of the Wetsuits. He submits that categorising the material composition of the Wetsuits as "rubberised textile" would be misguided. He further submits that rule 3(b) of the GIRs provides that articles of rubber with textile coverings must be classified according to their "essential character".

96. Mr Starr submits that the term "essential character" is only used in conjunction with rule 3(b) of the GIRs and, further, that Note (3) to Heading 40.15 of the HSENs precludes classification of the Wetsuits under rule 1 and rule 6 of the GIRs. This, he submits, is because classification must relate to the material that enables the Wetsuits to fulfil their primary purpose; that is to keep the wearer warm in cold water. He also submits that it is the neoprene alone which performs this function. Therefore, the Wetsuits must be classified as "an article of apparel of vulcanised rubber", under Heading 4015 of the UK Tariff.

97. Mr Starr relies on the decision by the then VDT in *Sola Wetsuits* in support of the Appellant's position that the Wetsuits should be classified according to Heading 4015. In this respect, he submits that one must have regard to the final product, and not just the material that it is made up from, in determining the classification of the Wetsuits. In his written submissions (the Appellant's Skeleton Argument), Mr Starr argues that the analysis starts and ends with Note (3) of Heading 40.15 of the HSENs. Whilst Mr Waldegrave considered Heading 40.15 of the HSENs, he does not address Mr Starr's point on Note (3). We not, however, that by his own submissions, Mr Waldegrave's position on behalf of HMRC is that the HSENs are relevant.

98. Mr Waldegrave submits that the outcome in *Sola Wetsuits* was as a result of the findings made by the VDT, at [52] to [54], as follows:

> "52. Nowhere other than in the Note 40.08 is a distinction made between single and double reinforcement. In the present case we find that the textile fabric is present merely for reinforcing purposes
>
> …
>
> 53. We do not accept that the Respondents' argument is reinforced by the inclusion of divers' suits in Chapter 61. The Appellant makes divers' suits as well as wetsuits and described the process as being very different from that involved in making wetsuits, which we accept.
>
> 54. We have not sufficient information on the items in the BTIs to be persuaded that they are helpful, particularly given that the purpose of the fabric covering is not specified and in our view it is of the greatest importance in the present case that the sole purpose of the double-lining was for reinforcement on those areas where the suit was rubbed..."

99. Mr Waldegrave, therefore, submits that the material finding made by the VDT was that the purpose of the double-lining was for reinforcement. He further submits that such a finding cannot be made in the appeal before us.

100. Having considered the parties' respective positions, we note that it is accepted by both parties that the Wetsuits comprise of a "mixture of materials" and cannot be defined by reference to only one of the materials used, subject to the provisions of the relevant Explanatory Notes. The Wetsuits are of more than one material or substance (being of neoprene rubber combined with knitted textile fabric). Taking the two Headings of the UK Tariff (i.e., 4015 and 6113) in sequential order, we are satisfied that Heading 4015 is the logical starting point.

101. Heading 4015 of the UK Tariff clearly refers to "Articles of apparel and clothing accessories (…), for all purposes, of vulcanised rubber other than hard rubber". HMRC accept that the Wetsuits are "articles of apparel" and "vulcanised rubber". This is not in issue between the parties. HMRC's case is, essentially, that the Wetsuits constitute "knitted fabrics" but they do not dispute the fact that neoprene is also present.

102. The Chapter Note to Heading 4015 states that:

> "**Chapter notes**
>
> 1. Except where the context otherwise requires, throughout the classification the expression 'rubber' means the following products, whether or not vulcanised or hard: natural rubber, balata, gutta-percha, guayule, chicle and similar natural gums, synthetic rubber, factice derived from oils, and such substances reclaimed.
>
> 2. This chapter does not cover:
>
> a. goods of Section XI (textiles and textile articles) …"

103. We will return to the presence of textile fabrics in the Wetsuits later.

104. The additional Chapter Note to Heading 4015 states this:

> "**Additional chapter note**
>
> Where woven, knitted or crocheted fabrics, felt or nonwovens are present merely for reinforcing purposes, gloves, mittens or mitts impregnated, coated or covered with cellular rubber belong to Chapter 40 even if they are:
>
> - made up from woven, knitted or crocheted fabrics (other than those of heading 5906), felt or nonwovens impregnated, coated or covered with cellular rubber; or
> - made up from unimpregnated, uncoated or uncovered woven, knitted or crocheted fabrics, felt or nonwovens and subsequently impregnated, coated or covered with cellular rubber."

105. We find that double-sided wetsuits, such as the Wetsuits in this appeal, are neither impregnated with rubber, or made up from unimpregnated fabrics covered with rubber.

106. We are satisfied that one cannot simply ignore the HSENs. Although the HSENs and are not legally binding, in *Hasbro*, at [18], Newey LJ (with whom Lewison and Patten LJJ agreed) stated that:

> "There is no doubt but that explanatory notes can and should be taken into account when deciding whether an item is capable of being classified under a particular heading."

107. And, at [28]:

> "…HSENs plainly fall to be taken into account when considering the scope of a heading and, hence, whether goods are "prima facie classifiable under [it]" for the purposes of GIR 3(a), but that by no means implies that HSENs should be read into a heading."

108. We agree with these propositions. The HSENs in relation to Heading 40.15 are expressed in the following terms:

> "**40.15 – Articles of apparel and clothing accessories (including gloves mittens and mitts), for all purposes, of vulcanised rubber, other than hard rubber**
>
> This heading covers articles of apparel and clothing accessories (including gloves, mittens and mitts) e.g., protective gloves and clothing for surgeons, radiologists, divers, etc., whether assembled by means of an adhesive or by sewing or otherwise obtained. These goods may be:
>
> (1) Wholly of rubber.
>
> (2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, other than those falling in **Section XI** (see Note 3 to Chapter 56 and Note 5 to Chapter 59) ...
>
> (3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character"

109. Taking Notes (1) to (3) of Heading 40.15 in turn, it is clear that the Wetsuits are not "wholly of rubber", given the textile fabrics included. Note (1) is not, therefore, applicable. In respect of Note (2), the Wetsuits clearly are not "of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, other than those falling in Section XI" (with reference to Note 5 to Chapter 59). Heading 5906 refers to "Rubberised textile fabrics, other than those of heading 5902". While textile clearly is present on the Wetsuits, we have already observed that the effect of the final part of Note 5 of Chapter 59 is, however, to exclude from the scope of Heading 5906 rubberised textile fabrics "where the textile fabric is present merely for reinforcing purposes and textile fabrics of Heading 5811". We shall return to the "reinforcement" point later.

110. In respect of Note (3) of Heading 40.15 of the HSENs, we are satisfied that the Wetsuits are of rubber, with parts of textile fabric, as the rubber is the constituent giving the Wetsuits their "essential character". We find that there is considerable force in Mr Starr's submission that one can end the enquiry with Note (3) of Heading 40.15 of the HSENs. Furthermore, we consider that the inner and outer textile layers are present merely for reinforcing purposes (see paras. 113 and 114 below) and, therefore, the Wetsuits are excluded from Chapter 59 by virtue of Note 5 and would fall to be characterised pursuant to Chapter 40. We are further satisfied that even if one is to approach categorisation by means of rule 3(b) of the GIRs (on the basis that commodity codes 4015 9000 00 and 6113 0010 00 are potentially equally applicable and in case we are wrong in respect of Note (3) of Heading 40.15 or the exclusion by virtue of Note 5 of Chapter 59), rule 3(b) clearly provides that:

> "(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."

111. HMRC do not dispute that regard must be had to the "essential character" of the Wetsuits. We find that there is considerable force in Mr Starr's submission that the essential character of the Wetsuits is to provide insulation for the wearer in colder water temperatures. This has not been challenged by HMRC. Such insulation is achieved by the neoprene (the rubber element) because of the manufacturing process that creates bubbles in the neoprene as the air bubbles are an effective insulator. We are, therefore, satisfied that the essential character of the Wetsuits is the neoprene rubber. As the neoprene provides the essential character of a wetsuit, the analysis under rule GIR 3(b) would, equally, result in categorisation of the Wetsuit under Heading 4015 (in particular 4015 9000 00).

112. Turning to Heading 6113 of the UK Tariff, the Section Notes of Heading 6113 provide that:

> "**Section notes**
>
> 1. This section does not cover:
>
> …
>
> ij. woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40;
>
> …
>
> 7. For the purposes of this section, the expression 'made up' means:
>
> …
>
> f. assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);"

113. Whilst it was not disputed by the Appellant that the textile layers on the panels used to make the Wetsuits constitute "knitted fabric", the Heading goes on to refer to "garments, made up of knitted or crocheted fabrics of heading…5906…". In relation to Heading 5906 (and returning to the "reinforcement" point), we are satisfied that the knitted textile fabrics are there for reinforcement, and not to insulate. In this respect, it was accepted by the parties that a single-sided wetsuit - where the textile lining was on the inside - was properly considered to be categorised on the basis that the textile material was present merely for reinforcement and, therefore, fell outwith Heading 5906 (by virtue of Note 5 to Chapter 59); and fell to be categorised under Chapter 40 (4015 9000 00). We find that the same internal lining exists in the Wetsuits under consideration, and that there is simply a further external lining, which was to provide protection from abrasion and wear and tear to the external surfaces of the neoprene. This evidence was undisputed. Taken together, the internal fabric was merely for the purposes of reinforcement and that the outer textile covering was merely protective. We find that both textile layers, despite any comments to the contrary, were present merely for the purposes of reinforcement of the neoprene rubber.

114. Whilst the European Regulation sought to classify wetsuits under Heading 6113, the European Regulation is no longer binding on the United Kingdom pursuant to para. 1 of Schedule 7 to the TCBTA. It appears (from the arguments presented on behalf of HMRC) that HMRC's consideration started, and ended, with the European Regulation. The Commission considered that the panels with fabric on both sides fell within Heading 5906 because the presence of textile fabric on both sides meant that it had a function beyond that of mere reinforcement. It is pertinent to note, however, that the Commission considered that, *prima facie*, the wetsuits could be classified under both Heading 6113 and Heading 4015, resulting in the Commission resorting to the tie-breaker rule (i.e., rule 3(b) of the GIRs).

115. Having considered all of the evidence and submissions, cumulatively, we are satisfied that the logical Heading of the UK Tariff under which to classify the Wetsuits is Heading 4015. Consequently, therefore, commodity code 4015 9000 00 applies. This is because the major component of the Wetsuits is the neoprene and the textiles only serve the purposes of reinforcement. The metrics of the Wetsuits indicate that the neoprene is greater by volume and weight in order to provide insulation. This is not a simple measurement of ratio, but is an illustration of the essential character; namely insulation achieved by the neoprene and not the textiles. We further accept that Note 40.08 of the HSENs is not applicable, not least because in the Appellant's case the rubber has been further worked and, therefore, it is irrelevant. It is, clearly, necessary to have regard to the final product.

116. Whilst we consider *Sola Wetsuits* to be persuasive, we hold that categorisation of the Wetsuits falls under Heading 4015 of the UK Tariff, by reason of Note (3) of Heading 40.15 of the HSENs.

CONCLUSIONS

117. In conclusion, we hold that:

(1) The Wetsuits are articles of apparel of vulcanised rubber.

(2) The Wetsuits are of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.

(3) The essential character of the Wetsuits is achieved by the neoprene, which is to provide insulation.

(4) The textile fabrics on both sides of the neoprene only serve as reinforcement.

118. Accordingly, therefore, the appeal is allowed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

119. 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.

Release date: 28th NOVEMBER 2024