[2016] UKFTT 304 (TC)

TC05073

Appeal number: TC2015/02302

CUSTOMS DUTY – Customs tariff classification-Combined Nomenclature-classification of defatted soy and tapioca pellets for the production of "popped" snacks-application of General Interpretation Rules

FIRST-TIER TRIBUNAL
TAX CHAMBER

JLM GLOBAL FOODS LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE MARILYN MCKEEVER
DR CAROLINE SMALL

Sitting in public at The Royal Courts of Justice, London on 18 March 2016

Ms Brown, solicitor, for the Appellant

Mrs Newstead Taylor, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. *Background*

2. This case concerns the correct customs tariff classification to be applied to the defatted soy tapioca pellets ("the pellets") imported by the Appellant to use in the manufacture of "popped" snacks.

3. There is no dispute between the parties as to the principal facts nor the legal framework or approach to be adopted. The dispute stems from the application of the law to the facts.

4. We will consider the system of customs duty classification in detail below. For the purposes of understanding the background we need only say that the Appellants had originally classified the pellets under commodity code 1106 10 00, which was subject to duty at 7.7%. At the time, the Appellant was unaware that the pellets could not fall within this classification. A consignment of pellets, imported by the Appellant in August 2014 was selected by HMRC for inspection. As HMRC was uncertain as to the correct classification, it sent a sample of the pellets to its contracted chemists, Campden BRI. HMRC summarised Campden's analysis as follows *"…Small pale brown discs, found to be of soybean (legume). The starch was well cooked, no evidence of tapioca. Starch 42.3%, Sucrose 3.5%, Protein 25%, total fat 0.6%, 1% passed through a 2mm sieve."*

5. On the basis of this analysis and after consulting HMRC's Tariff Classification service, HMRC wrote to the Appellant stating their view that the pellets should correctly be classified under commodity code 2008 99 99 being:

> *"Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugar or other sweetening matter or spirit, not elsewhere specified or included…Other"*

6. This classification, carried a customs duty rate of 18.4%. HMRC decided, in a letter of 5 December 2014 to issue a Post Clearance Demand Note (C18) demanding payment of the additional duty of £1,663.94 on the August 2014 consignment. Further C18s were raised in respect of earlier consignments, in the sum of £115,183.08 and a civil penalty of £2,500 was issued on 17 February 2015.

7. There followed further correspondence in which the Appellant put forward a different classification with a tariff rate of 4.5%, before submitting that the pellets should correctly be classified under commodity code 2304 00 00 as:

> *"Oilcake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soya bean oil."*

8. The tariff for goods classified under this code is 0%.

9. HMRC's original decision to classify the pellets under 2008 99 99 was upheld on review on 16 February 2015 and the Appellant's submitted the current appeal, against HMRC's classification of the pellets, the C18s and the penalties, on 13 March 2015.

10. The Appeal is made under section 16(1) Finance Act 1994 and under section 16(5) of that Act, the tribunal has power to quash or vary a decision of HMRC and substitute its own decision for a quashed decision.

11. At the hearing, Mrs Newstead Taylor invited the tribunal to put forward its own classification if we did not consider that either of the proposed classification were correct. We were, however, able to restrict our considerations to the two codes put forward by the parties.

12. *The system of classification of goods for customs duty purposes*

13. The EU operates a harmonised system in relation to customs duty so that all Member States importing goods from outside the EU must apply the same set of rules to determine how goods are to be classified which determines how much duty must be paid in respect of those goods.

14. The provisions of Council Regulation (EEC) No. 2658/87 (the Tariff Regulation) and Annex 1 to it, the Combined Nomenclature (CN) set out the rules to determine how goods entering the EU are to be classified. The CN is amended annually. The CN applicable at the material time is that set out in Commission Regulation (EC) No. 1001/2013.

15. The CN is divided into Sections which comprise a number of Chapters which are divided into headings and sub-headings. Each Section and Chapter is supplemented by explanatory Notes (CNENs) published by the European Commission, which provide guidance on the application of the Sections and Chapters. The World Customs Organisation publishes Explanatory Notes to the Harmonised System (HSENs). Whilst neither the CNENs nor the HSENs are legally binding, the European Court of Justice (ECJ) has consistently held that they are highly persuasive and stated in the case of *Develop Dr Eisbein & Co v Hamptzollant Stuggardt-West* (Case C/35-93) that they are an "important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered as a valid aid to the interpretation of the tariff".

16. The CN includes "General Interpretation Rules" (GIR). Unlike the CNENs and HSENs, the GIRs have legal force. The GIRs are supplemented with explanatory notes of their own. The GIRs and their Explanatory Notes are set out in the Appendix to this decision and we will make reference to them below.

17. The approach to classification is set out in the ECJ decision Holz Geenen GmbH v Oberfinanzdirektion Munchen (Case C-309/98) where the Court said:

> *"It is settled case law that…the decisive criteria for the classification of goods for Customs purposes is in general to be sought in their objective*

characteristics and properties as defined in the wording of the relevant heading of the CN. The [CNENs] and [HSENs] may be an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force."

18. The "objective characteristics" of the goods are to be determined having regard to factors including the appearance, composition, presentation and intended use of the product. (*Wiener SH GmbH v Haupzollant Emmerich* (Case C-338/95) ECR 1-6495.

19. *The facts*

20. We had before us a number of documents evidencing the supply chain from raw materials to the pellets and the composition of the pellets. We also had samples of the pellets and examples of the popped snacks into which they were converted and we heard evidence from Mr Paul Huggins, the Chief Executive of the Appellant. Mr Huggins struck us as an entirely straightforward witness and was clearly expert in the process by which soy meal, tapioca starch and salt are turned into "healthy snacks". This process is critical in determining the correct classification code for the pellets.

21. The sample pellets we saw were small, brown, disc-shaped objects, rather like lentils in appearance.

22. Mr Huggins explained that the pellets are manufactured by an American company, J R Short, which sources the raw materials and turns them into pellets. It produces many different kinds of pellets eg potato and rice, but we are concerned with the "defatted soy tapioca" pellets which are the subject of the appeal.

23. The Appellant manufactures its snacks for the "own brands" of a number of leading retailers and slimming organisations. The client specifies the desired nutritional profile of the finished snack and the Appellant provides J R Short with a precise specification in terms of the ingredients, moisture content, size and density of the pellets. J R Short do not supply these pellets to anyone else; they are designed by the Appellant and unique to them. Other companies have "popping machines" but the Appellant is the only producer of popped, soy-based snacks in the UK.

24. The first step in the process is the conversion of the soya beans into defatted soy flour. The hulls of the beans are removed and the oil is extracted via a solvent process using some heat. The use of heat in the process may have led to the comment in the report of Campden BRI that "the starch was well cooked". HMRC appears to have interpreted this to mean that the pellets themselves or the ingredients in them were cooked. Mr Huggins emphasised that the oil extraction process is highly controlled to ensure that the soy meal remains intact and the process does not denature the protein. The soy bean has a fat content of 20%. After extraction of the oil it is less than 1%. The soya oil is sold on the world markets. The defatted soy meal which is left is then ground into flour which is 57% protein and is high in fibre. The soy flour is then diluted with tapioca starch in order to obtain the nutritional profile desired by the Appellant's customer and a little salt is added.

25. The ingredients are agglomerated, that is to say they are mixed and compressed together so as to form pellets but the constituents remain in their original state and do not undergo any chemical change.

26. The soy flour and tapioca starch are combined in the proportions 55% soy to 45% tapioca by dry weight. Tapioca is very low in protein (0.2% as compared with 57% for soy) but it has a ;higher moisture content. The result of the process is that the finished pellets are about 30% protein.

27. The pellets are shipped in totes holding 2,200 lb which are sealed to ensure the purity of the product, but are not airtight.

28. The Appellant combines the pellets with potato, and sometimes other, pellets in proportions which depend on the levels of protein and fibre to be comprised in the finished snacks. The pellet mix is then introduced into small moulds where they are subjected to intense, but controlled, heat and pressure which causes the pellets to fuse together and "pop" or expand into individual "crisps".

29. After popping, the crisps are sprayed with sunflower oil to improve mouth feel and extend the shelf life, and flavourings are applied.

30. The major component of the pellets is always soy, whether this is considered on the basis of weight volume or cost.

31. The product could not be made without the soy flour. It is soy which defines the product.

32. The pellets *could* be made without the tapioca starch. Tapioca is used as it is fairly cheap and readily available. It is merely a dilutant. The pellets could be made with other starches such as rice flour, or with no other ingredients at all. When the Appellant first started to manufacture these snacks, they did so with pellets which were 100% soy. It was found that the addition of a dilutant improved the taste of the snacks and made them a more appealing colour.

33. The pellets in their unpopped form are not edible. Mr Huggins explained that the Appellant goes to great lengths to prevent the unpopped pellets getting into bags of the snacks. On the few occasions when they have failed to do this, they have been subject to claims for dental damage or complaints about "bits of plastic" in the bag.

34. *The General Interpretation Rules (GIR)*

35. The starting point in classifying goods in accordance with the CN is to apply the GIR.

36. Rule 1 states:

37. *"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"

38. The Explanatory Note makes clear that that the headings and any relevant Notes are paramount. That is, they are the first consideration in determining classification. The Appellant contends that the headings and Notes are to be interpreted in the light of Rules 2 to 5, provided the headings or Notes do not specifically prevent this.

39. As heading 2304 does not prohibit it, the Applicant submits that the remaining rules can apply and, in particular, seeks to rely on Rule 2 (b) which provides that a reference in a heading to a substance is to include a mixture of that substance with another substance and the correct classification is then to be determined by the application of Rule 3.

40. The Explanatory Notes make clear that Rule 2(b) extends a heading referring to a substance to include a mixture or combination of that substance with other substances. It cannot however "widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another …substance deprives the goods of the character of goods of the kind mentioned in the heading."

41. Explanatory Note (XIII) states that where mixtures or combinations of substances could *prima facie* be classified under two headings, one must then apply Rule 3, which provides as follows.

"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."

42. The Explanatory Notes state that the paragraphs of Rule 3 are to be applied in turn and are subject to any specific terms in the notes to a heading, Section or Chapter. Rule 3(a) provides that a more specific description of goods is to be

preferred to a more general description. If an item cannot be classified applying Rule 3(a), one must apply Rule 3(b). The Explanatory Notes indicate that the sub-rule applies to mixtures and composite goods consisting of different materials. Note (VII) provides that such goods are to be classified "as if they consisted of the component which gives them their essential character…". Note (VIII) indicates that there is no set way of establishing the essential character of a particular kind of goods but "it may, for example, be determined by the nature of the material...,the bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods". If the goods still cannot be classified by the application of these rules, they are to be classified in the heading which occurs last in numerical order among the headings of equal merit.

43. *The possible classifications*

44. The Appellant submits that the pellets should correctly be classified under CN heading 2304 00 00 (2304) "Oilcake and other solid residues, whether or not ground or in the form of pellets, resulting from the extraction of soya-bean oil".

45. The chapter heading for Chapter 23 of the Code states that it covers "Residues and waste from the food industries; prepared animal fodder."

46. The CNEN to 2304 provides "This heading does not include soya-bean flakes, whether or not ground, from which the soya-bean oil has not been extracted (heading 2308)"

47. The HSENs to heading 2304 provide that the heading covers "oil-cake and other solid residues remaining after the extraction of oil from soya beans by solvents…."

48. The HSENs make it clear that whilst the residues within the heading are usually used for animal foods, it also includes "non-textured defatted soya-bean flour fit for human consumption". The HSENs state that the heading *excludes* protein concentrates obtained by "eliminating certain constituents of defatted soya-bean flour".

49. At one point, it was suggested that the pellets should be classified under code 1208 10 00 "flours and meals of oils seeds or oleaginous fruits…of soya beans", but it was subsequently agreed that this heading could not apply to defatted soya beans.

50. HMRC contend that the pellets fall within Chapter 20 of the CN: "Preparations of vegetables, fruits, nuts or other parts of plants", and specifically within heading 2008 99 99 (2008) "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved, whether or not containing added sugars or other sweetening matter or spirit, not elsewhere specified or included…Other". This is a residual category.

51. The CNENS to the Chapter state that the Chapter covers "snack-products ready for consumption in the form of, for example, dried peas or peanuts which are only partially covered with dough and where the essential character of the product is consequently given by the vegetables, fruit, nuts or other parts of plants".

52. The tribunal must decide whether the pellets are property classified within heading 2304 or 2008.

53. *The Appellant's submissions*

54. The Appellant submits that the pellets fall within heading 2304 and in establishing the appropriate heading, one must interpret Rule 1 of the GIR in accordance with the provisions of the following rules and in particular rules 2(b) and 3(b).

55. The Appellant states that the product consists of a "solid residue" "in the form of pellets, resulting from the extraction of soya-bean oil" which is the subject matter of heading 2304. The pellets also contain tapioca starch, so, in order to apply Rule 1, we must have regard to Rule 2(b) which extends a heading to include a mixture of the substance referred to in the heading with another substance. This does not apply where the addition of the other substance deprives the goods of the character of the goods mentioned in the heading. The Appellant contends that the addition of tapioca starch does not deprive the pellets of the character of defatted soya residue, so heading 2304 remains the correct classification.

56. Ms Brown, for the Appellant, went on to say that if this was wrong, the only possible competing classification was 1108 14 00 (1108) "Manioc (cassava) starch". This is another name for tapioca starch.

57. She submitted that the mixing of tapioca starch with the soya meal and agglomeration of the mixture into pellets did not alter the character of the soy meal, but if it did and the pellets could be classified under two specific headings, then, in accordance with Explanatory Note (XIII) we must continue to Rule 3.

58. Applying Rule 3(a), there are two possible, specific headings: 2304 and 1108, so we must go to Rule 3(b) which specifically deals with mixtures. Explanatory Note (VII) requires the goods to be classified under the heading of the substance which gives the goods their "essential character". Applying the factors in Note (VIII) which help to determine the "essential character" the bulk of the product consists of soy meal, the product is more than 50% soy meal by weight. The pellets are 75% soy meal by volume and the soy meal is the critical ingredient in considering its role in the product. The Company could not produce its high protein, healthier snacks, without the soy meal. Soy is also the more expensive of the ingredients.

59. The European Court of Justice in the Case of *Turbon International GmbH v Oberfinanzdirection Koblenz* [2006] Case C-250/05 said that in classifying goods "it is necessary to identify from among the materials of which they are composed, the one which gives them their essential character. This may be done by determining whether the goods would retain their characteristic properties if one or other of their constituents were removed from them". In that case, the Court determined that the essential character of an ink cartridge for a printer was the ink and not the cartridge containing it as the specific function of the item was to provide the printer with ink.

60. The case of *Roeckl Sporthandschuhe GmbH & Co v Hauptzollamt Munchen* [2010] Case C-123/09 concerned gloves designed for horse riding which consisted of a textile material covered in polyurethane foam. Again the Court said that in identifying the material which gives the goods their essential character one can determine whether the goods would retain their characteristic properties if one or other of their constituents were removed from them. In that case, it was held that the polyurethane foam was the component which performed the primary function of providing flexibility and grip enabling the reins to be held and the horse controlled. The textile merely increased the effectiveness of the foam.

61. The Appellant submits that in the case of the pellets, one could remove the tapioca starch without affecting the essential character of the pellets which is derived from the soy meal. It is the high protein soy meal which is essential for the production of the snacks. Mr Huggins gave evidence that the tapioca starch was used merely to obtain the desired nutritional composition and improve the attractiveness of the end product. The snacks could be, and had in the past been, made with soy meal alone. One the other hand, if the soy meal was removed from the pellet it would be impossible to make the high protein snacks. Therefore, it was the soy which gave the mixture its essential character, bringing it within heading 2304.

62. If that is wrong, then one must apply Rule 3(c) which requires classification "in accordance with the heading which occurs last in numerical order among those which equally merit consideration" (*SIA Kurcums Metal v Valsts ienemumu* dienests [2012] Case C-558/11. On this basis also, the preferred classification in the present case would be 2304.

63. Mrs Brown further contended that the Appellant's position was supported by the recent EU case of *Staatssecretaris van Financien v Customs Support Holland BV* [2016] Case C-144/15 (the Holland case). This case concerned a product called Imcosoy 62 which was a soy protein concentrate intended to be used as feed for very young calves. Protein concentrates are specifically excluded from heading 2304 and the possible classifications were 2308 00 99 "vegetable materials and vegetable waste, vegetable residues and by-products…of a kind used in animal feeding…" and 2309 90 "preparations of a kind used in animal feeding-Other, including premixes".

64. The HSEN to 2309 indicates that "premixes" are compound compositions consisting of a number of substances. The heading excludes pellets made from a mixture of several materials which is classified as such under a specific heading. In other words, a "premix" is a new compound, and does not include mere mixtures which can be classified according to one or more of the individual components.

65. Imcosoy 62 is produced by two industrial processes. First the oil is extracted, leaving soya meal. Then the soya meal undergoes a further process in which it is stripped of most of its carbohydrate and fibre, leaving a concentrated protein product (62% protein by weight). This is something essentially different from the soya meal.

66. The ECJ had to consider whether the appropriate classification was 2304, 2308 or 2309. It was noted that 2308 was a residual category which the Court could only consider if the goods could not be classified under a more specific heading.

67. The Court found that Imcosoy 62 was not *the* residue of the process by which oil is extracted from soya beans but that it was a "derivative of that residue, obtained following a distinct and subsequent process specifically implemented in order to produce that protein concentrate and during which some of the constituent elements of the soya meal are removed". Imcosoy 62 cannot therefore fall within 2304.

68. The Court considered that heading 2309 applied to products obtained by processing materials to such an extent that they have lost the essential characteristics of the original material. It concluded that Imcosoy 62 fell within that heading because it was intended for a particular animal feeding purpose and the soy protein concentrate resulted from a process whereby the soy meal from which it was derived had lost its essential characteristics. As the product was a derivative of soy meal, not containing all the components of soy meal, it could not be excluded from 2309 by the Note which excludes agglomerated products consisting of a mixture of several materials, but classified as such under one specific heading.

69. The Court further observed that Imcosoy 62 could not be classified under 2308 as this was a residual heading and the product was capable of classification under the more specific heading of 2309.

70. Ms Brown referred to the case of *Fratelli Fancon v Industriale Agricole Tresse* (SIAT) [1982] Case 129/8 as authority for the proposition that, in the context of 2304, "residue" simply means what is left over after the extraction of the soya oil. It does not matter whether the intention is to produce the oil or the more valuable soy meal. It is the result which matters, not the purpose.

71. The heading to Chapter 20 refers to "*preparations* of vegetables, fruit, nuts or other parts of plants". The Holland case indicates that "preparation" involves a processing of the product or a mixture with other products.

72. The HSEN to 2008 provides "this heading covers fruit nuts and other edible parts of plants, whether whole, in pieces or crushed, including mixtures thereof, prepared or preserved otherwise than by any of the processes specified in other Chapters or in the preceding headings of this Chapter.". It provides examples such as almonds or other nuts, dry roasted or oil roasted, peanut butter, fruit preserved in water , syrup or alcohol, stems roots and other edible parts of plants (e.g. ginger, angelica, yams,…) conserved in syrup or otherwise prepared or preserved and so on. The Note provides that "other substances (e.g. starch) may be added…provided they do not alter the essential character of fruit, nuts or other edible parts of plants."

73. The Note goes on to say "the products of this heading are usually put up in cans, jars or airtight containers, or in casks, barrels or similar containers".

The heading excludes mixtures of plants which are not consumed as such but are used to make herbal "teas" or used to flavour beverages.

74. The CNEN for the Chapter states that it covers "snack-products ready for consumption".

75. The Appellant submits that this heading includes only products which are ready for immediate consumption. All the items mentioned can be consumed without any further processing.

76. The usual packaging for these products is designed to keep the products as they are and preserve them. This is not the case for the totes in which the pellets are imported.

77. The Appellant submits that whilst the pellets are a food grade product, they are not edible and cannot be regarded as "ready for consumption". In order to be ready for consumption they must be subjected to a significant industrial process involving high temperature and pressure applied in a precise manner. Accordingly, they cannot be classified under heading 2008.

78. Further, heading 2008 is a residual heading and in accordance with the GIR, as confirmed by the Holland case, if a product can be classified under a more specific heading, in this case 2304, that excludes the more general heading.2008.

79. Finally, even if 2008 could be regarded as applicable, the heading which occurs last in numerical order is 2304 so this is the correct classification under GIR Rule 3(c).

80. *The Respondent's submissions*

81. Mrs Newstead Taylor, for the Respondents began by emphasising the paramountcy of GIR 1.This is stated in the Explanatory Notes themselves at Note (V(a)). Accordingly, she submitted, if a substance can be classified in accordance with the provisions of GIR 1, it is neither necessary nor permissible to consider the terms of Rules 2 and 3. Rule 3(a) states that the specific is to be preferred to the general. Explanatory Note(IV(b)) provides that "If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete". HMRC contends that the pellets can be classified under heading 2008 solely by reference to GIR Rule 1.

82. The parties agree that one must classify goods according to their "objective characteristics", which can include their intended use. The Advocate-General, in *Wiener SH GmbH v Hauptzollant Sttugart-West* [1997] Case C-338/95 stated that "…the intended use of a product may constitute an objective criterion for

classification if it is inherent in the product and if the inherent character can be assessed on the basis of the product's objective characteristics…". HMRC contend that in the present case there is nothing in the objective characteristics of the pellets which would indicate that they were to be used to make popped crisps. The intended use is not therefore part of the inherent character and cannot be taken into account in the classification process.

83. One must look at the headings and sub-headings and relying on the objective characteristics determine which heading and/or sub-heading is the most applicable. Applying GIR Rules 1 and 6, HMRC submit the most appropriate classification is 2008.

84. The title of Chapter 20 is "Preparations of vegetables, fruit, nuts or other parts of plants". Mrs Newstead Taylor emphasised that the Chapter applies to "preparations" of the stated items. Heading 20.08 covers "Fruit, nuts and other edible parts of plants, otherwise prepared or preserved… not elsewhere specified or included. Sub-heading 99 relates to "other". The HSEN to heading 20.08 is set out at paragraph 72 above. Mrs Newstead Taylor pointed out that the heading can, in terms, apply to mixtures. She then went on to consider the meaning of the expression "preparation".

85. In the Holland case, one of the headings under consideration was 2309, "Preparations of a kind used in animal feeding". The Court said "…it follows from the case law of the Court that the term "preparation" under that heading means either the processing of a product, or a mixture with other products". So a "preparation" can include a "mixture". HMRC submits that the pellets are a mixture. They consist of defatted soy, tapioca starch and salt. In addition, the pellets are produced by a manufacturing process. Accordingly, HMRC submits that the pellets are preparations because they are mixtures and they have been subject to a process.

86. HMRC does not accept the Appellant's contention, based on the case of *Weber v Milchwerke Paderborn-Rimbeck* [1989] Case 40/88 that there is a distinction between processing and mere mixing. The Holland case held that preparation can involve processing or mixing. Even if this is wrong, the pellets have, in any event been subject to a process and so are "preparations".

87. The constituents of the pellets, soya beans and cassava (tapioca) are both edible parts of plants and they have been subject to a mixing or process which means they are "preparations" of edible parts of plants within heading 2008.

88. The HSENs to the heading indicate that other substances such as starch may be added provided they do not alter the essential character. HMRC argue that the

addition of the tapioca starch does not affect the essential character as both components are edible parts of plants.

89. The CNENs to the Chapter, begin with a general note that "this Chapter covers snack-products ready for consumption". HMRC contend that the Chapter is not confined to such items, but covers other things also. For example, heading 2004 includes frozen vegetables, which are not a snack-product. Sub-heading 2009 11 is frozen fruit juice, also not a snack-product. There is no exclusion for non-snack products and the Respondents contend that the Chapter covers more than this. In any event, Mrs Newstead Taylor reminded us that the HSENs and CNENs are not legally binding.

90. The Respondent's second point concerns the phrase "ready for consumption" in the Chapter heading. The Appellant had sought to argue that, as the pellets were not ready for consumption, they could not fall within Chapter 20, The Respondents drew a distinction between "ready for consumption" and "ready for immediate consumption". That distinction is made in the notes to the Chapter which exclude cucumbers and gherkins which are provisionally preserved and which are not ready for *immediate* consumption. There is no blanket exclusion of items not ready for immediate consumption and the Chapter contains examples of items where some further process is required before the product is ready for immediate consumption. Frozen vegetables and fruit juice are not ready for immediate consumption. Sub-heading 2005 20 10 covers potatoes in the form of flour, meal or flakes which require a further process before they can be eaten. Heading 2005 refers to a "papad" which is a sheet of dried dough which must be fried or heated to make a papadom.

91. HMRC submit that in the case of the pellets, the fact that they need another process, the popping process, before they can be eaten does not mean that they are outside the scope of Chapter 20 and that they answer the description in the heading and the notes of 2008.

92. HMRC also submit that the totes in which the pellets are transported, whilst not airtight, are sealed to prevent contamination and so are a "similar container" to the "cans, jars or airtight containers, or …casks or barrels" in which products of heading 2008 are generally put up.

93. HMRC's conclusion is that the pellets can be classified, by reference to GIR Rules 1 and 6 within sub-heading 20008 99 99 and there is therefore no need to go any further.

94. However, as 2008 is a residual category, HMRC also considered heading 2304.

95. It contends that, in order to fall within heading 2304, the goods must be a solid residue resulting from the extraction of soya bean oil. It is accepted that the residue is soya bean meal. The Appellant had sought to rely on a number of Binding Tariff Information notices (BTIs) to illustrate that other products had been classified within 2304 even though they had other substances mixed with them. HMRC invited the tribunal to treat these with caution as there was not sufficient detail for us to know exactly what the products mentioned in the BTIs were and whether they were comparable with the pellets.

96. The Respondents argue that the pellets are not the residue left after extracting soya bean oil, but are a derivative of the soya bean meal obtained after a distinct and separate process so that, as with Imcosoy 62 in the Holland case, they cannot be classified under heading 2304. They also say that in order to be a derivative it is not necessary that a constituent element of the soy is removed. The definition of "derivative" in the Oxford English Dictionary is "something based on another source". The pellets are based on soya meal, but combined with tapioca and salt through a process and are therefore a derivative of soy meal. The process of producing the pellets alters the character of the soy as the protein content is reduced to 30%. The CNENs require the product to "result from" the extraction of soya oil to be within 2304 and the pellets are a derivative, processed into a different kind of product.

97. The pellets can be classified within 2008 using only GIR Rules 1 and 6. Rules 2 and 3 are needed to bring them within 2304 .Explanatory Note (XII) to Rule 2(b) states that the inclusion of mixtures cannot be used to widen a heading where the addition of another material deprives the goods of the character of goods of the kind mentioned in the heading. In HMRC's view, the addition of tapioca starch reduces the protein content of the soy flour and makes it a derivative which no longer answers the description of goods within 2304.

98. HMRC submit that there is no need to consider GIR Rule 3 as the pellets can be classified under heading 2008 in a straightforward way as a preparation of other parts of plants, ready for consumption and packaged appropriately. HMRC do not accept that the pellets can be classified under two or more headings which is a pre-requisite for the application of Rule 3.

99. *Discussion*

100. We begin by considering the proper approach to the application of the GIR. The parties agree that the headings and relevant Section or Chapter notes are paramount. Explanatory Note (IV) to Rule 1 points out that many goods can be classified without any further recourse to the interpretative rules, for example live horses. There is unlikely to be much argument about whether something is a live horse or not. In other

cases, Rule 1 itself, read in conjunction with Explanatory Note (III)(b) provides that, unless the heading or notes otherwise require, the correct heading is to be determined in accordance with the provisions of Rules 2 to 5.

101. We accordingly agree with the Appellant that, unless prohibited from doing so, one may apply Rules 2 and 3 in order to allocate goods to a heading in accordance with Rule 1.

102. The first consideration is the objective characteristics of the product. The pellets are small hard discs, reddish brown in colour and similar to lentils in size and shape. They are made up of defatted soy flour, tapioca starch and salt. The pellets are packaged in totes containing 2,200 lb of the product. We agree with HMRC that the intended use of the product; to be popped into snacks, is not "inherent in the product" and should not be regarded as one of its objective characteristics.

103. We must then consider, on the basis of the objective characteristics and applying the GIR, which heading most appropriately covers the product.

104. In applying GIR 1, there is nothing in the heading or notes of either Chapter 23 or Chapter 20 which prevents us using Rules 2 and 3 to allocate the pellets to a heading in accordance with Rule 1.

105. The Pellets are comprised of more than one substance, so do not obviously fall within a single heading. We must therefore apply Rule 2. The Notes to Rule 2(b) make it clear that the Rule does not expand a particular heading to include goods where the addition of another material means that the goods no longer fit the description in that heading. Explanatory Note (XIII)) provides "As a consequence of this Rule, mixtures…if prima facie classifiable under two or more headings, must therefore be classified according to the principles of Rule 3." The pellets are composed of defatted soya meal within 2304 and manioc (cassava) starch (tapioca starch) within 1108 14 00. We therefore continue to Rule 3.

106. Rule 3(b) provides that mixtures must be classified as if they consisted of the material which gives them their "essential character". Explanatory Note (VIII) states "the factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by…the bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods".

107. In the case of the pellets, the major part of their bulk, quantity and weight consists of defatted soya meal. Soya meal is more valuable than tapioca starch. Whilst, in the present case, the intended use of the goods may not be a factor which

may be used to determine its objective characteristics for the first stage of classification, we consider that the "role of a constituent material in relation to the use of the goods" may be considered in applying Rule 3(b). The pellets are used to produce high protein snacks. The soya meal is the critical ingredient in the pellets. They could not be turned into high protein snacks without it. They could be turned into high protein snacks without the tapioca starch.

108. All the factors point to the soya meal being the material which gives the pellets their essential character and on this basis, the goods are to be classified as if they consisted of soya meal under 2304.

109. HMRC argued that it was not necessary to consider Rules 2 and 3 because the pellets could be classified under heading 2008 without recourse to any other considerations. We disagree, for the reasons set out below.

110. HMRC argued that the pellets were "prepared" *because* they were a mixture. However, the HSEN to the heading provides that it covers "…other edible parts of plants…including mixtures thereof, prepared or preserved…". That is, the heading applies where a mixture of edible parts of plants is prepared. The goods are not "prepared" in this context simply by being a mixture.

111. They further argued that the components were "prepared" because they were subject to the process of agglomeration. We consider that a "process" in this context requires more than a mere mixing, which is what, in essence, the agglomeration of the components is.

112. HMRC further argued that the pellets were "ready for consumption" in accordance with the CNENs to Chapter 20. They argued that it was not necessary that the pellets be ready for *immediate* consumption. They pointed out that frozen vegetables, which were neither a snack product nor ready for immediate consumption were within the Chapter, as were "papads" which had to be fried or heated to turn them into padadoms and potato flakes which required the addition of water before they were ready to be eaten. By analogy, they submitted that the fact that the pellets required another process, the popping process, to turn them into popped crisps ready for *immediate* consumption did not take them outside Chapter 20.

113. We were not persuaded by that analogy. Almost all of the headings under Chapter 20 relate to items which are obviously snack products and are obviously fruit, nuts or other parts of plants (such as crystallised ginger or angelica) which have been preserved or prepared in some way. One can simply open the tin, jar or packet and eat them. Even the anomalous items mentioned in paragraph 112 can be eaten with

minimum preparation and certainly without anything which could be described as a "process".

114. The pellets are self-evidently not "ready for consumption". They cannot be eaten until they have been subject to an industrial process involving patented machinery and high temperatures and pressures. This is of a different order from defrosting frozen vegetables or heating up a papadom. We heard how the Appellant goes to great lengths to prevent the unpopped pellets from getting into the final product in order to avoid claims by consumers who clearly do not wish to eat them.

115. Nor do we consider that the totes in which the pellets are transported are "similar containers" to "cans, jars or airtight containers, or …casks [or] barrels…". These are containers in which goods are bought by the end user whether individuals or caterers/restaurants etc. The totes are a bulk transport container not intended for the consumer.

116. The Respondents also seek to argue that the pellets cannot fall within heading 2304 because they are a "derivative" of soy meal, like Imcosoy 62, and not the residue left after the extraction of oil from soya beans. We consider that the relevant distinction is between chemical and physical change. Where two substances are mixed together in a way which changes only their physical state without a chemical reaction, each substance retains its identity. In principle, it would be possible to recover the separate components from the mixture. Where a substance or substances are subjected to a process which causes chemical changes to the structure of the substances, their identity is changed and the resulting, chemically different product can be described as "derivative" of the original substance or substances. In this case, it is not possible to get the original components back.

117. Imcosoy 62 was a protein concentrate obtained by subjecting soya meal to a process which removed various components from the meal and altered it chemically. It was a derivative of soya meal; it could no longer be described as soya meal.

118. In the present case, the agglomeration to which the soya meal and tapioca starch were subjected altered only the physical state of the constituents. Mr Huggins explained how the process was very carefully controlled to ensure that the soy protein was not denatured. The protein content of the soy was exactly the same before and after it was compressed into the pellets. The protein content of the *pellets* was different from the protein content of the soy meal because of the diluting effect of the tapioca starch, but neither the soy nor the tapioca was chemically altered by the process. We do not therefore consider that the pellets are a derivative of soy meal which falls outside heading 2304.

119. Even if it could be argued (and we do not think it can) that the pellets could be classified under both heading 2304 and heading 2008, 2304 would still be preferred because it provides a more specific description which is preferred to a more general description (GIR Rule 3(a)). Heading 2008 is a general, residual heading.

120. Further, Rule 3(c) provides that if goods cannot be classified in any other way "they are to be classified in the heading which occurs last in numerical order among those which equally merit consideration…". 2304 is later in numerical order than 2008.

121. *Decision*

122. For the reasons set out above, we consider that the correct customs classification of the pellets is commodity code 2304 00 00.

123. Accordingly, we quash HMRC's decision concerning the classification of the pellets and determine that the correct commodity code is 2304 00 00 and we allow the appeal against the Post Clearance Demand Notes and the penalties.

124. 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.

MARILYN MCKEEVER
TRIBUNAL JUDGE

RELEASE DATE: 4 MAY 2016

APPENDIX
GENERAL RULES FOR THE INTERPRESTATION OF HE HARMONIZED SYSTEM AND THE EXPLANATORY NOTES TO THE GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

Classification of goods in the Nomenclature shall be governed by the following principles :

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.

GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

Classification of goods in the Nomenclature shall be governed by the following principles:

RULE I

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.

EXPLANATORY NOTE

(I) the Nomenclature sets out in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover. In many cases, however, the variety and number of goods classified in a Section or Chapter are such that it is impossible to cover them all or to cite them specifically in the titles.

(II) Rule 1 begins therefore by establishing that the titles are provided "for ease of reference only'. They accordingly have no legal bearing on classification.

(Ill) The second part of this Rule provides that classification shall be determined:

(a) according to the terms of the headings and any relative Section or Chapter Notes, and

(b) where appropriate, provided the headings or notes do not otherwise require, according to the provisions of Rules 2, 3, 4, and 5.

(IV) Provision (Ill) (a) is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules (e.g., live horses (heading 01.01), pharmaceutical goods specified in Note 4 to Chapter 30 (heading 30.06))

(V) In provision (Ill) (b), the expression "provided such headings or Notes do not otherwise require" is intended to make it quite dear that the terms of the headings and any relative Section or Chapter Notes are paramount, ie, they are, the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate only to particular goods. Consequently those headings cannot be extended to include goods which otherwise might fall there by reason of the operation of Rule 2(b).

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.

EXPLANATORY NOTE

RULE 2(a)

(Incomplete or unfinished articles)

(I) The first part of Rule 2(a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished provided that, as presented, it has the essential character of the complete or finished article.

(II) The provisions of this Rule also apply to blanks unless these are specified in a particular heading. The term "blank" means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used other than in exceptional cases, for completion into the finished article or part (e.g. bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).

Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".

(Ill) In view of the scope of the headings of Sections Ito VI, this part of the Rules does not normally apply to goods of these Sections.

(IV) Several cases covered by the Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section XVI, and Chapters 61, 62, 86, 87 and 90).

RULE 2 (a)

(Articles presented unassembled or disassembled)

(V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.

(VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

(VII) For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, provided only assembly operations are involved.

No account is to be taken in that regard of the complexity of the assembly method. However, the components shall not be subjected to any further working operation for completion into the finished state.

Unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately.

(VIII) Cases covered by this Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section) (VI, and chapters 44, 86, 87 and 89).

(IX) In view of the scope of the headings of Sections Ito VI, this part of the Rule does not normally apply to goods of these Sections.

RULE 2(b)

(Mixtures and combinations of materials or substances)

(X) Rule 2 (b) concerns mixtures and combinations of materials or substances, and goods consisting of two or more materials Or substances. The headings to which it refers are headings in which there is a reference to a material or substance (e.g., heading 05.07— ivory), and headings in which there is a reference to goods of a given material or substance (e.g., heading 45.03 - articles of natural cork). It will be noted that the Rule applies only if the headings or the Section or Chapter Notes do not otherwise require (e.g., heading 15.03— lard oil, not ... mixed).

Mixtures being preparations described as such in a Section or Chapter Note or in a heading text are to be classified under the provisions of Rule 1.

(XI) The effects of the Rule is to extend any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances. The effect of the Rule is also to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance.

(XII) It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.

(XIII) As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if prima fade classifiable under two or more headings, must therefore be classified according to the principles of Rule 3.

RULE 3

When by application of Rule 2 (b) or for any other reason, goods are, prima fade, 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.

EXPLANATORY NOTE

(I) This Rule provides three methods of classifying goods which, prima fade, fall under two or more headings, either under the terms of Rule 2 (b) or for any other reason. These methods operate in the order in which they are set out in the rule. Thus Rule 3 (b) operates only if Rule 3 (a) fails in classification, and if both Rules 3 (a) and (b) fail, Rule 3 (c) will apply. The order of priority is therefore (a) specific description; (b) essential character; (c) heading which occurs last in numerical order.

(II) The Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require**. For instance, Note 4(8) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.05 shall be classified in one of the former headings. Such goods are to be classified according to Note 4 (B) to Chapter 97 and not according to this Rule.

RULE 3 (a)

(Ill) The first method of classification is provided in Rule 3 (a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.

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

(a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).

(b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

Examples of the latter category of goods are:

(1) Tufted textile carpets, identifiable for use in motorcars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.

(2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods of heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.

(V) 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 than the others. In such cases, the classification of the goods shall be determined by Rule 3(b) or 3(c).

RULE 3(b)

(VI) This second method relates only to:

(i) Mixtures.

(ii) Composite goods consisting of different materials.

(iii) Composite goods consisting of different components.

(iv) Goods put up in sets for retail sales. It applies only if Rule 3(a) fails.

(VII) In all these cases the goods are to be classified as if they consisted of the material or component which gives them their **essential character**, insofar as this criterion is applicable.

(VIII) The factor which determines essential character\will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role 6f ,a constituent material in relation to the use of the goods.

(IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are:

(1) Ashtrays consisting of a stand incorporating a removable ash bowl.

(2) Household spice racks consisting of a specially designed frame (usually of wood) and an appropriate number of empty spice jars of suitable shape and size.

As a general rule, the components of these composite goods are put up on a common packing.

(X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which:

(a) consist of at least two different articles which are, prima facie,classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

(b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and

(c) are put up in a manner suitable for sale directly to users without repacking (e.g. in boxes or cases or on boards).

The term therefore covers sets consisting, for example, of different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal.

Examples of sets which can be classified by reference to Rule 3(b) are:

(1) (a) Sets consisting of a sandwich made of beef, with or without cheese in a bun

(heading 16.02), packaged with potato chips (French files) (heading 20.04):

Classification in heading 16.02

(b) Sets, the components of which are intended to be used together in the preparation of a spaghetti meal, consisting of a packet of uncooked spaghetti (heading 19.02), a sachet of grated cheese (heading 04.06) and a small tin of tomato sauce (heading 21.03), put up in a carton:

Classification in heading 19.02.

The Rule does not, however, cover selections of products put up together and consisting, for example, of:

a can of shrimps (heading 16.05), a can of pâté de fob (heading 16.02), a can of cheese (heading 04.06), a can of sliced bacon (heading 16.02), and a can of cocktail sausages (heading 16.01); or

a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

In the case of these two examples and similar selections of products, each item is to be classified separately in its own appropriate heading.

(2) Hairdressing sets consisting of a pair of electric hair clippers (heading 85.10), a comb (heading 96.15), a pair a scissors (heading 82.13), a brush (heading 96.03) and a towel of textile material (heading 63.02), put up in a leather case (heading 42.02):

Classification in heading 85.10.

(3) Drawing kits comprising a ruler (heading 90.17), a disc calculator (heading 90.17), a drawing compass (heading 90.17), a pencil (heading 96.09) and a pencil-sharpener (heading 82.14), put up in a case of plastic sheeting (heading 42.02):

Classification in heading 90.17.

For the sets mentioned above, the classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.

(XI) This rule does not apply to goods consisting of separately packed constituents put up together, whether or not in a common packing, in fixed proportions for the industrial manufacture of, for example, beverages.

RULE 3(c)

(XII) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they are to be classified in the heading which occurs last in numerical order among those which equally merit consideration in determining their classification.

RULE 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.

EXPLANATORY NOTE

(I) This Rule relates to goods which cannot be classified in accordance with Rules I to 3. it provides that such goods shall be classified under the heading appropriate to the goods to which they are most akin.

(II) In classing in accordance with Rule 4, it is necessary to compare the presented goods with similar goods in order to determine the goods to which the presented goods are most akin. The presented goods are classified in the same heading as the similar goods to which they are most akin.

(Ill) Kinship can, of course, depend on many factors, such as description, character, purpose.

RULE 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 qobds if they are of a kind normally used for packing such goods. However, this provision is not binding whetuch packing materials or packing containers are clearly suitable for repetitive use.

EXPLANATORY NOTE

RULE 5 (a)

(Cases, boxes and similar containers)

(I) This Rule shall be taken to cover only those containers which:

(1) are specially shaped or fitted to contain a specific article or set of articles; i.e., they are designed specifically to accommodate the article for which they are intended. Some containers are shaped in the form of the article they contain;

(2) are suitable for long-term use, i.e., they are designed to have durability comparable to that of the articles for which they are intended. These containers also serve to protect the article when not in use (during transport or storage, for example). These criteria enable them to be distinguished from simple pickings;

(3) are presented with the articles for which they are intended, whether or not the articles are packed separately for convenience of transport. Presented separately the containers are classified in their appropriate headings;

(4) are of a kind normally sold with such articles; and

(5) do not give the whole its essential character.

(II) Examples of containers, presented with the articles for which they are intended, which are to be classified by reference to this Rule are:

(1) Jewellery boxes and cases (heading 71.13);

(2) Electric shaver cases (heading 85.10);

(3) Binocular cases, telescope cases (heading 90.05);

(4) Musical instrument cases, boxes and bags (e.g., heading 92.02)

(5) Gun cases (e.g., heading 93.03).

(Ill) Examples of containers not covered by this Rule are containers such as silver caddy containing tea, or an ornamental bowl containing sweets.

RULE 5(b)

(Packing materials and packing containers)

(IV) This Rule governs the classification of packing materials and packing containers of a kind normally used for packing the goods to which they relate. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use, for example, certain metal drums or containers of iron or steel for compressed or liquefied gas.

(V) This Rule is subject to Rule 5 (a) and, therefore, the classification of cases, boxes and similar containers of the kind mentioned in Rule 5(a) shall be determined by the application of that rule.

RULE 6

For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those sub-headings 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.

EXPLANATORY NOTE

(I) Rules 1 t 5 above govern, mutatis mutandis, classification at subheading levels within the same heading.

(II) For the purposes of Rule 6, the following expressions have the meanings hereby assigned to them:

(a) "Subheadings at the same level" : one-dash sub-headings (level 1)or two-dash subheadings (level 2)

Thus, when considering the relative merits of two or more one-dash subheadings within a single heading in the context of Rule 3 (a), their specificity or kinship in relation to a given article is to be assessed solely on the basis of the texts of the competing one-dash subheadings. When the one-dash subheading that is most specific has been chosen and when that subheading is itself subdivided, then, and only then, shall the texts of the two-dash subheadings be taken into consideration for determining which two-dash subheading should be selected.

(b) "unless the context otherwise requires": except where Section or Chapter Notes are incompatible with subheading texts or Subheading Notes.

This occurs, for example, in Chapter 71 where the scope assigned to the term "platinum" in chapter Note 4 (B) differs from that assigned to "platinum" in Subheading Note 2. for the purpose of interpreting subheadings 7110.11 and 7110.19, therefore, Subheading Note 2 applies and Chapter Note 4(B) is to be disregarded.

(Ill) The scope of a two-dash subheading shall not extend beyond that of the one-dash subheading to which the two-dash subheading belongs; and the scope of a one-dash subheading shall not extend beyond that of the heading to which the one-dash subheading belongs.