



CUSTOMS DUTIES – classification of accessories for use with dolls and toys under Chapter 95 of the Combined Nomenclature – application of Note 3 to Chapter 95 – meaning of “suitable for use” and “principally” in Note 3 – effect of Note 3 on scope of subheading 9503 00 29 (parts and accessories of dolls) – application of General Rule of Interpretation 3 – scope of subheading 9503 00 70 (sets) – burden of proof in customs matters

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal numbers: UT/2020/0051
UT/2020/0054

BETWEEN

**BUILD-A-BEAR WORKSHOP UK HOLDINGS
LIMITED**

Appellant

-and-

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

Respondents

TRIBUNAL

**MRS JUSTICE JOANNA SMITH
JUDGE ASHLEY GREENBANK**

**Sitting in public by way of remote video hearing, treated as taking place in London, on
13 and 14 January 2021**

**Laurent Sykes QC, instructed by Addleshaw Goddard LLP, for Build-a-Bear Workshop
UK Holdings Limited**

**Owain Thomas QC and Mr Paul Reynolds, counsel, instructed by the General Counsel
and Solicitor to HM Revenue & Customs, for the Commissioners for Her Majesty’s
Revenue and Customs**

DECISION

INTRODUCTION

1. This is an appeal by Build-A-Bear Workshop UK Holdings Limited (“**BAB**”) from a lengthy and detailed decision (the “**FTT Decision**”) of the First-tier Tribunal (Judge Harriet Morgan) (the “**FTT**”) dated 27 November 2019. The FTT gave permission both for the appeal and a cross-appeal from the Commissioners for Her Majesty’s Revenue and Customs (“**HMRC**”) on 1 June 2020.

2. On 18 October 2012 and 22 July 2013, HMRC upheld the issue of three C18 post-clearance demands (“**C18s**”) in respect of customs duty and import VAT on the basis that BAB had not correctly declared the import of certain goods for the purposes of the Combined Nomenclature (the “**CN**”). On 13 July 2015, HMRC upheld a decision to refuse to repay to BAB customs duties and import VAT in respect of such goods. BAB appealed these decisions to the FTT. The commercial significance of the appeal, as recorded in paragraph [4] of the FTT Decision, is that the classifications upheld by HMRC generally attract a customs duty at 4.7%, whereas the classifications for which BAB contends would attract customs duty at 0%.

3. The Build-A-Bear group, of which BAB is the UK arm, is a global retailer of stuffed toys (in both human and animal form) together with “accessories” for those toys. The issues between the parties relate to the correct classification for customs duty purposes of various of the “accessories” imported by BAB.

4. A number of different accessories were in issue at the hearing before the FTT but for the purposes of this appeal, it is agreed that relevant accessories fall into the following main categories, (1) clothing; (2) footwear; (3) plastic and textile items; (4) sets; (5) hearts; and (6) accessories for animal toys. At the beginning of the appeal, an application was made by BAB to amend its Grounds of Appeal also to include wigs. In circumstances where the issues relating to wigs are similar to those applicable to clothes in general and where it was accepted that no prejudice would ensue, HMRC did not seek to resist this application. As the issues concerning clothing and wigs are similar, we have addressed them together. We refer to the six categories of accessories identified above, together with the wigs, in this decision notice as the “**Accessories**”.

BACKGROUND FACTS

5. The FTT described BAB’s business in paragraph [8] of the FTT Decision as follows:

“BAB offers an experience whereby, at BAB’s “workshops” or online, customers can choose a “skin” to create their own stuffed toy or doll in the form of an animal, including bears, or a human (“BAB stuffed animals” and “BAB stuffed dolls” and together “BAB stuffed toys”). At the workshop children participate in stuffing the skin, with the assistance from a store associate, before it is stitched into the finished BAB stuffed toy by a store associate. As set out below, a textile heart is always inserted into the skin before it is finally stitched together to form the finished product. BAB also sell a range of other toys and dolls as set out below. The items are included within the extensive range of clothing and other “accessories” which BAB also sells which can be used with BAB stuffed toys and other toys BAB sells. Customers can purchase the items separately without the need to purchase a toy”.

6. The Build-A-Bear group’s business was traditionally focussed on toys in the form of animals, including bears. In 2009, the Build-A-Bear group introduced a “Sweetheart” range of

stuffed dolls in human form, branded as “Honey” and “Daisy”. These are rounded in size and shape and were originally sold in the United States, but sales in the United Kingdom began in 2012. From sometime in 2015 onwards, BAB has also sold (under licence) a range of four “Lalaloopsy” dolls in a human form.

7. The Accessories in dispute are all sold and used with both stuffed bears (the “**BAB Bears**”), and with the Sweetheart and Lalaloopsy dolls (the “**BAB Dolls**”).

8. In order to accommodate the particular (non-human) features of the BAB Bears, clothes sold by BAB feature slits (relevant to this appeal are the slits which are formed in the unsealed sections of the seam of clothing items such as trousers and shorts) which allow the tail of the bear to be pulled through them, thus permitting the clothing to fit properly. Similarly, wigs sold by BAB for dressing up a BAB Bear as a special character feature two small loop-holes of around 10 cms, which allow the protruding ears of a bear to be pulled through so that the wig sits better on the bear’s head. Various different types of footwear are produced by BAB, including football boots, walking shoes, slippers and sandals. These all have a rounded appearance and generally feature BAB’s paw print logo on the tread of the sole.

9. In addition to clothing, wigs and footwear, the Accessories include the textile and plastic hearts which are inserted into the BAB Bears and the BAB Dolls (“**hearts**”), sets of clothing items (including items with slits and/or shoes) (“**sets**”), scaled down versions of human accessories such as sunglasses and mobile phones (“**plastic and textile items**”), and a range of clothes and other accessories for animal toys such as leashes and collars, plastic animal food bowls, toy accessories, dog houses, dog beds and pet carriers in a variety of materials (“**animal accessories**”). We return to the detail of these items when we address the arguments raised by the parties on this appeal.

THE LEGAL FRAMEWORK

The Community Customs Code

10. The legal background to the operation of the Community Customs Code (the “**Code**”) was set out by the FTT at paragraphs [96]-[107] of the FTT Decision and has been repeated before us (in terms that we did not understand to be opposed) in an Annex to HMRC’s skeleton argument.

11. In summary, the customs classification for goods imported from outside the EU is based on the CN adopted under Article 1 of EC Regulation 2658/1987 (the “**Tariff Regulation**”). The CN is derived from the World Customs Organisation’s harmonized system of commodity nomenclature as laid down by the International Convention on the Harmonized Commodity Description and Coding System 1983 to which the EU is a party.

12. The Court of Appeal in *Invamed Group Limited v Revenue and Customs Commissioners* [2020] EWCA Civ 243 (“**Invamed**”) per Patten LJ at [5], reproduced as “a convenient summary of the legal structure of these arrangements” a passage from the judgment of Lawrence Collins J in *Vtech Electronics (UK) plc v Commissioners for Customs & Excise* [2003] EWHC Ch 59 (“**Vtech**”) at paragraphs [6]-[12]:

“[6] The Common Customs Tariff came into existence in 1968. By Article 28 of the revised EC Treaty Common Customs Tariff duties are fixed by the Council acting on a qualified majority on a proposal from the Commission.

[7] The level of customs duties on goods imported from outside the EC is determined at Community level on the basis of the Combined Nomenclature (“CN”) established by art 1 of Council Regulation 2658/1987. The CN is established on the basis of the World Customs Organisation’s Harmonised System laid down in the International Convention on the Harmonised

Commodity Description and Coding System 1983 to which the Community is a party.

[8] Article 3(1)(a)(ii) of the International Convention provides that, subject to certain exceptions, each contracting party undertakes “to apply the General Rules for the interpretation of the Harmonised System and all the Section, Chapter and Subheading Notes and shall not modify the scope of the Section, Chapters, headings or subheadings of the Harmonised System”. The International Convention is kept up to date by the Harmonized System Committee, which is composed of representatives of the contracting states.

[9] The CN, originally in Annex 1 to Regulation 2658/87, is re-issued annually... The CN comprises: (a) the nomenclature of the harmonized system provided for by the International Convention; (b) Community subdivisions to that nomenclature (“CN subheadings”); and (c) preliminary provisions, additional section or chapter notes and footnotes relating to CN subheadings.

[10] The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the harmonised system, and the two extra digits identify the CN sub-headings of which there are about 10,000. Where there is no Community sub-heading these two digits are “00” and there are also ninth and tenth digits which identify the Community (TARIC) subheadings of which there are about 18,000.

[11] There are Explanatory Notes to the Nomenclature of the Customs Co-operation Council, otherwise known as Explanatory Notes to the Harmonised System (“HSENs”). The Community has also adopted Explanatory Notes to the CN (pursuant to Article 9(1)(a) of Council Regulation 2658/87), known as CNENs.

[12] Binding Tariff Information is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council Reg 2913/92/EEC) on request from a trader. They are called BTIs, and such information is binding on the authorities in respect of the tariff classification of goods...”

13. In the present case, the FTT addressed a number of BTIs produced by the parties at paragraph [124] of the FTT Decision, saying that it found them of limited assistance. No argument has been raised before us on the appeal by reference to any BTIs.

Interpretation of the Code

General Rules for Interpretation

14. Section I of Part I of the Annex to the Tariff Regulation contains some general rules for the interpretation of the CN (“**GIRs**”). For present purposes, we need refer only to Rules 1, 3 and 6:

“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. ...

3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:

(a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when

two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

(b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

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

4. ...

5. ...

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

Case law

15. We were referred to a number of authorities, both in the Court of Justice of the European Union (and its predecessor the European Court of Justice) (the “**CJEU**”) and in domestic courts on the subject of the approach to the classification of goods under the CN and we shall consider these, as necessary, in addressing the substantive issues raised on this appeal. The FTT was also taken to numerous authorities and summarized them in paragraphs [125]-[159] of the FTT Decision. It was not our understanding that this summary was the subject of any particular criticism from the parties. Indeed, the general principles of classification are not in doubt (although a specific issue arises in relation to the application and interpretation of Note 3 to Chapter 95 of the CN in this case, which we shall return to later).

16. For present purposes, suffice to say that:

(1) The GIRs provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code and (unlike the HSEs and CNENs) have “the force of law” (*Vtech* [16]).

(2) It is common ground that, in the interests of legal certainty and ease of verification, the decisive criteria for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN (*Holz Geenen GmbH v Oberfinanzdirektion Munchen* (Case C-309/98) at [14]).

(3) The intended use of the goods may be considered as part of the classification analysis where that use is inherent to the goods and that inherent character is capable of being assessed by reference to the objective characteristics and properties of the goods (see *Hauptzollamt Hamburg-St. Annen v Thyssen Haniel Logistic GmbH* (Case C-459/93) (“*Thyssen Haniel*”) at [13]).

(4) Having regard to the objective characteristics and properties of the goods, a combined examination of the wording of the headings and the explanatory notes to the

relevant sections and chapters should be undertaken to determine whether a definitive classification can be reached, in accordance with GIR 1 and GIR 6. If not, then in order to resolve the conflict between the competing provisions, recourse must be had to GIRs 2-5 (see the opinion of Advocate General Kokott in *Uroplasty v Inspector van de Belastingdienst* (Case C-514/04) (“*Uroplasty*”) at [42]).

(5) GIR 3 will apply only when it is apparent that goods are prima facie classifiable under a number of headings (see *Kip Europe SA & Ors and Hewlett Packard International SARL v Administration de douanes* (Cases C-362/07-C-363/07) (“*Kip Europe*”) at [39] and the wording of GIR 3 itself).

(6) Classification must proceed on a strictly hierarchical basis, taking each level of the CN in turn. The wording of headings and subheadings can be compared only with the wording of headings and subheadings at the same level (see the opinion of Advocate General Kokott, *Uroplasty* [43]).

(7) The HSEs and the CNENs are an important aid to the interpretation of the scope of the various tariff headings but do not themselves have legally binding force. The content of the HSEs and the CNENs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions (see *Revenue and Customs Commissioners v Honeywell Analytics Limited* [2018] EWCA Civ 579 per Davis LJ (“*Honeywell Analytics*”) at [95] and *Invamed* per Patten LJ at [12]).

RELEVANT CLASSIFICATION PROVISIONS IN THIS APPEAL

Relevant provisions of Chapter 95

17. It was common ground that the Accessories (with the exception of hearts) all fell to be classified within Chapter 95 of Section XX of the CN, which has the title “Toys, Games and Sports Requisites; Parts and Accessories thereof”:

“9503 00 Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages; dolls; other toys; reduced size (“scale”) models and similar recreational models, working or not, puzzles of all kinds:

9503 00 10 - Tricycles, scooters, pedal cars and similar wheeled toys; dolls’ carriages

- *Dolls representing only human beings and parts and accessories thereof:*

9503 00 21 -- Dolls

9503 00 29 -- Parts and accessories

- *Toys representing animals or non-human creatures:*

9503 00 41 -- Stuffed

9503 00 49 -- Other

.....

9503 00 70 - *Other toys, put up in sets or outfits....*

9503 00 75 -- Of plastics

9503 00 79 -- Of other materials....

- *Other....*

.....

-- Other

9503 00 95 --- Of plastics

9503 00 99 ---Other”

(emphasis added)

18. We refer to the subheadings in italics above in the order they appear as “**the Dolls Subheading**”, “**the Toys Subheading**”, “**the Sets Subheading**” and the “**Other Toys Subheading**”.

Relevant chapter notes

19. Note 3 to Chapter 95 (“**Note 3**”) is of particular importance in this appeal. It provides as follows:

“3. Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.”

Note 1 identifies various articles that are not covered by Chapter 95 and is not relevant to the appeal or the cross-appeal.

20. Note 4 to Chapter 95 (“**Note 4**”) relates to combinations of items that are sold together. It is also relevant to the appeal and the cross-appeal. It provides:

“4. Subject to the provisions of note 1 above, heading 9503 applies, *inter alia*, to articles of this heading combined with one or more items, which cannot be considered as sets under the terms of [GIR 3(b)], and which, if presented separately would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys.”

Relevant provisions of the HSEs

21. The HSEs for Chapter 95 under the heading “General” provide that, *inter alia*:

“Each of the headings of this Chapter also covers identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith, and provided they are not articles excluded by Note 1 to this Chapter”.

22. The HSEs for Chapter 95 under the heading “General” provide that, *inter alia*:

“(C) Dolls

This group includes not only dolls designed for the amusement of children but also dolls intended for decorative purposes (e.g. boudoir dolls, mascot dolls), or for use in Punch and Judy or marionette shows, or those of a caricature type.

Dolls are usually made of rubber, plastics, textile materials, wax, ceramics, wood, paperboard, papier maché or combinations of these materials. They may be jointed and contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice etc. They may also be dressed.

Parts and accessories of dolls of this heading include: heads, bodies, limbs, eyes (other than those unmounted of glass, of heading 70.18), moving mechanisms for eyes, voice-producing or other mechanisms, wigs, dolls’ clothing, shoes and hats.

(D) Other toys

This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g. pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes:

All toys not included in (A) to (C). Many of the toys are mechanically or electrically operated.

These include:

(i) Toys representing animals or non-human creatures even if possessing predominantly human physical characteristics (e.g. angels, robots, devils, monsters), including those for use in marionette shows.

.....

(xiii) Dolls' houses and furniture, including bedding

(xiv) Dolls' tea and coffee sets; toy shops and the like, farmyard sets etc....

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this heading when they are put up in a form clearly indicating their use as toys (e.g. instructional toys such as chemistry, sewing etc. sets).

Also, as provided by Note 4 to this Chapter, subject to Note 1 to this Chapter, this heading includes articles of the heading combined with one or more items which would be classified in other headings if presented separately, provided that:

(a) The combined items are put together for retail sale, but the combination cannot be considered as a set under the terms of General Interpretive Rule 3(b); and

(b) The combination has the essential character of toys. Such combinations generally consist of an article of this heading and one or more items of minor importance (e.g. small promotional articles or small amounts of confectionery)."

23. Under the heading "Parts and Accessories", the HSENs for Chapter 95 provide that:

"This heading also covers identifiable parts and accessories of the articles of this heading, which are suitable for use solely or principally therewith and provided they are not articles excluded by Note 1 to this Chapter."

Relevant provisions of the CNENs

24. The CNENs covering relevant codes, as published by the Commission on 30 May 2008, stated the following:

"9503 00 21 Dolls

See the [HSEN] to heading 9503, (C), first two paragraphs.

See also the Explanatory Notes to subheadings 9503 00 81 to 9503 00 99.

This subheading includes, by application of general rule 2(a) for the interpretation of the Combined Nomenclature, unassembled or disassembled dolls.

950300 29 Parts and accessories

See the [HSEN] to heading 9503, (C), third paragraph.

950300 41 and 9503 00 49 Toys representing animals or non-human creatures

These subheadings include, by application of general rule 2(a) for the interpretation of the Combined Nomenclature, unassembled or disassembled toys representing animals or non-human creatures.”

25. The CNENs also contain guidance on the application of Note 4 and the Sets Subheading. These are relevant to the cross-appeal and we have referred to this guidance in our discussion of the cross-appeal.

THE FTT DECISION

26. We review the FTT Decision in relation to the Accessories in some detail in the sections below, but, in this section, we have set out a summary of the main findings which form the subject of the appeal and the cross-appeal.

27. The FTT also set out alternative conclusions for the classification of the Accessories in the event that its main findings were found to be incorrect. We have limited this summary to the main findings of the FTT.

Clothing and wigs

28. It was common ground before the FTT, and before us, that the clothing and wigs are “accessories” and fall within Chapter 95, heading 9503. It was (and remains) also common ground, as the FTT recorded in paragraph [160] of the FTT Decision that:

“...under GIRs 1 and 6, as applied in combination with Note 3, [the clothing and wigs] fall, at any rate on a “prima facie” basis within the [Toys Subheading] and the sub-heading “stuffed” (9503 00 41) on the basis that they are accessories which are principally suitable for use with those articles”.

29. As regards the clothes and wigs, the primary question at issue before the FTT concerned whether the clothes and wigs also fall within the Dolls Subheading, and its further, two dash, sub-heading for “parts and accessories” (9503 00 29) on a *prima facie* basis such that the correct classification is to be determined under the tie-breaker provisions in GIR 3.

30. The FTT decided that the clothing and wigs fell within the Toys Subheading only, essentially because: “whilst the clothing items can plainly be used on any toy or doll of an appropriate size, the fact is that they are, according to their objective design characteristics, suitable principally for use with stuffed animal toys” (FTT [187]). The FTT arrived at this conclusion because of its interpretation and application of Note 3, which we will address below.

Footwear

31. The FTT made similar findings in respect of footwear, determining that footwear is also to be classified under the Toys Subheading only, because although the shoes produced by BAB are suitable for use with certain dolls in human form “the size and rounded shape of the footwear, as designed specifically to fit BAB’s stuffed bears, clearly indicates that the footwear is suitable for use principally, in the sense of for the most part or chiefly, with stuffed bears” (FTT [203(1)]).

Sets

32. The FTT found that sets of clothing where one item of a set contained a slit but another item did not, should be classified as falling within the Toys Subheading (9503 00 41) as accessories of stuffed toys (FTT [204] and [206]).

Plastic and textile items

33. The FTT found that the plastic and textile items should be classified within the Dolls Subheading as “parts and accessories” of dolls within subheading 9503 00 29. This finding extended not just to those items which could be worn by dolls (such as wigs and hats), but also to other items which could be used for play with dolls (FTT [238] to [249]).

Hearts

34. The FTT found that the plastic and textile hearts were equally suitable for use with articles falling within the Dolls Subheading and articles falling within the Toys Subheading. As a consequence of this finding, and a finding that the plastic and textile hearts were not objects of amusement in their own right, the FTT decided that they fell to be classified under “the appropriate heading according to their utilitarian function as textile and plastic items” (FTT [257]).

Animal accessories

35. The FTT found that the animal accessories were suitable for use with animal toys, but that they were equally suitable for use with stuffed animal toys and hard-bodied animal toys. On the basis of those findings, the FTT decided that the animal accessories were to be classified as items in their own right under the Other Toys Subheading (FTT [253]).

THE APPEAL

36. We will deal first with BAB’s appeal.

The Grounds of Appeal

37. BAB’s grounds of appeal are, in summary, as follows:

(1) Ground 1: the FTT was wrong to treat the effect of Note 3 as requiring an accessory to be “solely or principally” for use with dolls in order to constitute an accessory under subheading 9503 00 21 or 9503 00 29. The effect of Note 3 is not to qualify the express reference to accessories of human dolls in the Dolls Subheading.

(2) Ground 2: even if Note 3 qualifies the express reference to accessories in the Dolls Subheading, that test has been applied incorrectly. It is not the case that the “solely or principally” test requires identification of a single heading or subheading.

(3) Ground 3: the FTT applied the wrong test in concluding that, in any event, neither the Dolls Subheading nor the Toys Subheading was more specific. The Dolls Subheading is plainly the more specific of the two subheadings.

(4) Ground 4: the conclusion that the shoes were suitable for use principally with stuffed bears is not supported by the FTT’s primary findings of fact. This conclusion ought to be reversed on the grounds set out in *Edwards v Bairstow* [1956] AC 14 at page 36.

38. In the context of the FTT’s decision in relation to clothing and wigs, it is the first three grounds of appeal that are relevant. In summary, BAB contends that the FTT’s conclusion that the clothing and wigs fell within the Toys Subheading only, essentially because they were suitable principally for use with stuffed animal toys, was based on an error of law of a kind described in either Ground 1 or Ground 2. In BAB’s submission, the FTT should have found that the clothing and wigs *prima facie* fell within both the Dolls Subheading and the Toys Subheading such that the provisions of GIR3(a) come into play. Having regard to a correct interpretation of GIR 3(a), BAB submits that the clothing and wigs should have been classified under the Dolls Subheading on the grounds that this was the subheading that provided the “most specific” description. This is Ground 3 of the appeal.

39. In relation to the FTT’s decision regarding the footwear (and in addition to the points it makes in Grounds 1, 2 and 3 of its appeal), BAB also contends that the FTT’s conclusion that the shoes were suitable for use principally with stuffed bears is not supported by the FTT’s primary findings of fact. This is Ground 4 of the appeal.

40. As is clear from its Grounds of Appeal, a determination of Grounds 1, 2 and 3 of the appeal in the context of clothing and wigs will largely dispose of BAB’s appeal in relation to the other Accessories. This is because, insofar as the remaining Accessories are concerned, BAB’s case is:

(1) Sets: the FTT’s conclusion on sets was also premised on its initial classification of clothing and shoes as falling within the Toys Subheading, which was, in turn based on its interpretation and application of Note 3;

(2) Plastic and textile items: BAB does not challenge the FTT’s conclusion that the plastic and textile items are to be classified for customs duty purposes as accessories of a human doll (under the Dolls Subheading), but BAB contends that the FTT erred in its analysis of GIR 3(a) which would bite if it were wrong on its primary case;

(3) Hearts: the FTT’s conclusion on hearts (that they were equally suitable for use with articles falling within the Dolls Subheading and articles falling within the Toys Subheading) was also premised upon its decision that Note 3 requires the identification of only one heading (or subheading) into which the article is classified.

(4) Animal accessories: the FTT’s conclusions on animal accessories (that they were equally suitable for use as accessories of stuffed animal toys or other animal toys and so could not be classified in the Toys Subheading) were based on its incorrect interpretation and application of Note 3.

41. We have therefore proceeded to address these issues, as a starting point, in the context of the appeal against the FTT Decision in relation to clothing and wigs. Once we have established the principles which should be applied, we will revert to the other matters under appeal.

Clothing and wigs

42. In the case of the appeal against the FTT’s conclusions on the classification of clothing and wigs, we will take Grounds 1 and 2 together as they both require detailed consideration of the proper interpretation and application of Note 3. However, before we come to the arguments of the parties to the appeal, we should first set out in more detail the decision made by the FTT relevant to the issues raised by these first two Grounds of Appeal.

The FTT Decision

43. The FTT made the following findings of fact as to the clothing and wigs:

“...All BAB’s core clothing and “accessories” can be used with and worn by [the Sweetheart range of BAB stuffed dolls”. (FTT [9])

“I accept that, as supported by the evidence taken from the websites of other doll retailers and photographic evidence in the bundles of the accessories in use with non- BAB toys and dolls, that BAB’s accessories fit a range of dolls or toys other than those sold by BAB.” (FTT [18])

“The slits do not have a functional purpose other than to enable tails or ears to be pulled through (although in some cases a doll’s hair could be pulled through them...). For example they do not have any fastening function as regards trousers or skirts. Ms Stout confirmed that the slits are placed where they are in the relevant item because that is where the tail or ears are located when the item is worn by a BAB stuffed bear and agreed that the slits have no function when the item is used on a human doll or toy with no tail or ears.” (FTT [57])

“All of the slits for tails are 4.5 cms long and are usually located in the seam of the clothing item. Ms Stout confirmed that, whilst the material of trousers and shorts may vary, the size and shape of these items is predominantly the same. They are all based on the same design specification (with the same waist size and leg width) although they may be held up or fastened in different ways. The shorts are made to the same basic specification as the trousers save for the length of the legs.” (FTT [58])

“I agree with Ms Stout's description of the slits in the seams of these items as discreet in the sense that, when the relevant item is worn by a doll or toy with no tail, they are not obvious or not easily seen. In terms of appearance of the garment, the slit is relatively insignificant in proportion to the overall size of the garment and its overall appearance...” (FTT [60])

“The wigs in dispute are designed for dressing up a bear or doll as a special character. They include two small loop-holes of around 10 cms which, if the wig is worn by a doll or toy with protruding ears, can be used to help secure the wig in place. As Ms Stout demonstrated they are only of use if the wig is worn by a bear or other toy with protruding ears although use of the loops is not essential to keep the wig in place; they allow the ears to be pulled through so the wig sits better on the toy's head. Ms Stout agreed that the loops are specifically located to accommodate ears and that this was part of the specification given to the manufacturer. If the wig is worn by a human doll with no protruding ears the wig sits in place on its own and the loops are not required.” (FTT [61])

“The loops are covered in hair to conceal them. I agree with Ms Stout's description of the loops as discreet in that they are not very visible from outside the wig.” (FTT [62])

44. The FTT then summarized its conclusions on clothing items in paragraph [170]:

“In my view, for the reasons set out in full below:

The clothing items are, according to their objective characteristics and properties, “accessories” which are, within the meaning of note 3, “suitable for use...principally” with animal toys of a stuffed kind (under sub-heading 9503 00 41);

Under GIR 1 and 6 and on the plain meaning of note 3, as read in the context of the overall hierarchical approach under the GIRs, the clothing items are to be classified definitively with those articles under the sub-heading for animal toys of a stuffed kind...”

45. At paragraphs [171] to [187], the FTT set out in detail its reasoning behind the conclusions in paragraph [170]. All of this reasoning is of importance to the decision reached by the FTT, but we have set out the key passages below.

46. The FTT began by recording that its starting point was to determine whether the clothing items fell within the scope of Note 3. At paragraph [171], the FTT said this:

“[171] On the basis of the case law, in deciding which heading in chapter 95 applies to the clothing items, the correct starting point under GIR 1 and 6 must be to assess whether the items, which are accepted to be accessories, are suitable for use solely or principally with articles falling within chapter 95 within the meaning of article 3 [this should have said note 3] according to the items' objective characteristics. On their natural meaning, I interpret the term “suitable” to mean right and appropriate and the term “principally” to mean for the most part or chiefly. On that basis, in my view, the clothing items are

“accessories” which are suitable, in the sense of right or appropriate for use for the most part or chiefly with animal toys of a stuffed kind...”

47. In support of the proposition at FTT [171] that the clothing items were “principally” suitable for use with stuffed toys, the FTT made three separate points, as follows.

(1) First that:

“The critical factor is that the items are specifically designed, according to BAB’s specifications, to fit stuffed bears of the size and proportions of the BAB stuffed bears with slits in the clothing or loops on the wigs which are evidently positioned and sized to enable the tail or ears of the stuffed bear to be pulled through.” (FTT [171(1)])

(2) Second that:

“Whilst the clothing items may fit some human dolls, these design features have no function as regards such dolls...” (FTT [171(2)]);

(3) Third that much of the evidence presented by BAB as to the interchangeability of the products for use with human and animal toys, the commercial history of the group and the sales data:

“is not objectively verifiable evidence of the type which can be taken into account in the classification analysis and/or does not establish the proposition asserted and/or in any event does not detract in any way from the significance of the objective characteristics of the clothing items, including the slits or loops, as features which make the clothing items suitable for use chiefly with stuffed bears...” (FTT [171(3)]).

48. In paragraph [173], the FTT considered BAB’s argument that “the presence of slits in the clothing items does not affect a consumer’s view of the items as suitable for use with human dolls” but concluded that the evidence before it was “not objectively verifiable material of a type which evidences how consumers are encouraged to use these particular clothing items or how they view the clothing items’ objective characteristics as regards their suitability for use chiefly with human dolls or animal toys”.

49. In paragraph [174], the FTT rejected the fact that the clothing items may have the BAB pawprint logo on them or their packaging as a matter to be taken into account in the analysis.

50. In paragraph [175], the FTT turned its attention specifically to the interpretation and application of Note 3 (as applied under GIR 1 and GIR 6), saying that it:

“provides a definitive classification for an accessory where it can be identified as being suitable solely or principally [for] use with articles within a particular heading:

(1) Under GIR 1 and 6 items are to be allocated (where possible) to a particular heading, according to their objective characteristics and properties, as specifically defined in the relevant heading (and in the section or chapter notes). In that context I note that the wording of the headings in point here plainly suggests a clear dividing line and demarcation between (a) all dolls in human form (under the dolls heading) and (b) all toys in animal form or other non-human form (under the toys heading).

(2) It would be out of kilter with that approach to interpret note 3 as meaning that items are to be classified under heading 9503 where they can be viewed as suitable solely or principally for use with articles falling under one or more headings taken together in a holistic way (on the basis that GIR 3 then determines which particular heading applies). Rather:

(a) On the plain meaning of the words used, as interpreted in light of the overall approach under GIR 1 and 6, the relevant enquiry is whether, according to their objective characteristics and properties, the clothing items are accessories suitable for use solely or principally with particular articles as specifically defined in a particular heading or sub-heading.

(b) On the natural meaning of the terms “principally” and “suitable”, an accessory which is held to be right and appropriate for use, for the most part or chiefly, with articles of a particular heading or sub-heading cannot also be suitable for use in that sense with a different set of articles of a different heading or sub-heading.

(c) The reference at the end of note 3 that relevant accessories “are to be classified with those articles” plainly indicates, as is in line with GIR 1 and 6, that accessories are to be classified definitively with such particular articles as they are found to be suitable for use solely or principally with.”

51. The FTT then referred to an argument raised by BAB as to the correct interpretation of the Dolls Subheading and continued (at FTT [177] and [178]):

“[177] It seems to me that, given that note 3 applies to chapter 95 generally with no exclusions, it is likely that it is intended to apply to the reference to “parts and accessories thereof” in the human dolls heading. If that was not the intention the wording of note 3 could have been modified accordingly. Moreover, it would be very odd if “parts and accessories” are to be classified with articles in headings in chapter 95 (a) which do not specifically mention “parts and accessories” only if they are suitable for use solely or principally with those articles but (b) which specifically mention “parts and accessories” by reference to some lesser test. I also think it likely that, in any event, the term “parts and accessories thereof” in the dolls heading is to be interpreted as meaning that an item must be mainly or principally intended for or suitable for use with human dolls for it to be an accessory of such a doll.

[178] On that basis, it follows that if an item cannot be identified as an “accessory” suitable for use solely or principally, in the sense of chiefly or for the most part, with articles within a particular heading or sub-heading of chapter 95, it is to be classified as an item in its own right under the heading or sub-heading within which it otherwise falls under the usual approach to classification. That would be the case, therefore, if, for example, the item is equally suitable for use with human dolls and animal toys such that, under note 3, it cannot be specifically identified as an “accessory” or “part” of either set of articles. The overall effect of note 3, therefore, as applied in conjunction with the GIRs, is that an item is classified as an accessory or part of another article only where it can be identified as suitable for use solely or principally with that article.”

52. In summary therefore the FTT took the view that:

(1) Note 3 provides a definitive classification for items that fall within its terms (FTT [175] and [175(2)(c)]).

(2) On a natural reading of “suitable” and “principally”, an accessory could be suitable for use “principally” only with items of one heading or subheading for the purposes of Note 3 (FTT [175(2)(b)]).

(3) Note 3 operates to exclude from heading 9503, accessories which are not solely or principally suitable for use with articles of a specific subheading within Chapter 95. An accessory which is suitable for use equally with articles which fall within different subheadings, has to be classified as an item in its own right (FTT [178]).

(4) Note 3 applies to limit the scope of the reference to “parts and accessories” in the Dolls Subheading (subheading 9503 00 29) to items within Note 3 i.e. to those which are solely or principally for use with dolls in human form (FTT [177]). (This is what the parties refer to as Note 3 being “read-in” to the Dolls Subheading.)

53. In paragraph [179], the FTT expressed the view that the case law did not lead it to any different result.

54. In paragraphs [181] and [182], the FTT discussed the decision in *Invamed* in the Upper Tribunal, a decision that has since been overturned by the Court of Appeal, which upheld the decision of the First-tier Tribunal in that case. At paragraph [182(3)], the FTT said:

“In [the UT’s] view [in *Invamed*], at [70], the correct approach is to determine whether there are characteristics of the vehicle which, although they do not detract from use by disabled persons (because they do not outweigh the objectively identifiable benefits to such persons), do detract from use by able-bodied persons because, viewed objectively, they outweigh the benefits to those persons of using a scooter as an alternative to walking (even if some people might still choose to use the scooters notwithstanding the perceived disadvantages).”

55. The FTT then continued by distinguishing the approach taken in *Invamed* in the following terms:

“In this case, I accept that, on the approach taken in *Invamed*, according to their objective characteristics, the clothing items are suitable for use to provide the same basic clothing function as accessories for human dolls and animal toys of an appropriate size. The presence of the slits or loops does not prevent the clothing items being used on a human doll of an appropriate size albeit that the slits or loops do not have any function as regards such dolls (except to the limited extent set out above as regards hats). If the only test in this case was, similarly to the test in *Invamed*, whether the clothing items are suitable for use solely with an article, then, on the *Invamed* approach, the fact that the clothing items are suitable for use to perform the same basic function as regards both human dolls and animal toys would prevent them being classified with animal toys.” (FTT [184])

“However, unlike in *Invamed*, the test set out in note 3 is also satisfied where “accessories” such as the clothing items are suitable for use “principally” with particular articles. For the reasons already given, the fact that the clothing items can be used with human dolls (or other toys) of an appropriate size, does not detract from the fact that their design with slits and loops of a specific size and position to accommodate ears and tails of a stuffed bear renders them suitable, in the sense of right or appropriate, for use principally, in the sense of for the most part or chiefly, with such toys. As set out in [171]-[174], there is insufficient objectively verifiable evidence of relevance to assessing, according to their objective characteristics, with what articles the items are suitable for use chiefly or for the main part, to justify a conclusion to the contrary.” (FTT [185])

“In this case, however, it is not a question of assessing whether, due to the presence of the slits or loops, the clothing items have lost or retained their character as items which provide a clothing function for toys or dolls. As set out above, whilst the clothing items can plainly be used on any toy or doll of an appropriate size, the fact is that they are, according to their objective design characteristics, suitable principally for use with stuffed animal toys.” (FTT [187])

56. On this basis, the FTT reached the conclusion that the fact that the clothing items and wigs were suitable for use with dolls did not prevent their being principally suitable for use with stuffed toys.

Do the grounds of appeal raise issues of fact or law?

57. On behalf of HMRC, Mr Thomas QC submitted that BAB's skeleton for the appeal and oral submissions at the hearing sought, on occasions, to mount a full scale attack on findings of fact made by the FTT in circumstances where the evaluative conclusions reached by the FTT, a specialist tribunal and the primary fact finder, are not susceptible to appeal save on *Edwards v Bairstow* grounds. Mr Thomas contended that rather than organizing his submissions by reference to errors of law, Mr Sykes QC on behalf of BAB, "instead takes issue with many of the FTT's evaluative findings, yet seeks to present these as challenges on points of law".

58. Our attention was drawn to the judgment of Jacob LJ in *Proctor v Gamble v HMRC* [2009] EWCA Civ 407 at [10], citing Lord Hoffman in *Designers Guild v Russell Williams (Textiles) Ltd* [2001] 1 All ER 700 to the effect that the courts would be hesitant to interfere where "the decision involves the application of a not altogether precise legal standard to a combination of features of varying importance [such that it]...falls within the class of case in which an appellate court should not reverse a judge's decision unless he has erred in principle."

59. We also have regard to what HMRC described as the "particularly stringent observance of this principle in classification cases", as exemplified in *Cooneen Watts & Stone Ltd v Revenue and Customs Commissioners* [2014] UKUT 31 (TCC) ("*Cooneen*") at paragraphs [67]-[69]. As Nugee J (as he then was) made clear in that case, it is important that an appellate tribunal is limited to an appeal on a point of law, that it confines itself to what are truly questions of law and does not substitute its own view of the facts for that of the fact-finding body. As he said at paragraph [69]:

"It is obviously important that the appellate tribunal scrutinises the grounds of appeal with care to be sure that they are not what Peter Smith J described in *HMRC v Photron Europe Ltd* [2012] UKUT 275 (TCC) as 'a classic disguised factual challenge dressed up as questions of law'".

60. However, on close analysis of BAB's submissions, we disagree with Mr Thomas that BAB is (for the most part) seeking in this case to make such a challenge. Save for the matters identified in paragraph [61] below, to which we shall return later, the essence of BAB's challenge appears to us to focus on the approach that the FTT should have taken in applying Note 3 (a question of law). BAB says that the FTT erred in reading Note 3 into the Dolls Subheading and erred in misconstruing Note 3 in any event and that these errors led directly to wrong conclusions being arrived at on the facts.

61. Thus, by way of example,

(1) In paragraph 16 of his skeleton, Mr Sykes notes that "The facts have been found" and goes on to say that the FTT considered that the additional functionality (provided by the slit in the clothing items) was sufficient to conclude that the Toys Subheading was in point. However he goes on to say "That was because of the legal test [i.e. in his submission, the wrong legal test] adopted by the FTT".

(2) Whilst Mr Sykes submits in his skeleton at paragraph 23 that paragraph [187] of the FTT Decision (which sets out factual findings as to objective design characteristics) is an error of law, he goes on to say that such error "is a direct result of reading the references to "parts and accessories" in the [Dolls Subheading] as if it incorporated Note 3 (as the FTT construed Note 3)".

(3) Similarly in paragraph 63 of his skeleton, Mr Sykes submits that the FTT erred in failing to consider whether and how the slit in the clothing accessories affected use with a human doll as being relevant to the issue of classification. The skeleton then goes on to say “That was an error of law and one which flowed from the FTT’s view that Note 3 fell to be read into the [Dolls Subheading] to qualify there the reference to parts and accessories and its reading of Note 3 which admitted principal suitability for use with articles of only one heading.”

62. HMRC conceded at the hearing that, insofar as BAB is correct in challenging the FTT’s interpretation or application of Note 3, then there is no reason why this tribunal may not review the FTT’s findings of fact (which on that scenario would have been made having regard to the wrong legal test). For the most part, it was not our understanding that BAB was intending or intimating a broader, more generalized and stand-alone attack on the evaluative findings of the FTT and there is, in any event, no Ground of Appeal to that effect. However, this is subject to two exceptions: (i) the FTT’s findings in relation to footwear, which are the subject of Ground 4 of the appeal and (ii) some of BAB’s challenges to the FTT’s approach to the question of whether the clothing items and wigs were “principally” suitable for use with stuffed toys, challenges which were addressed in its skeleton argument and orally at the hearing, but not in the Grounds of Appeal. We return to both of these issues below.

BAB’s case

63. We now turn to consider the specific arguments raised in the appeal in respect of Grounds 1 and 2.

64. By its grounds of appeal and as explained in its skeleton for the hearing, BAB contends that:

(1) It is not possible to read Note 3 into the Dolls Subheading so as to qualify the express reference in that heading to parts and accessories of human dolls only (as the FTT did in [177] of the FTT Decision). BAB says that the clothing items are within the Dolls Subheading on its plain meaning and accordingly (because they are also within the Toys Subheading), one must pass straight to GIR 3.

(2) The FTT erred in its application of Note 3 such that, even if it were possible to read Note 3 into the Dolls Subheading, Note 3 (on its proper interpretation) would not affect the conclusion that the FTT should have arrived at, namely that the clothing items are accessories of human dolls. The FTT erred in law in considering that the principal suitability for use of an item must necessarily correspond to a single heading within Chapter 95 (FTT [175]). Had the FTT taken the correct approach, it would have identified that the clothing items fell under more than one subheading in Chapter 95 such that one must pass straight to GIR 3.

65. As we have said above, these issues require careful consideration of the application of Note 3 within Chapter 95, its true interpretation and the question of whether and how it is to be applied to the Dolls Subheading. As HMRC pointed out in its skeleton argument, this consideration will need to include analysis of the following questions: (i) At what stage does Note 3 apply? (ii) What is the true interpretation of Note 3 (including the true interpretation of the words “suitable” and “principally”)?; and (iii) What is the effect of Note 3 on the Dolls Subheading? Some of these issues overlap and they were, on occasions, elided by Mr Sykes in his submissions on behalf of BAB. However, we agree the HMRC’s broad approach is helpful and so have separated our analysis to address these three questions before summarizing our conclusions on the classification of the clothing items and wigs.

At what stage does Note 3 apply?

66. For ease of reference, we set out again the wording of Note 3:

“Subject to note 1 above, parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles”.

67. We were not referred to any case law which assists on the correct interpretation of Note 3.

BAB's arguments

68. As a starting point, BAB's arguments on this issue overlap significantly with its arguments on the meaning of the word “principally” in Note 3, where BAB does not accept the FTT's interpretation. We have addressed that point separately under the next heading.

69. On the question of the stage at which Note 3 applies, BAB relies on the fact that the express words of Note 3 refer to “articles of this chapter” (emphasis added), i.e. Chapter 95 and it points out that Note 3 does not refer to headings. From this starting point, BAB contends that Note 3 is obviously asking whether “parts and accessories” are suitable for use solely or principally with articles of Chapter 95 or fall within other chapters. In his oral submissions, Mr Sykes expanded on this point, saying that if there is an exclusionary element to Note 3, it only requires that the sole or principal use is not with items in other chapters.

70. Put differently, it is BAB's submission that Note 3 is intended to provide a means for classifying “parts and accessories” within the CN as a whole. As Mr Sykes said in his skeleton argument “This is not a competition between headings within Chapter 95 but a competition between headings throughout the Combined Nomenclature.”

Discussion

71. We reject the argument that Note 3 applies solely to differentiate between articles that fall within Chapter 95 and those which do not, for the following reasons:

(1) BAB's construction seems to us to ignore the express requirements of GIR 1 and GIR 6 to the effect that “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 “...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...”.

(2) Having regard to GIR 1 and GIR 6, classification is expressly to be determined by reference to the terms of particular headings and subheadings, together with related section and chapter notes. GIR 1 does not envisage that classification should be undertaken by reference to chapters, an exercise which would require a focus on the organization of the products into those chapters, rather than on the terms of particular headings and subheadings.

(3) We agree with HMRC that the focus on the phrase “*this chapter*” in Note 3 by BAB is misguided. It accords that phrase a much greater significance than is permitted by the wording of GIR 1 and by the fact that a chapter is merely an organizational device to facilitate reference. In our judgment, the plain and obvious meaning of the words of Note 3 is that the sole or principal use must be in relation to particular “*articles*”, i.e. particular products falling into a heading in Chapter 95. Thus, the phrase “articles of this chapter” is plainly a reference to articles which fall within the headings contained in Chapter 95.

(4) In this context, we note the reference in GIR 1 to “chapter notes”. Note 3 is plainly not general guidance as to the approach to be taken to the CN whenever “parts and accessories” are in issue. On the contrary, it is a chapter note, designed to determine the classification of items within Chapter 95. We agree with Mr Thomas that an enquiry which required contemplation of the breadth of the whole of Chapter 95 and comparison with other competing chapters would be unworkable and cannot have been intended on the natural and obvious meaning of the words in Note 3 as interpreted against the background of the provisions in GIR 1.

(5) Further and in any event, we cannot see that Note 3 would be of any real efficacy or assistance in the context of the classification exercise if it is merely stating that “parts and accessories” which are solely or principally classifiable with articles (general) in Chapter 95 should be classified with articles in that chapter. Such a reading of Note 3 would provide no guidance whatever as to how those “parts and accessories” are to be classified within the headings and subheadings of the chapter.

(6) Indeed, we agree with HMRC that if BAB’s approach were to be accepted, the effect of Note 3 would be to assemble a list of headings within Chapter 95 between which GIR 3 would then be required to arbitrate. In other words it would give rise to more ambiguity. Indeed BAB appears to acknowledge this in its Grounds of Appeal at paragraph 21(a) when it says that the language of Note 3 “favours the conclusion that a multitude of prima facie classifications is permissible”. This would appear, on the face of things, to be inconsistent with the approach that should be taken to examining the objective characteristics of a product under GIR 1 and GIR 6, namely (as Lawrence Collins J held in *Vtech* at [107], where he was dealing with a challenge that the Tribunal had stopped at GIR 1 and not determined the dispute under GIR 3) “...to find the category in which it should be placed, and not to assemble a list of theoretically possible but increasingly implausible categories between which the provisions of rule 3 must be used to decide”. On our reading of GIR 3, it is intended as a tie-break provision and not as a freestanding basis for classification whenever two or more classifications can be reasonably envisaged.

72. For all of these reasons, we reject the submission that Note 3 operates only to assist the classification of items as between headings in different chapters of the CN. It is a chapter note. The wording of GIR 1 and GIR 6 is clear: classification is to be undertaken according to the terms of the headings and subheadings and any relative section or chapter notes. We agree with the FTT (FTT [175]) that, where Note 3 applies, its purpose is to provide a definitive classification of the relevant part or accessory alongside articles in respect of which it is solely or principally suitable for use. Note 3 is relevant to the entire process of classification of the items to which it applies. There is nothing in the wording of Note 3 itself to suggest otherwise.

The interpretation of Note 3

The meaning of “suitable for use” and “principally”

73. HMRC pointed out in its skeleton argument that “BAB’s case has throughout been that an accessory can have more than one principal use”. Whilst this is plainly the case, there are three distinct aspects to BAB’s arguments on this issue.

74. The first is developed in its Grounds of Appeal (at [13]-[23]), where BAB addresses this point as an extension of its argument concerning the stage at which Note 3 applies, which we have addressed above, and not by reference to a stand-alone point as to the true interpretation of the word “principally” in Note 3.

75. In summary, BAB submits that the purpose of Note 3 (i.e. bringing within Chapter 95 items which would otherwise not be within the Chapter 95) is best fulfilled if Note 3 recognizes

a principal suitability for use which is not confined to articles of a single heading. In light of these arguments, BAB says that in deciding that the Note 3 test could only be satisfied where “parts and accessories” were suitable for use solely or principally with articles of a single heading (FTT [175]), the FTT erred in law. It says that once one understands that the concept of headings is irrelevant to the application of Note 3, there is every reason to construe the concept of “principal use” in Note 3 as permitting a reference to use with more than one item or items across headings.

76. We have addressed these arguments above. Once one dismisses the idea that the purpose of Note 3 is to mandate a comparison at chapter level, the contention that such purpose would “best be achieved” if Note 3 recognizes a principal suitability for use which extends beyond articles of a single heading no longer has any force.

77. In its Grounds of Appeal, BAB developed an additional argument to the effect that the language of Note 3 itself envisages *prima facie* classification within more than one heading as it is framed in the plural (“classified with those articles”). However, that was not a point pursued in BAB’s skeleton argument or oral submissions on the appeal, presumably because BAB recognized that this argument overlooks the fact that (as HMRC pointed out in its skeleton argument) the use of “articles” in the plural is entirely consistent with, and necessitated by, the use of the phrase “parts and accessories”, which refers to two different and distinct products; parts being (in general terms) essential or integral to the functioning of the item, and accessories being items which provide some additional functionality or enhance the performance of the primary article (see the analysis of the FTT at [216]-[237] of the FTT Decision in the context of considering whether plastic and textile items were to be classified as accessories of human dolls).

78. The second aspect of BAB’s submissions on this issue is to be found in BAB’s skeleton argument for the hearing. These submissions appeared, for the most part, to address the meaning of “principal use” in Note 3 in the context of a contention that the term “parts and accessories” in the Dolls Subheading imported a different test from the principal use test applied by Note 3 (i.e. that it is not permissible to read the requirements of Note 3 into the subheading) – a point to which we return below.

79. The third aspect of BAB’s submissions arose from the oral submissions made by Mr Sykes and from paragraph 47 of his skeleton argument. BAB also contends that the words “suitable for use...principally” themselves permit the possibility that an accessory may have more than one principal use, and that such concept is consistent with an accessory falling *prima facie* within more than one heading or subheading.

80. In support of its argument that there is no reason why “principal use” in Note 3 cannot involve more than one item or items across headings, BAB points to Note 2 in Chapter 90, which reads:

“(b) Other parts and accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading...are to be classified with the machines, instruments or apparatus of that kind. (c) All other parts and accessories are to be classified in heading 9033.”

81. In our judgment, the FTT was right to find that the plain and obvious meaning of the term “suitable” was “right and appropriate” and the plain and obvious meaning of the term “principally” was “for the most part or chiefly” (FTT [171]) and accordingly that an accessory can only be suitable for use principally with articles of one heading or subheading (FTT [175(2)(b)]) for the purpose of Note 3.

82. We have arrived at this conclusion for the following reasons:

(1) In *Pfizer Consumer Healthcare Ltd v Revenue and Customs Commissioners* (Case C-182/19) (“*Pfizer*”), the CJEU pointed out (at [48]) that:

“...the meaning and scope of terms for which EU law provides no definition must be determined according to their meaning in everyday language whilst considering the context in which they occur and the purposes of the rules of which they form part...”

(2) The natural meaning of the word “principally” as defined in the Oxford English Dictionary is “in the chief or first place; above all; pre-eminently”. We agree with HMRC that it is difficult to see how, as a matter of language, goods can be suitable for use in the first place, pre-eminently or chiefly with articles of more than one heading.

(3) This interpretation (as required by *Pfizer*) gives effect to the clear purpose of Note 3 which, in our view, is to provide a definitive classification of items which fall within its scope by providing that a part or accessory should be classified with the item of which it is solely or principally a part or accessory. That purpose would be frustrated if Note 3 could provide for classification under more than one heading or subheading.

(4) This approach – and adopting the natural meaning of “principally” – is reinforced by the overall approach under GIR 1 and 6 where items are to be allocated (where possible) to a particular heading (see, for example, *Vtech* [107]).

(5) Furthermore, we do not see how reference to the terms of Note 2 to Chapter 90 provides any real assistance to BAB. It is a different note in a different chapter. Insofar as it expressly provides for the possibility that “parts and accessories” may be suitable for use with “a number of machines, instruments or apparatus” we note that it also expressly provides that these are to be “of the same heading”. If anything, Note 2 to Chapter 90 might be said to indicate that if the draftsman of the CN had intended the principal use test in Note 3 to apply to more than one article in more than one heading, he or she would have said so.

The case law

83. In addition, existing case law dealing with the use of the word “principally” elsewhere in the CN (albeit of course in different chapters and thus different contexts) is supportive of our construction.

84. Thus in *Kip Europe*, the CJEU was concerned with multi-function devices that copied, printed and scanned. The relevant chapter note was Note 5(B)(a) to Chapter 84, relating to data-processing systems. That note sets out classification rules where a product “is of a kind solely or principally used in an automatic data processing system”. Although printing and scanning necessarily involve data processing, it was agreed that copying does not. At paragraphs [47] and [48] of its judgment the CJEU gave guidance for determining whether the devices in question could be described as “of the kind used ... principally in an automatic data-processing system”.

“[47] If the copying function is secondary in relation to the other two functions [scanning and printing], those machines should be considered units of automatic data-processing machines within the meaning of Note 5(B) to Chapter 84 of the CN...”

[48] However, if the copying function of the machine at issue in the main proceedings is of an equivalent importance to that of their other two functions, those machines could not be considered units of automatic data-processing machines because they do not meet the condition laid down in Note 5(B)(a) to Chapter 84 of the CN, that is to say, that they be 'of a kind solely or principally used in an automatic data-processing system'”

85. In *GD European Land Systems - Steyr GmbH v Zollamt Eisenstadt Flughafen Wien* (Case C-262/15) (“**GD European Land**”) the CJEU was concerned with goods described as a turret system for armoured fighting vehicles, which had been classified by the customs office as “an armoured turret which, as an identifiable part, will be fitted solely or principally in armoured fighting vehicles” (at [16]). Note 3 to Section XVII of the CN provided that “References in Chapters 86 to 88 to “parts” or “accessories” do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters”. In considering the application of Note 3 to Section XVII, the CJEU held at paragraphs [35]-[37] and [41] that a turret system could only be described as ‘principally’ for use with an armoured fighting vehicle where it was “primarily intended for use with an armoured fighting vehicle”.

86. We agree with HMRC that the analysis in these cases does not fit with the argument that “suitable for use... principally...” in Note 3 can refer to any one of several ‘main’ uses. On the contrary, the analysis is, in our judgment, consistent with a use being described as the ‘principal use’ only where it is the predominant use. It also seems to us that the analysis undertaken by the FTT was consistent with this approach; it considered whether the Accessories were equally suitable for bears and for dolls, or whether it was possible to determine a principal (i.e. predominant or chief) use. In our judgment it was right to do so.

87. In this context it is worth having regard to paragraph [35] of the CJEU’s decision in *GD European Land*:

“[35] ...the fact that a turret system has been imported for the production or assembly of armoured fighting vehicles and is indeed used, subsequently, for that purpose, although it may be an element that is to be taken into consideration, does not necessarily mean that that system is ‘solely’ or ‘principally’ intended for use with such vehicles within the meaning of note 3 to Section XVII of the CN...”.

88. Likewise in this case, the acceptance by the FTT that the Accessories were “suitable for use” with both dolls and bears was plainly not an acceptance that they were principally suitable for use with both dolls and bears – that was a different question which the FTT went on to address separately.

The findings of the FTT

89. In this context we should also address BAB’s related criticisms of the central findings of the FTT in this respect, albeit that these arguments are not foreshadowed in its Grounds of Appeal.

90. In summary, BAB contends that, in arriving at its factual conclusion that the presence of slits in the clothes and loops on the wigs rendered the clothing and wigs suitable for use principally with toys falling under the Toys Subheading, the FTT erred in failing to consider whether and how the slits and loops affected their use with a human doll.

91. BAB contends that the FTT erred in law in three respects.

(1) First, the FTT failed to take account of CJEU authority to the effect that additional functionality which does not deprive the article of real practical functionality for the purpose of its classification within one heading or subheading does not necessarily cause an article to be classified under another heading or sub-heading. In this case, BAB argues that the slits and loops did not deprive the clothing or wigs of their practical functionality as an accessory to a human doll and so should not necessarily cause the clothing to cease to be an accessory of a human only doll. In support of this argument, BAB relies upon the decision of the CJEU in *BVBA Van Landeghem v Belgium* (Case C-486/06) (“**Van Landeghem**”) at [34] to the effect that the mere addition of

characteristics pertaining to an article in issue is not decisive of its classification and that an assessment must be undertaken as to the entirety of the characteristics of that article, taking into account the relative importance of the criteria used for their classification.

(2) Second, the FTT failed to consider whether the slits and loops were “sufficiently invasive” as to prevent suitability for use as an accessory of a human only doll (by reference to *Invamed* [2016] UKFTT 0775 at [57], [59] and [64]).

(3) Third, the FTT gave too much weight to one additional design feature (i.e. the slits or the loops). One additional design feature was not on its own capable of affecting suitability for use. In support of this argument, BAB relies upon the decision of the Court of Appeal in *Payne v Revenue & Customs Commissioners* [2020] EWCA Civ 889 at [62] to the effect that the use of the word “primarily” imports something more than a suitability which is marginally greater than another or any number of other suitabilities, and that “primarily” requires “more than a percentage point advantage of one suitability over another”.

92. BAB says that these errors flowed from the FTT’s view that Note 3 fell to be read into the Dolls Subheading to qualify there the reference to “parts and accessories”, together with its (incorrect) reading of Note 3 which admitted principal suitability for use with articles of only one heading.

93. We address the argument that the FTT erred in law in reading the requirements of Note 3 into the Dolls Subheading at [99] to [112] below. As regards the interpretation of Note 3 itself, we have found that the FTT was right in its interpretation of Note 3. BAB’s challenge is, in essence, that, in deciding that the clothing items were “principally” suitable for use with stuffed toys, the FTT placed too much weight on the presence of the slits or loops. The FTT employed the phrase “specifically designed” for this purpose (FTT [171(1)]). Mr Sykes criticises the use of that phrase for the reasons that we have set out above. However, in our view, the FTT employs that phrase merely as a description of its view, having reviewed all the evidence, of the importance of the adaptations made to the clothing and the wigs to their functionality. These are precisely the sort of evaluative findings that this tribunal should be reluctant to disturb.

94. An appeal of this sort could only get off the ground and we could only make a finding different from that made by the FTT if we could be “satisfied that no tribunal acting judicially and properly instructed as to the law could have failed to make that finding” (see *Revenue and Customs Commissioners v Kearney* [2010] EWCA Civ 288 at [49]). Given the clear findings of fact made by the FTT as to the objective characteristics of the clothing and wigs and the evaluative determination then undertaken by it in light of those findings, we could not be so satisfied. In our view, having correctly interpreted Note 3, the FTT was entitled to find that the accessories in dispute were principally suitable for use with other toys and in particular with stuffed bears for the purpose of Note 3. We reject Mr Sykes’s challenge to those findings, which, in our judgment, strays too far into the realms of the findings of fact made by the FTT.

The effect of Note 3 on the Dolls Subheading?

95. Even if it is wrong in its arguments as to the stage at which Note 3 is to be applied and even if it is wrong as to the true and proper interpretation of the word “principally” in Note 3, BAB nevertheless has an additional argument (in Ground 1 of the Grounds of Appeal) which focusses on the presence of the words “parts and accessories” in the Dolls Subheading itself.

BAB's submission

96. As we understand the way in which BAB advances its arguments in the Grounds of Appeal, the skeleton argument and in oral submissions (taken together), the submission appears to be as follows:

- (1) the Dolls Subheading itself includes express reference to “parts and accessories”,
- (2) in the circumstances, it is not possible or appropriate to “read in” Note 3 to the wording of that subheading – Note 3 is not relevant to its interpretation;
- (3) instead one must determine the meaning of those words (and that Subheading) on a stand-alone basis – as is set out in paragraph 10 of the Grounds of Appeal: “they would be superfluous if they were not intended to import *a separate test*” (*emphasis added*);
- (4) in undertaking the exercise of interpretation, it is necessary to have regard to the intended use test articulated in the case law, which admits of more than one main use and which is not constrained by the headings of the chapter;
- (5) the express inclusion of the words “parts and accessories” in the Dolls Subheading makes it clear that accessories which are for dolls must be classified within the Dolls Subheading even if they are also for use with animal toys. (This means that the Dolls Subheading is always in point where the article can reasonably be described as a “part or accessory” of a doll, regardless of whether that article can also be described as a part or accessory for a toy under the Toys Subheading; and where the article can also be described as a part or accessory for a toy under the Toys Subheading, GIR 3 must be employed to determine the correct classification.)

97. In advancing this case, Mr Sykes seeks to persuade us to apply a less stringent test for parts and accessories under the Dolls Subheading than would be applied on the FTT’s (and our) interpretation of Note 3. Instead of parts and accessories needing to be suitable for use principally (i.e. chiefly or for the main part) with articles of the Dolls Subheading (as the FTT found is the case on the basis that Note 3 has to be read-in to the subheading), he contends that it is only necessary on a proper reading of the Dolls Subheading to establish that their use with Dolls is a main intended use.

98. Before considering whether Mr Sykes is right to seek to apply this main intended use test to the wording of the Dolls Subheading, it is first necessary to consider whether the first part of his submission – that Note 3 is not to be read-in to the Dolls Subheading - is correct.

Should Note 3 be read into the Dolls Subheading?

99. The FTT decided (at FTT [177]) that it was necessary to read Note 3 into the Dolls Subheading.

100. HMRC says that the FTT was correct to do so. In short, HMRC says that having regard to the hierarchical structure of the CN, the Dolls Subheading cannot be engaged unless and until an article falls within the terms of heading 9503. The clothing items and wigs in this case only fall for consideration under the Dolls Subheading and the Toys Subheading because the effect of Note 3 is to bring them within the remit of heading 9503, having regard to the terms “dolls” and “other toys” in that heading.

101. During the hearing we were concerned to understand why the Dolls Subheading includes the specific reference to “parts and accessories” given that, on HMRC’s interpretation (and that of the FTT), there is no real need for the reference to “parts and accessories” in the Dolls Subheading since, if Note 3 is read-in to the subheading in the manner in which HMRC suggests, the subheading only extends to parts and accessories which are suitable for use

“solely or principally” with dolls. That position would be reached by applying Note 3 to a subheading which simply referred to “dolls” and made no specific reference to “parts and accessories” in much the same way as HMRC say Note 3 applies to the reference to stuffed toys in the Toys Subheading.

102. HMRC confirmed that, in their view, Note 3 is to be read into each relevant heading and subheading and that it follows that, where Note 3 applies, the text of the heading or subheading is to be read as meaning that “parts and accessories” are included only if they are suitable for use solely or principally with the article in the heading. Thus, it was HMRC’s contention that “the fact that the words ‘parts and accessories’ may appear expressly in some subheadings, and not in others, is not of significance”.

103. BAB on the other hand sought to provide two distinct explanations.

(1) In its skeleton argument (paragraph 46), BAB contended that the inclusion of the words “parts and accessories” in the Dolls Subheading could be explained on the grounds that it indicated that the test for an article to fall within the subheading was different from the principal use test in Note 3.

(2) At the hearing, Mr Sykes focussed on a different reason, namely that (assuming his interpretation of Note 3 to be correct) the inclusion of the words “parts and accessories” in the Dolls Subheading demonstrates, for the purposes of the application of the GIR 3(a) tie-break provision, that the Dolls Subheading is more specific than the Toys Subheading. BAB says this is particularly important in a situation such as this where there is only a very fine distinction between the Dolls Subheading and the Toys Subheading, which Mr Sykes sought to illustrate by reference to a decision of the US Court of International Trade: *Toy Biz Inc v United States* (3 January 2003).

104. We have already dismissed (at [79]-[82] above) Mr Sykes’s argument that the concept of “principal use” in Note 3 can extend to items in more than one heading or subheading. So BAB’s rationale for the reference to “parts and accessories” in the Dolls Subheading turns on that wording permitting a different interpretation from that which would obtain if the phrase is read in a manner consistent with Note 3. We turn to that point later in this decision notice, but first we will address the question as to whether, as a matter of principle, Note 3 should be read into the Dolls Subheading in a manner which restricts the scope of the Dolls Subheading to parts and accessories falling within Note 3.

105. We are not convinced by HMRC’s submissions on this issue. GIR 1 and GIR 6 require classification to be undertaken by reference to the terms of the headings and subheadings and the relative section notes and chapter notes, unless the context otherwise requires. That must mean that classification is to be undertaken by reference to the wording of the headings and subheadings. For this reason, we do not find attractive an interpretation which requires us to ignore the wording of the Dolls Subheading (or to regard it as being of no significance) as HMRC invite us to do. We start from the premise that, when engaging in an exercise of classification for the purpose of the CN, we must seek to give effect to the wording of the Dolls Subheading, which, in simply referring to “parts and accessories” without more, is different from Note 3.

106. We are also not convinced by HMRC’s arguments regarding the hierarchy of the headings.

107. We accept that, as we have already acknowledged, we are required to adopt a strict hierarchical approach to classification (see the opinion of Advocate General Kokott in *Uroplasty* at [43]). We must therefore begin the process of classification by an analysis of the headings at the first level – in this case at the level of heading 9503.

108. In the present case, it is accepted by the parties that the clothing items and wigs fall within heading 9503. HMRC say that this is because Note 3 applies to bring them within the heading. But, even without Note 3, in our view, the clothing items and wigs would fall within heading 9503; the HSEs in two separate places – first under the heading “General” in the notes to Chapter 95 and second under the heading “Parts and Accessories” – support the view that the headings in the chapter (including heading 9503) extend to parts and accessories which are suitable for use solely or principally with articles within the heading. At that level, the clothing items and wigs would fall within heading 9503 on the basis that the clothing and wigs are suitable for use solely or principally with articles within the heading, that is dolls and/or toys, both of which are referred to in the heading. They would not fall out of the heading, even applying the interpretation of “principally” to which we have referred to above, if they were suitable for use both with dolls and with toys but it was not possible to determine which was the predominant use. The strict hierarchical process would then require that we move on to classify all of the items that have fallen within that heading within a relevant subheading of heading 9503.

109. HMRC’s analysis would require an item that is only used as an accessory to dolls and toys (and so would otherwise fall within heading 9503) to fall into another heading (i.e. not 9503) if it cannot be allocated either to dolls or to toys by reference to its predominant use. This appears to be the FTT’s conclusion (see FTT [178]). The effect is to allow the subheadings within the chapter to dictate the scope of the headings.

110. We do not accept that this is the correct reading. After all, the CN has to be interpreted in a manner consistent with the harmonized system. The harmonized system does not possess the subdivisions which are present in the CN. There is no subdivision of heading 9503. So such an accessory would clearly fall within heading 9503.

111. We therefore cannot agree that Note 3 has to be read into each heading and subheading with the effect that it excludes from that heading or subheading items that might otherwise fall within it. Rather, we agree with the FTT’s conclusion (at FTT [175]) that Note 3 is a rule which provides for a definitive classification of items that fall within its terms. It operates, as prescribed by GIR 1 and GIR 6, alongside the wording of relevant headings and subheadings to determine the classification of articles that fall within Chapter 95.

112. We therefore reject Mr Thomas’s submission that it is necessary to read Note 3 into each heading and subheading within Chapter 95. It follows that we agree with Mr Sykes that the FTT erred in law when it reached the conclusion (at FTT [177]) that it was necessary to do so.

The reference to “parts and accessories” in the Dolls Subheading

113. We will return to what, in our view, is the correct application of Note 3 in this case later in this decision notice, but first we must return to the meaning of the reference to “parts and accessories” in the Dolls Subheading and to Mr Sykes’s submission that those words must have been included for a reason, and that reason can only be that a different test to the Note 3 test was intended.

114. As we understand his argument, Mr Sykes says that whether an article falls to be classified as a part or accessory of a doll under the Dolls Subheading is determined in accordance with the normal principles of classification under GIR 1 and GIR 6. An item must be classified by reference to its objective characteristics as defined in the wording of the relevant heading or subheading of the CN. For this purpose, the intended use of the goods can be considered provided that it is inherent to the item and that character can be assessed by reference to the objective characteristics of the item itself.

115. In support of this submission, Mr Sykes refers us to the decision of the Upper Tribunal in *Revenue and Customs Commissioners v Huxley (UK) Limited* [2017] UKUT 393 (“**Huxley**”). In that case, the Upper Tribunal considered the decisions of the CJEU in *Thyssen Haniel, Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafen* (Case C-480/13) (“**Sysmex**”), and *Anagram International Inc. v Inspecteur van de Belastingdienst Douanedistrict Rotterdam* (Case C-14/05) (“**Anagram International**”). At [59] to [61] of its decision, the Upper Tribunal says this:

“59. As submitted by Mr White, it appears that the ECJ has developed the “naturally intended use” test applied in *Thyssen Haniel* to one of “use in practice” and, as in *Thyssen Haniel*, a purely theoretical use has been discarded. Again findings as to the objective characteristics and properties of the product were ascertained with the assistance of an expert’s report.

60. The ECJ made reference in its reasoning to [*Anagram International*], a case involving the classification of gas-filled balloons which had been described as a “plastic festive balloon” on which different motifs could be printed depending on the occasion for which it was to be used. The question was whether it could be correctly classified as a festive article or as a toy. The court held at [26] of its judgment:

“... It is irrelevant that those balloons can also be used as festive articles. If the objective characteristic of a product can be established at the time of customs clearance, the fact that it may also be possible to envisage another use for that product will not preclude its classification for legal purposes. For its classification for customs purposes, that product does not have to be solely or exclusively intended for use corresponding to that objective characteristic. It suffices if that is the main use for which it is intended...”

61. It is therefore clear that “use in practice” as that term is used in *Sysmex* is a synonym for “main use”. The main use of a product is therefore capable of constituting an objective characteristic if it can be established at the time of customs clearance. However, both *Thyssen Haniel* and *Sysmex* establish that the main use of a product can be ascertained by adducing evidence, notwithstanding that such evidence is not available to the customs officer at the point of entry.”

116. Mr Sykes says that the effect of these decisions is that the “main use” or the “use in practice” of an item is capable of being an objective characteristic of an item which is taken into account in classifying an item under GIR 1 and GIR 6.

117. Mr Sykes goes further. He says that it is possible to have several “main” functions without those functions needing to be ranked and that a use which is a main use can be taken into account for the purposes of classification. He points to the following passage from the judgment of Davis LJ in *Honeywell Analytics* (at [111]-[112]), a case concerning the classification of a gas monitoring device, in support of this submission:

“111. ...a number of the authorities do also invoke a principal function or main intended use principle in order to help assess what particular classification heading is appropriate to the particular product in question: such principle operating independently of, albeit concurrently with Explanatory Notes or GIRs.

112. Thus in the *Hauptzollamt Hannover v Amazon* case (cited above) the Court of Justice accepted that, while Amazon's Kindle device had a dictionary function, that did not make the device an electronic dictionary for classification purposes: since that was not the "principal function" of a Kindle. It is true that Note 3 to Section XVI featured in that case; but the statements

of principle there set out seem to go wider than that. The cases of *Neckerman*, *Sysmex* and *Sony Corporation* (cited above), among others, also all contain statements of principle to like effect: again, statements of principle not based on Notes or GIRs. For example, in *Sysmex* (at paragraph 32) this was said, in unqualified terms:

‘... according to the case law, in order to be classified under the tariff-heading relating to a use, the product to be classified need not be solely or exclusively intended for that use. It suffices that that use is the main use for which the product is intended...’

Accordingly, even on this alternative basis I would query if the respondent could have succeeded here, unless it could have established that it was the (or, possibly, a) main intended use of the Device to measure or check the level of gases. And that it had not established.” (underlining added)

118. Mr Sykes contends that it is clear from this passage that the main intended use test, as articulated by Davis LJ, is not a strict “one winner only” test but is more nuanced and Mr Sykes says that explains why Davis LJ acknowledges the possibility that “a” main intended use may, on the facts, be enough to meet the test.

119. We are inclined to accept Mr Sykes’s submission that the specific reference to “parts and accessories” in the Dolls Subheading must import a different test to that in Note 3. The cases to which Mr Sykes refers are seeking to apply the accepted principles of classification for the purposes of GIR 1 and GIR 6 to which we refer at [16] above. Applying those principles, the intended use of an item may be a relevant objective characteristic in determining whether an item can be classified as a “part” or “accessory” of a doll, if one is considering the wording of the sub-heading on a stand-alone basis. The cases to which Mr Sykes refers provide some useful guidance as to the circumstances in which an intended use may be relevant. We accept, relying upon the words of Davies LJ in *Honeywell Analytics* that there may be circumstances in which it is appropriate to have regard to a main intended use of an item (which is not the predominant use) for this purpose.

120. For the reasons that we give below, however, we do not, for the purposes of the appeal against the FTT’s decision in relation to clothing and wigs, need to determine whether the intended use of clothing or wigs with dolls in human form (even if not the predominant intended use) is sufficient to be taken into account for the purposes of classification within the Dolls Subheading. The issue is relevant to the classification of the plastic and textile hearts and we will return to it in that context.

The interaction of Note 3 and the Dolls Subheading

121. The issue for us is that, in the present case, it is not possible to take the wording of the Dolls Subheading in isolation. GIR 1 and GIR 6 require classification to be undertaken by reference to the terms of the headings and subheadings and the relative section notes and chapter notes. In this case, that means by reference to both the wording of the Dolls Subheading and Note 3.

122. It is common ground that the clothing items and wigs fall within heading 9503. If we follow the process of classification to the next level in the hierarchy, we are faced with a choice between classification in the Toys Subheading (as parts and accessories of stuffed bears within sub-heading 9503 00 41) and classification in the Dolls Subheading (as parts and accessories of dolls within the specific sub-heading 9503 00 29).

123. The FTT, having taken into account all of the evidence, found that the clothing and wigs are “suitable for use” with both dolls and stuffed bears. The FTT also found that the clothing and wigs are suitable for use “principally” with stuffed bears. As we have already said, the

FTT was entitled to reach the conclusions that it reached and we should be reluctant to disturb them. We have accepted the FTT's findings on these matters.

124. On the basis of those findings, Note 3 clearly directs that classification must follow the classification of the item with which the clothing and wigs are principally suitable for use, in this case, stuffed bears. Even if we accept the possibility that the clothing and wigs might also fall within heading 9503 00 29 as parts and accessories of dolls on the basis that Mr Sykes contends – i.e. that a main intended use of the clothing and wigs is as an accessory to dolls – the direction in Note 3 is clear and so classification in accordance with Note 3 must take precedence over classification under the Dolls Subheading. This is not a case in which classification between the two subheadings is “finely-balanced” (to adopt the phrase of Lawrence Collins J in *Vtech* at [105]). It is not necessary to resort to GIR 3 to resolve the issue.

125. This does not mean that the reference in the Dolls Subheading to parts and accessories has no relevance. We can envisage that there may be circumstances in which the findings of fact are such that a given item might be regarded as potentially falling within the Dolls Subheading (as a part or accessory of dolls within subheading 9503 00 29) in circumstances in which the classification of the item is not determined by Note 3. This is the case in relation to the classification of the plastic and textile hearts to which we refer below. However, it does not affect the classification of the clothing items and wigs.

126. As it is not necessary to have recourse to GIR 3 to determine the classification of the clothing and wigs, Ground 3 of BAB's appeal is not in point in relation to the appeal against the FTT Decision in respect of clothing and wigs. We will however return to Ground 3 in the context of the appeal against the FTT Decision in respect of hearts.

Conclusions: clothing and wigs

127. We are aware that our discussion has traversed across a number of related points with similar principles at issue. This, to an extent, reflects the manner in which the submissions of the parties were made. It may therefore be helpful if we set out a summary of our conclusions on the classification of clothing and wigs.

- (1) Note 3 is a chapter note and should be taken into account for the purpose of classification together with the terms of the headings of the CN and any relevant section notes (GIR 1 and GIR 6).
- (2) Note 3 directs that parts and accessories which are solely or principally suitable for use with articles which fall within Chapter 95 must be classified with those articles.
- (3) The purpose of Note 3 is therefore to identify a particular heading or subheading into which parts or accessories must be classified. It is consistent with that approach that an article can have a principal use with items in only one heading or subheading for the purpose of Note 3. We agree with the FTT that “principally” in Note 3 should be given its ordinary meaning and should be taken to mean “for the most part or chiefly”. We reject Ground 2 of the Appeal.
- (4) Note 3 provides direction as to the classification of items that are within Chapter 95, which is separate from the wording of the individual headings and subheadings. It is not intended to narrow the scope of particular headings or subheadings.
- (5) The FTT erred in law, as suggested in Ground 1 of the Appeal, by reading Note 3 to Chapter 95 into the wording of subheading 9503 00 29 (the “parts and accessories” subheading to the Dolls Subheading).

(6) The reference to “parts and accessories” in the Dolls Subheading may therefore extend beyond parts and accessories which are suitable for use “solely or principally” with dolls in human form.

(7) There are no good reasons for us to disturb the FTT’s findings that the clothing items and the wigs were, according to their objective design characteristics, suitable for use principally with stuffed toys for the purposes of Note 3 (FTT [187]).

(8) It is accepted that the clothing and wigs fall within heading 9503 as parts and accessories of dolls and other toys. If we follow the process of classification to the next level in the hierarchy, although the clothing and wigs might also fall within the Dolls Subheading (as parts and accessories of dolls in human form within subheading 9503 00 29), they must, in accordance with Note 3, be classified as parts and accessories of stuffed toys within the Toys Subheading (within subheading 9503 00 41).

(9) It is not necessary to resort to GIR 3 for the purposes of classification. The effect of Note 3 is clear. The position is not finely balanced (*Vtech* [105]). For this reason, Ground 3 of BAB’s appeal is not relevant to the appeal in relation to clothing and wigs.

128. Although we have decided that the FTT’s decision in relation to clothing and wigs did contain an error of law, we will not set aside the decision in this respect. For the reasons that we have given above, based on the findings of the FTT, we would have reached the same conclusion albeit for different reasons; namely that the clothing and wigs should be classified as parts and accessories of stuffed toys within the Toys Subheading (within subheading 9503 00 41).

Footwear

The Grounds of Appeal

129. BAB contends that the FTT erred in dealing with the classification of the footwear for similar reasons to those identified in relation to its appeal against the FTT Decision on clothing and wigs (Grounds 1, 2 and 3 of the Appeal). Our views on those aspects of the appeal in relation to footwear are the same as those that we have set out above in relation to clothing and wigs.

130. However, BAB raises a further ground of appeal. BAB also contends that the FTT’s primary findings of fact did not support the conclusion that the footwear was suitable for use principally with stuffed bears. This is Ground 4 of the Grounds of Appeal and directly engages the test in *Edwards v Bairstow* referred to above.

The FTT Decision

131. The FTT made its findings of fact as to the footwear at paragraphs [81]-[83] of the FTT Decision. At FTT [81]. It said this:

“The general sizes and shapes of the footwear range are very similar, with the main variants being the material used and the type of shoe...In production, all BAB footwear is moulded over the same cast. The shoes all have a rounded appearance and generally feature BAB’s paw print on the tread of the sole”.

132. The FTT then recorded (also at FTT [81]) that it was Ms Stout’s evidence that

“the round design is to facilitate the shoes fitting on dolls which typically do not have moving joints. She asserted that the wider shape makes it easier to fit the shoes onto the dolls’ feet and that, in practice, they often fit onto the plastic moulded feet of dolls with greater ease than on the feet of a BAB stuffed toy where the stuffed foot has to be stuffed into the shoe...”

133. In paragraph [82], the FTT recorded the evidence as to the paw print logo. The FTT then continued in paragraph [83]:

“[Ms Stout] accepted that some dolls do have moving joints but said that she thought that most dolls have fixed joints. It was put to her that the shape of the shoes was nothing to do with the fixed ankle but rather was designed simply to accommodate the shape of a bear’s foot. She said that was not correct. There was a need for wriggle room due to the fixed joints. The articulation of the ankle plays a role in the ability to fit the foot into a shoe. She did not accept that they are specifically for the round feet of stuffed bears...They would fit Honey and Daisy and Lalaloopsy or a Cabbage Patch doll but some are a bit too big for Rosie. She considered that Homey and Daisy have a rendition of a human foot albeit they have a rather rounded shape and they more closely resemble a BAB stuffed bear’s foot than some dolls’ feet do. She said it is common for soft dolls to have a rounded foot because the stuffing puffs out the textile doll skin and expands to fill it.”

134. The FTT recorded the submissions of the parties as to footwear at paragraph [201] of the FTT Decision. HMRC contended that the shoes were specifically designed in terms of their distinctive round shape and size to fit BAB Bears and said that the fact that they fit onto some specific types of doll is irrelevant. BAB contended that the shoes were plainly equally suitable for use as accessories for human dolls and animal toys. BAB relied on the evidence to the effect that the shoes had been designed with a round shape due to the difficulty of inserting feet attached to non-moving joints into a shoe with a foot shape. HMRC responded that there was no real evidence that a rounded shoe of this kind fits more easily onto a doll with fixed joints.

135. The FTT concluded that the shoes were to be classified under the Toys Subheading and noted the following as regards the evidence (at FTT [203]):

“(1) The size and rounded shape of the footwear, as designed specifically to fit BAB’s stuffed bears, clearly indicated that the footwear is suitable for use principally, in the sense of for the most part or chiefly, with stuffed bears.

(2) I note that Ms Stout sought to demonstrate that the shoes are suitable for use with dolls and that the rounded shape facilitates use with dolls with fixed joints. From the demonstration and evidence given, however, I cannot see that such a round shape (corresponding to the paws of a BAB stuffed bear) is a necessary feature for a shoe to be fitted on dolls with fixed joints.

(3) The footwear is suitable for use with certain dolls, such as BAB’s Honey and Daisy and Cabbage Patch dolls, which have more rounded feet than those corresponding to a human foot. However, for the reasons set out above in relation to the clothing items, the fact that the shoes can be used in such dolls (or may fit on other dolls with feet corresponding to human feet) does not detract from the fact that their design specification renders them suitable for use principally with stuffed bears.

(4) The comments set out at [173] and [174] in relation to clothing items apply equally here as regards the corresponding evidence relating to footwear.”

BAB’s case

136. BAB contends that the FTT should not and could not properly have concluded that the footwear was suitable principally for use with stuffed bears for the following reasons.

(1) The evidence was to the effect that the BAB Bears’ feet are intentionally the same shape as the BAB Dolls. The shoes are designed to fit BAB Bears and BAB Dolls as well as other dolls. The FTT recognized that the shoes are suitable for use with dolls

but, having regard to the evidence, it was unreasonable to conclude that the shoes were designed specifically for use with bears.

(2) In any event, as the FTT appreciated at [172]-[174] of the FTT Decision, the designer's purpose is only relevant to the extent that it is reflected in the objective characteristics or it helps to elucidate the significance of certain features. There is nothing in the nature of the shoes that reflects an intention that the shoes be used for bears rather than human dolls. The FTT was wrong to adopt the "specifically designed" test for this purpose. (Mr Sykes relied upon *Amoena (UK) Limited v Revenue and Customs Commissioners* [2016] UKSC 41 ("*Ameona*") per Lord Carnwath at [31].)

Discussion

137. We reject these criticisms for the following reasons:

(1) The FTT rejected Ms Stout's evidence that dolls with fixed joints needed shoes that were particularly rounded (which evidence she had advanced in support of the proposition that the rounded design was specifically to facilitate the shoe fitting on human dolls). This led the FTT to conclude that the rounded shape of the shoe is not a necessary feature for dolls with fixed joints.

(2) The FTT did recognize that the shoes were suitable for use with some dolls. However, the fact that the shoes are suitable for such use is not on its own sufficient to establish that the shoes are suitable for use principally with dolls.

(3) We agree with HMRC's submissions that, in deciding that the shoes were suitable for use principally with stuffed toys, the FTT was entitled to take into account the fact that the shoes would only be suitable for use with dolls which had rounded feet (i.e. mainly BAB Dolls), rather than feet which corresponded to human feet. This is particularly so given that the defining feature of the Dolls Subheading, as Mr Sykes was at pains to point out in a different context, is that dolls under that subheading are required to represent human features and the HSEs and CNENs are clear that products lacking human features will not be dolls (see CNENs to 95.03 at (D) "(i) Toys representing animals or non-human creatures even if possessing predominantly human physical characteristics will be classified as toys"). As HMRC point out, "Toys representing animals or non-human creatures" are not defined only by representing real animals, but also all imaginary creatures (including bears with customarily rounded feet).

(4) In the circumstances, the FTT was entitled to conclude that, given the round shoes would only fit on dolls' feet where those feet did not represent human feet (a defining feature of the dolls subheading), they could not be "principally" for use with dolls.

(5) The FTT's decision that "their design specification renders them suitable for use principally with stuffed bears" did not represent a misapplication of the appropriate test. Whilst it was common ground that the correct test is not whether an item has been specifically designed for a particular purpose, the FTT had correctly directed itself as to the law (see FTT [125] et seq) and it was open to the FTT to take the view that the design specification was capable of constituting an objective criterion for classification because it was inherent in the shoes that they had been designed for round feet.

138. For all of these reasons we do not consider that in finding that the footwear is to be classified within the Toys Subheading, the FTT arrived at a finding which no reasonable tribunal could properly have reached.

Conclusions: footwear

139. For similar reasons to those set out above in relation to clothing and wigs, we agree that the FTT erred in law in reading the requirements of Note 3 into subheading 9503 00 29 (i.e. Ground 1 of the Appeal). However, based on the findings of the FTT, we would have reached the same conclusion as the FTT; namely that the footwear should be classified as parts and accessories of stuffed toys within the Toys Subheading (within subheading 9503 00 41). We will not therefore set aside the FTT Decision in this respect.

140. We dismiss BAB's appeal in relation to the classification of footwear based on Ground 4 of the Grounds of Appeal.

Sets

141. As we have mentioned above, the FTT decided that sets of clothing where one item of a set contained a slit but another item did not should be classified as falling within the Toys Subheading (9503 00 41) as accessories of stuffed toys (FTT [204], [206]).

142. This decision followed partly from its decision that the clothing items with slits fell to be classified in that subheading and also from its decision that classification in the Toys Subheading was to be preferred to classification under the Sets Subheading (9503 00 70) applying GIR 3(b).

143. We consider the potential relevance of classification under the Sets Subheading in the context of HMRC's cross appeal. BAB's only challenge to the FTT Decision in this respect was based on its challenge to the classification of clothing items with slits. We agree with the FTT's decision on the classification of those items and so we dismiss BAB's appeal in relation to the classification of sets for similar reasons.

Plastic and Textile items

144. BAB does not challenge the FTT's conclusion that the plastic and textile items are to be classified for customs duty purposes as accessories of a human doll, and accordingly we do not need to consider their classification further in the context of BAB's appeal.

Hearts

145. BAB makes an additional point, which we have not addressed in the context of our analysis of the classification of clothing and wigs, but which is relevant to the classification of the plastic and textile hearts.

The FTT Decision

146. The FTT found that the plastic and textile hearts were equally suitable for use with articles falling under both the Dolls Subheading and the Toys Subheading and so could not be regarded as solely or principally for use with articles of one subheading for the purposes of Note 3.

147. It followed in the FTT's view, that because the hearts were not objects of amusement in their own right, they had to be classified by reference to their utilitarian function as textile and plastic items outside Chapter 95.

148. This is reflected in paragraph [257] of the FTT Decision:

“[257] In my view, the textile hearts and plastic beating hearts are identifiable from their objective characteristics, notably their heart shape, sizing and, in the case of the beating hearts, their pulsation feature, as parts or accessories for use with stuffed dolls or toys (albeit that explanatory materials, such as marketing materials, may need to be provided to the customs authorities to explain the significance of these features). However, there is nothing to

identify them as suitable for use principally with stuffed human dolls or animal toys. They are equally suitable for use with both of these items. On that basis:

(1) For the same reasons as set out in relation to the other items, they cannot be classified as accessories under either the dolls heading or the toys heading. Given they are not objects of amusement when viewed as items in their own right, they should be classified under the appropriate heading according to their utilitarian function as textile and plastic items respectively.”

BAB's arguments

149. In support of its arguments that the FTT erred in its view that there can be only one principal use for an item within the terms of Note 3, BAB says that the view expressed by the FTT leads to illogical results. It points in particular to the FTT's decision that because hearts did not meet the test in Note 3 (i.e. they could not be regarded as suitable solely or principally for use with articles of one subheading in circumstances where they were equally suitable for use with articles falling under both the Dolls Subheading and the Toys Subheading) they were to be classified as items in their own right according to the usual classification principles (and so fell outside Chapter 95).

150. BAB says that this is an absurd outcome which “defeats the whole purpose of Note 3” in the sense that it has the effect of excluding from Chapter 95 altogether an accessory that the FTT had expressly acknowledged was identifiable from its objective characteristics as an accessory for use with items within Chapter 95 (i.e. stuffed dolls or toys).

Discussion

151. For the reasons that we have given, we agree with the FTT's interpretation of the terms “principally” and “suitable for use” in Note 3. We also agree with the FTT that an article can have a principal use with items in only one heading or subheading for the purpose of Note 3. The FTT's conclusion on the classification of hearts does not undermine its decision on those points.

152. We do, however, agree with BAB that the FTT's conclusion on the classification of the hearts was wrong. In our view, that incorrect conclusion flowed from the FTT's error in reading the wording of Note 3 into the wording of headings and subheadings in Chapter 95. We have set out our reasons below.

153. As we have explained at [108] above, the HSEs are clear that an item which is suitable for use solely or principally as an accessory of articles that fall within heading 9503, also falls within heading 9503. The FTT has found that the hearts are identifiable, from their objective characteristics, as parts or accessories for use with stuffed dolls or toys. They must therefore fall within heading 9503.

154. Note 3 does not operate to exclude the hearts from this heading. It is sufficient at this level that toys and dolls are within the same heading. (If the effect of Note 3 had been to exclude the hearts from this heading, the CN would be inconsistent with the harmonized system, which is a conclusion which we should avoid if at all possible.)

155. If we move to the next level in the hierarchy, the findings of the FTT suggest that the hearts are potentially classifiable under two subheadings: subheading 9503 00 29, as parts and accessories of dolls in human form within the Dolls Subheading; and subheading 9503 00 41, as parts and accessories of stuffed toys within the Toys Subheading.

156. It is clear from the FTT's findings that the FTT regarded the hearts as equally suitable for use with articles falling within each of these subheadings (FTT [257]). We accept that finding. We also agree with the FTT that the hearts do not therefore fall within the terms of Note 3 as they are not suitable for use principally with articles of one subheading. However,

we disagree with the FTT that the effect of Note 3 is to exclude the hearts from these subheadings. In our view, Note 3 simply does not apply to provide a definitive classification.

157. We should therefore consider the classification of the hearts by reference to their objective characteristics and the terms of the relevant subheadings in accordance with GIR 1 and GIR 6.

158. In the case of classification under the Dolls Subheading, this is a specific subheading for parts and accessories of dolls (9503 00 29). As we have discussed (see [16(3)] above), the case law suggests that the intended use of an item may be a relevant objective characteristic in determining whether that item can be classified as a “part” or “accessory” of a doll, if one is considering the wording of this sub-heading alone. Most of those cases refer to the intended use of an article. However, we accept, relying upon the words of Davies LJ in *Honeywell Analytics* (at [111], [112]), that there may be circumstances in which it is appropriate to have regard to a main intended use of an item (which is not the predominant use) for this purpose.

159. In our view, this is such a case. The FTT has found that the hearts are identifiable from their objective characteristics as parts or accessories of dolls or stuffed toys and that they are suitable for use equally with both items. The intended use of the hearts is just one factor in the classification. It would not be appropriate to exclude the hearts from this subheading – a specific subheading for parts and accessories of dolls – on the basis that these items might equally be used in connection with items in another subheading.

160. If we turn to the Toys Subheading, in this case, the wording of the subheading does not expressly refer to parts or accessories. Classification within the subheading for stuffed toys (9503 00 41) relies on the extension to the subheading by virtue of the references in the HSEs and CNENs to which we refer at [21], [23] and [24] above. The explanatory notes contain similar wording (including the reference to sole or principal use) which is found in Note 3, which raises the question as to whether the hearts are classifiable within the subheading.

161. In our judgment, the better view is that the hearts therefore cannot be classified in the Toys Subheading as the hearts are not suitable for use principally (in the sense of, for the most part of chiefly) with stuffed toys. On that basis, the hearts must be classified in the Dolls Subheading under subheading 9503 0029 as parts and accessories of dolls in human form.

162. Even if we are wrong on that point so that the hearts remain prima facie classifiable under the two subheadings, the choice of subheading would then be finely balanced and accordingly it would be necessary to resort to GIR 3 to determine the correct classification of the hearts. In that case, in our view, the hearts would still be classified in the Dolls Subheading under subheading 9503 0029 as parts and accessories of dolls in human form. Under GIR3(a) the dolls subheading is clearly the more specific as it expressly refers to parts and accessories.

Conclusions: hearts

163. We have decided that the FTT erred in reading the words of Note 3 into the headings and subheadings of Chapter 95. That interpretation led the FTT to its decision that the plastic and textile hearts had to be classified independently and could not be classified as parts or accessories of dolls or stuffed toys (because they were not principally suitable for use with either dolls or stuffed toys). It reached that conclusion notwithstanding its finding that the hearts were identifiable as parts or accessories of dolls or stuffed toys from their objective characteristics.

164. For the reasons we have given, in our judgment, that conclusion was not correct. We will set aside the FTT Decision in this respect and remake the decision. The plastic and textile hearts should be classified as parts and accessories of dolls within the Dolls Subheading (within subheading 9503 00 29).

Animal accessories

The FTT Decision

165. The FTT's decision in relation to animal accessories, whilst turning on its interpretation and application of Note 3 did not involve the question of its interaction with the wording of the Dolls Subheading.

166. The FTT found that the animal accessories were suitable for use with animal toys, but that they were equally suitable for use with stuffed animal toys and hard-bodied animal toys. On the basis of those findings, the FTT decided that the animal accessories could not be classified in the Toys Subheading but were to be classified as items in their own right under the Other Toys Subheading (as they were items which were designed for amusement).

167. The relevant passage in the FTT Decision is found at paragraph [253], where the FTT said:

“253. I have concluded that these items are to be classified as items in their own right (and not as "accessories" of animal toys) under the other toys heading and in the relevant sub-heading according to what they are made of. In my view, for the same reasons as set out in relation to the plastic and textile items, these items constitute accessories suitable for use with animal toys. However, there is nothing in their objective characteristics which render them principally suitable for use with stuffed animals or with other non-stuffed or hard-bodied animal toys. They are equally suitable for use with either of these categories of toy animals. On that basis, for the same reasons as set out in relation to the textile and plastic items at [249], they are to be classified as items in their own right under the other toys heading (given they are designed for amusement) and the relevant sub-heading according to what they are made of.”

168. In the alternative, the FTT found:

“254. If I am wrong in the analysis set out at [253] and these items can be classified under both of the relevant sub-headings on a prima facie basis, in my view, for the same reasons as set out in relation to the clothing items at [199], under GIR 3(a) neither of those sub-headings provides a more specific description of the items than the other and the items should be classified under GIR 3(c) by reference to the heading which is the last in numerical order (9503 00 49).”

BAB's arguments

169. BAB says that the FTT's decision turns on its incorrect interpretation and application of Note 3. It says that the FTT was correct in its alternative reasoning (at FTT [254]) and the animal accessories should accordingly be classified under subheading 9503 00 49 (as accessories of animal toys – other) as a result of the application of GIR 3(c).

Discussion

Did the FTT Decision involve an error of law?

170. We agree with BAB that the FTT's approach to the classification of the animal accessories involved an error of law. Our reasons are set out below.

171. As we have mentioned before, it is necessary to follow a strict hierarchical approach to classification (opinion of Advocate General Kokott in *Uroplasty* [43]).

172. There is no dispute between the parties that the animal accessories fall within heading 9503.

173. At the level of the “one dash subheadings”, the choice is between the Toys Subheading and the Other Toys Subheading.

174. The FTT found that the animal accessories “constitute accessories suitable for use with animal toys” (FTT [253]). We take this to be a finding that, according to their objective characteristics, the animal accessories are identifiable as accessories of animal toys for the purposes of classification. The FTT then moves on (in FTT [253]) to consider the relative suitability of the animal accessories for use with either stuffed animal toys, or non-stuffed or hard-bodied animal toys (which is relevant to classification at the next level of “two-dash” subheadings). Given the FTT’s approach to the application of Note 3, it can only have done so if it was also of the view that the animal accessories are solely or principally suitable for use with animal toys within the terms of Note 3.

175. Given its final classification of the animal accessories within the Other Toys Subheading, however, the FTT must also have taken the view that the animal accessories were potentially classifiable according to their objective characteristics in the Other Toys Subheading. The reason that the FTT gives for that final classification (and so preferring the Other Toys Subheading over the Toys Subheading at this level) is because it reads the words of Note 3 into the “two dash” subheadings for stuffed animal toys (9505 00 41) and for other animal toys (9503 00 49). Having done so, and as we have described in our decision in relation to the classification of the plastic and textile hearts, it also allows its view of the scope of those subheadings (as restricted, in its view, by Note 3) to define the scope of a superior subheading. For the reasons that we have given, we do not accept that that is a permissible interpretation as it involves an incorrect application of Note 3 and is contrary to the strict hierarchical approach to classification required by the CJEU case law. It was, in our view, an error of law.

Remaking the FTT Decision

176. We must therefore consider whether we should remake the FTT Decision in relation to animal accessories.

177. It is accepted that the animal accessories fall within heading 9503 so we will begin the process of classification at the next level in the hierarchy which involves a choice between the Toys Subheading and the Other Toys Subheading.

178. As between these subheadings, the FTT’s findings suggest that the animal accessories might be classified in either subheading according to their objective characteristics. However, applying GIR 1 and GIR 6, we must have regard not only to the wording of the relevant headings but also to the relative section notes and chapter notes. When we apply Note 3, based on the findings of the FTT, we must classify the animal accessories with the Toys Subheading. As we have described, Note 3 is a rule of classification which dictates that parts or accessories must be classified with the items with which they are solely or principally suitable for use. At this level in the classification, the animal accessories are solely or principally suitable for use with animal toys (i.e. items falling within the Toys Subheading) and must be classified with them. The choice is not finely balanced (*Vtech* [105]) and so it is not necessary to resort to GIR 3.

179. This approach is not, however, available at the next level in the classification. The available subheadings are those for “stuffed” animal toys (9505 00 41) and for “other” animal toys (9503 00 49). The FTT found that the animal accessories are equally suitable for use with items in both categories. So Note 3 does not apply to determine the classification and we are not assisted by the wording of the subheadings, which contain no express reference to “parts and accessories”.

180. In our view, the only available conclusion is that the animal accessories are prima facie classifiable in both subheadings and the choice between the two has to be regarded as finely balanced. In those circumstances, it is appropriate to have regard to the rules in GIR 3.

181. GIR 3 provides three methods of classifying goods which prima facie fall under two or more headings. The methods in GIR 3 operate in the order in which they are set out in GIR 3.

182. GIR 3(a) provides that where goods are prima facie classifiable under two headings or subheadings, the heading or subheading which “provides the most specific description shall be preferred to the headings providing a more general description”.

183. There is some guidance as to the operation of GIR 3 in the HSEs. The relevant section of the guidance provides as follows:

“(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 ...

(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. ...”

184. In his submissions on the application of GIR 3, Mr Sykes referred us to *Hasbro European Trading BV v Revenue and Customs Commissioners* [2018] EWCA Civ 1221, a case in which the Court of Appeal considered the classification of “Beyblades”, a form of spinning top. In that case, Newey LJ expressed the view that, whilst the exercise required by GIR 3(a) is principally a textual one requiring a comparison of the wording of the potentially applicable headings, that exercise has to be performed by reference to the goods in question to determine which heading provides the most specific description of those goods. He said this at [41] to [43]:

“41. For my part, I would agree that textual analysis must be of prime importance in a GIR 3(a) case. The fact, however, that the HSEs in respect of the GIRs direct attention to which description “more completely identifies” the goods indicates, however, that the “objective characteristics and properties of the goods” can also be significant. GIR 3(a) seems to me to call for an evaluation of which heading provides the most specific description of the relevant goods. Often, it may not in practice be necessary to look beyond the wording of the rival headings to determine this. The particular characteristics of the goods can potentially be material, however.

42. A certain amount of guidance as to how GIR 3(a) should be applied can be gleaned from Case C-183/06 *RUMA GmbH v Oberfinanzdirektion Nürnberg* [2007] ECR I-1561. In that case, the CJEU said (in paragraph 35 of its judgment):

“According to the wording of point 3(a) of the general rules for the interpretation of the CN in Part One, Section I, A, of the CN, which specifically covers the situation where goods are prima facie classifiable under two or more headings, ‘the heading which provides the most specific description shall be preferred to headings providing a more general description’. In the present case, it must be pointed out that, as regards the objective characteristics and properties of the keypad membrane at issue in the main proceedings, and in particular given the fact that it refers expressly to ‘[p]arts of apparatus of subheadings ... 8525 20 91’, namely to parts of mobile telephones, subheading 8529 90 40 provides a more specific description than subheading 8538 90 99 which covers a much

wider and more varied range of goods , as shown by its title read in conjunction with that of heading 8537” (emphasis added).

The heading covering a "much wider and more varied range of goods" was thus rejected.

43. This makes obvious sense. The ultimate question is which heading provides the most specific description. In general, the heading encompassing the most limited range of goods can be expected to be the most specific. A heading covering a broader range is likely to be seen as more generic and less specific.”

185. In the present case, the competing subheadings are for “stuffed” animal toys (subheading 9503 00 41, “toys representing animals or non-human creatures - stuffed”) and “other” animal toys (subheading 9503 00 49, “toys representing animals or non-human creatures – other”). Although it might be said that in terms of a pure textual analysis, the “stuffed” toys category is the narrower as the reference to “other” in principle encompasses a broader range of goods, neither category provides a more specific description of these goods. In that case, we should move to the other rules in GIR 3.

186. GIR 3(b) applies to “mixtures, composite goods..., and goods put up in sets for retail sale”. It is not relevant in this case. So we must resort to GIR 3(c). GIR 3(c) requires goods which cannot be classified under GIR 3(a) or (b) to be classified under the heading which “occurs last in numerical order amongst those which equally merit consideration”. In this case, that is subheading 9503 00 49 (“toys representing animals or non-human creatures – other”).

Conclusions: animal accessories

187. We allow BAB’s appeal in relation to the animal accessories. The FTT Decision in relation to animal accessories involved an error of law. We will remake the decision to classify the animal accessories under subheading 9503 00 49 (toys representing animals or non-human creatures – other).

THE CROSS-APPEAL

Introduction

188. HMRC take a number of points by way of cross-appeal. They are, in summary as follows.

(1) Ground 1: HMRC challenge the FTT’s conclusion on the classification of sets of clothing where one item of a set contained a slit but another item did not. The FTT decided that such sets should be classified as falling within the Toys Subheading (9503 00 41) as accessories of stuffed toys. HMRC say that these sets should be treated as falling within the Sets Subheading (9503 00 70).

(2) Ground 2: HMRC say that the FTT erred in finding that the plastic and textile items should be classified as “parts and accessories” of dolls within subheading 9503 00 29. HMRC say that the correct classification for such items – other than those items which can be worn by dolls – is as “other toys” under subheading 9503 00 95 or subheading 9503 00 99 depending upon whether the items were made of plastic or other materials.

(3) Ground 3: HMRC say that the FTT erred in not finding that BAB had failed to discharge the burden of proof imposed upon it by failing to adduce evidence in relation to certain items listed on the C18s.

189. We deal with each of these grounds separately below.

Ground 1: clothing sets

The FTT Decision

190. As we have mentioned above, the FTT found that sets of clothing where one item of a set contained a slit but another item did not should be classified as falling within the Toys Subheading (9503 00 41) as accessories of stuffed toys (FTT [204] and [206]). This conclusion followed partly from the FTT's decision on clothing items themselves, but the FTT's analysis also took account of the provisions of the CN and relevant HSEs and CNENs regarding sets.

191. The relevant passage in the FTT's decision is in subparagraph (2) of paragraph [206]:

“(2) I note that the GIR 1 states that classification is to 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" (emphasis added) including GIR 3(b). In my view, the fact that chapter 95 includes a specific heading for other toys put up for retail sale in sets or outfits, does not of itself require GIR 3(b) to be disregarded in the absence of any express provision to that effect. It is reasonable to suppose that the sets heading applies to goods of the relevant description only where they are not otherwise to be classified under a different heading, according to the "material or component which gives them their essential character" under GIR 3(b). I note also that some of the BTIs produced indicate that the relevant customs authorities considered that GIR 3(b) was potentially in point in such circumstances although classification was not in fact made on that basis.”

192. The FTT therefore took the view that these sets should be classified by reference to the material or component which gave the sets their “essential character”, applying GIR 3(b). The component which gave the sets their essential character was the item which had the slits. On that basis, the sets should be classified as accessories of stuffed toys falling within the Toys Subheading. In particular, the FTT took the view that the Sets Subheading should only apply to items which could not otherwise be classified under a different heading (after applying GIR 3(b)).

The parties' submissions

193. Mr Thomas, for HMRC, submits that in reaching this conclusion the FTT erred in law. He says that it is only appropriate to have recourse to GIR 3 (including GIR 3(b)) where an analysis of the available headings and sub-headings applying GIR 1 and GIR 6 does not produce a single suitable sub-heading but instead produces two or more potentially suitable sub-headings, the choice between which is finely-balanced. In the present case, the Sets Subheading was clearly the most appropriate subheading (applying GIR 1 and GIR 6) and there was no need to resort to GIR 3 for the purposes of the classification.

194. Mr Sykes, for BAB, supports the FTT's approach. However, he says that the FTT's conclusion is wrong because, consistent with his main argument, the clothing with slits should be classified as “parts and accessories” of dolls within subheading 9503 00 29 when GIR 3(b) is applied.

195. Furthermore, he says the Sets Subheading is limited to sets which also include items that are not within Chapter 95. In support of this submission, he points to Note 4 to Chapter 95 which refers to combinations of items which are not treated as sets under GIR 3(b).

196. Mr Thomas rejects Mr Sykes's point on Note 4 to Chapter 95. He submits that Note 4 is intended to expand heading 9503 so that it brings within its scope all combinations of items that might properly be regarded as “toys” even if they involve an item within a heading being

sold in combination with an item which is itself alien to that heading. It does not limit the Sets Subheading. If anything, it expands it.

Discussion

The interaction of GIR 3(b) and the Sets Subheading

197. As a starting point, we agree with Mr Thomas that the correct approach is to classify these items by reference to their objective characteristics and properties as defined in the terms of the relevant headings in the CN and any relevant chapter and section notes before turning to the subheadings and any related subheading notes. This is the approach dictated by GIR 1 and GIR 6.

198. We also agree with Mr Thomas that it is only necessary to have recourse to GIR 3 (including GIR 3(b)) if it is not possible to classify items definitively using the approach dictated by GIR 1 and GIR 6. This will be the case where an analysis of the terms of the relevant headings and/or subheadings results in the identification of more than one heading or subheading which may provide an appropriate classification and the choice of the most suitable heading or sub-heading is finely-balanced.

199. This approach is supported by authority. In its decision in *Kip Europe*, the CJEU said this at [39]:

“In order to answer those questions, it is necessary to state, as a preliminary point, that, as is apparent from the wording of General Rule 1, for legal purposes, classification is determined according to the terms of the headings and any relative section or chapter notes, before the other provisions of the General Rules come to bear. General Rule 3 applies only when it is apparent that goods must be classified under a number of headings.”

and in *Vtech*, Lawrence Collins J said this at [105]:

“Both the Regulation and the Tribunal (in its primary finding on this aspect) cannot be criticised for stopping at GIR rule 1 (and the corresponding rule 6) and not going on to apply rule 3. I accept the submission for the Commissioners that goods are not considered to be “prima facie classifiable under two or more headings”, with the result that rule 3 must be invoked, purely by virtue of the fact that they could technically be brought under two or more headings, and that the purpose of rule 3 is to arbitrate between headings whose application remains finely-balanced.”

200. The FTT’s approach in paragraph [206(2)] would seem to involve an application of GIR 3 (and in particular GIR 3(b)) as part of the process of identification of prima facie appropriate subheadings. We agree with Mr Thomas that, following the decision of the CJEU in *Kip Europe*, that stage in the process of classification should be undertaken by applying GIR 1 and GIR 6. It is only once that process has been completed, and where it has identified more than one potentially relevant heading or subheading, that GIR 3 is used to arbitrate between them.

201. The FTT’s approach therefore involved an error of law.

The classification of the clothing sets

202. As we have described above, the process of classification should be applied on a strict hierarchical basis taking each level of the CN in turn (see the opinion of Advocate General Kokott in *Uroplasty* at [43]).

203. In the present case, all of the items which are included in these sets clearly fall within Chapter 95 and within heading 9503. The question for us is the subheading into which the sets should fall.

204. This leads us to a consideration of the scope of the Sets Subheading (9503 00 70). The subheading itself simply refers to “Other toys put up in sets or outfits”. Further guidance on the scope of the subheading is, however, found in the CNENs.

205. The guidance on the Sets Subheading in the CNENs states the following:

““Sets” of this subheading consist of two or more different types of articles (principally, for amusement), put up in the same packaging for retail sale without repacking.

Articles of the same subheading, except for items covered by subheadings 9503 00 95 or 9503 00 99 (since these subheadings may include miscellaneous articles of different types), are not to be considered different types of articles.

Apart from the articles forming a set, simple accessories or objects of minor importance intended to be used with the articles (for example, a plastic carrot or a plastic brush for a toy animal) can be present.

By virtue of note 4 to chapter 95, this subheading includes sets intended for the amusement of children, consisting of articles of heading 9503 combined with one or more items which, if presented separately, would be classified in other headings provided that the combinations have the essential character of toys. Examples are:

– sets consisting of toys in the form of injections moulds and moulds for modelling pastes, together with other items such as tubes or tablets of paint, modelling pastes, pencils and chinks,

-cosmetic sets for children, containing articles of heading 9503 combined with preparations of heading 3304.

However, cosmetic sets for children containing preparations of heading 3304 which do not contain any articles of heading 9503 are excluded (heading 3304).

“Outfits” of this subheading consist of two or more different articles put up in the same packing for retail sale, without repacking, and are specific to a particular type of recreation, work, person or profession, such as instructional and educational toys.”

206. From that guidance, we take the following principles:

- (1) sets within the Sets Subheading must consist of two or more different articles put up in the same packing for retail sale;
- (2) as a general rule, a set must contain items which are of “different types” i.e. that would be classified under separate subheadings within heading 9503 or, in a case falling within Note 4 to Chapter 95 (see [209]-[211] below), comprise an item or items falling within a subheading or subheadings within heading 9503 and an item or items falling outside heading 9503;
- (3) the exception to this general rule is for combinations of items which all fall within subheading 9503 00 95 or subheading 9503 00 99, as explained in the CNENs;
- (4) in addition to the main articles which form the set, the set may include accessories which are intended to be used with those articles.

207. With the exception of combinations of items that fall within subheading 9503 00 95 or subheading 9503 00 99, from the guidance as set out in the CNENs, it follows that a combination of items, which are packaged together for sale, and which fall within the same subheading of heading 9503, does not fall within the Sets Subheading. Such combinations fall

to be classified under the relevant subheading into which those items otherwise fall. So, for example, if we had taken the view that clothing with slits fell to be classified under subheading 9503 00 29 as parts and accessories of dolls, these clothing sets would also be classified under that subheading and not under the Sets Subheading.

208. The guidance set out in the CNENs does not have the force of law, but it is an important aid to the interpretation of the CN (*Van Landeghem* [23]-[25]). We cannot discern any reason to depart from the guidance in the CNENs in this case. So we intend to follow it and ensure that our conclusion is, so far as possible, consistent with it.

209. Mr Sykes submitted that the Sets Subheading is limited to combinations of items that fall within Note 4 to Chapter 95. By way of recap, Note 4 provides:

“Subject to the provisions of note 1 above, heading 9503 applies, inter alia, to articles of this heading combined with one or more items, which cannot be considered as sets under the terms of [GIR 3(b)], and which, if presented separately would be classified in other headings, provided the articles are put up together for retail sale and the combinations have the essential character of toys.”

210. The CNENs contain the following explanation of Note 4:

“Combinations to be classified under heading 9503 by virtue of this note consist of one or more articles of heading 9503 combined with one or more items of other headings put up together for retail sale and the combinations have the essential character of toys.

Such combinations derive the essential character of toys not only from the packaging but also from the importance, value and use of their components,

The classification of such combinations in the relevant subheading is determined by the items of heading 9503 contained in the combination; the other components are not taken into account.

For example:

– a plastic doll filled with sweets is to be classified under subheading 9503 00 21,

– a figurine representing a clown, a circus tent, toy animals and a key ring is to be classified under subheading 9503 00 70 as a set of toys comprising a figurine, tent and toy animals.”

211. Note 4 to Chapter 95 therefore extends to cases where items of other headings are sold in combination with items within heading 9503 provided that the combination retains the essential character of toys, and provided that the combination is not considered a set within GIR 3(b).

212. There is however nothing in the wording of Note 4 or the wording of the Sets Subheading to suggest that the Sets Subheading is confined to combinations within Note 4 as Mr Sykes submits. The guidance given in the CNENs suggests that the Sets Subheading is not so restricted. For example, the paragraph relating to combinations of items within the same subheading excludes combinations of items, which fall within subheading 9503 00 95 or subheading 9503 00 95 (to the effect that such combinations can form a set within the Sets Subheading). The clear implication is that items of different subheadings within heading 9503 can form a set within the Sets Subheading. Furthermore, the reference to Note 4 itself is, in our view, clearly intended to be inclusive. For these reasons, we reject Mr Sykes’s submission.

213. It follows that, in accordance with the principles that we have set out above, a set comprising one or more clothing items without a slit, which would otherwise be classified as

“parts or accessories” of a doll (within subheading 9503 00 29), and one or more clothing items with slits, which would otherwise be classified as “parts or accessories” of a stuffed toy (within subheading 9503 00 41), can form a set within the Sets Subheading (9503 00 70).

214. Furthermore, applying GIR 1 and GIR 6, and classifying the clothing sets by reference to their objective characteristics and properties as defined in the terms of the relevant subheadings, the Sets Subheading is prima facie an appropriate subheading in which to classify the clothing sets. Indeed, in our view, it is the most appropriate subheading at that level as the other potentially relevant subheadings – 9503 00 29 and 9503 00 41 – fail to reflect the characteristics of at least one of the major items within the set. The choice is not finely balanced. It is therefore possible to classify the clothing sets within the Sets Subheading without the need to refer to GIR 3 as there is no need to resort to GIR 3 to arbitrate between the Sets Subheading and any competing subheadings.

Remaking the FTT decision

215. The FTT’s decision involved an error of law. As a consequence of that error, the FTT decided that the clothing sets should be classified as accessories of stuffed toys falling within the Toys Subheading.

216. We allow HMRC’s appeal and set aside the FTT’s decision to the extent that it relates to the clothing sets. We do not require any further evidence in order to remake the decision. So we will remake the decision in accordance with s 12(2) of the Tribunals, Courts and Enforcement Act 2007. The clothing sets should be classified in the Sets Subheading (9503 00 70).

Ground 2: other plastic and textile items

The FTT decision

217. The FTT found that the plastic and textile items should be classified as “parts and accessories” of dolls within subheading 9503 00 29. This finding extended not just to those items which could be worn by dolls (such as wigs and hats), but also to other items which could be used for play with dolls (FTT [238] to [249]). HMRC challenge the FTT’s decision in relation to these other items.

218. The reasons which the FTT gave for its conclusion are in summary as follows:

- (1) although the examples given in the HSEs of accessories of a doll were limited to items which could be worn by a doll, there was no reason for distinguishing between items on that basis (FTT [242]),
- (2) the “critical factor” was that all the plastic and textile items – whether they could be worn by a doll or not – could be used to enhance the amusement or play value of a doll (FTT [243]);
- (3) from their objective characteristics – their size and scale, and the presence of elastic loops to allow them to be attached to dolls – the items were suitable principally for use with human dolls and had no other function as objects of amusement (FTT [245]):
- (4) the baby carriers, which had slits to allow the tail of a toy to be pulled through, were suitable for use equally with stuffed toy bears as human dolls, but this was not sufficient to indicate that they were chiefly suitable for use with stuffed bears or animal toys (FTT [246]).

The parties’ submissions

219. Mr Thomas submits that the FTT erred in law in reaching its conclusion. He gave three reasons.

- (1) The plastic and textile items are not properly classifiable as “accessories”. The term “accessories” in this context has a limited meaning and is restricted to items that can be worn by a doll (as demonstrated by the examples in the HSEs).
- (2) The items have no inherent connection with dolls by virtue of their objective characteristics.
- (3) The items have their own independent play value or utility.

220. For these reasons Mr Thomas submits, the other plastic and textile items should be classified as “other toys” under subheading 9503 00 95 or subheading 9503 00 99 (depending upon whether they are made of plastic or other materials).

221. Mr Sykes says the FTT correctly applied the relevant test as set out by the Supreme Court in *Amoena*. The various items all enhanced the functionality of a doll and had no independent play value. He distinguished the fact that the HSEs list dolls’ houses and dolls’ tea sets as examples of items which fall within the subheadings for “other toys” on the grounds that a dolls’ house was an independent item of play and not an accessory to a doll. A similar argument applied to tea sets, but he also pointed out that, as noted by the FTT (at FTT [244]), the French language version of the HSEs refers simply to “tea sets” without reference to “dolls”.

Discussion

The meaning of “accessories”

222. HMRC’s primary challenge to the FTT’s decision in relation to the plastic and textile items is that they are not “accessories” of a doll within the meaning of Note 3 to Chapter 95. As we have seen, Note 3 refers to “parts and accessories which are for use solely or principally with articles of [Chapter 95]”.

223. We have been referred by the parties to various authorities on the meaning of the term “parts and accessories” in other parts of the CN, including the decisions of the CJEU in *Unomedical A/S v Skatteministeriet* (Case C-150/10) (“*Unomedical*”) and *Turbon International GmbH v Oberfinanzdirektion Koblenz* (Case C-250/05) (“*Turbon*”). For present purposes, we need only refer to the decision of the Supreme Court in *Ameona*. As with the other cases to which we have been referred, the background to the decision in that case was very different from the present case. The case concerned the classification of a mastectomy bra, designed to be worn with an artificial breast form by women who had undergone breast surgery. One of the questions before the court was whether or not the bra could be regarded as an “accessory” of the breast form.

224. The Upper Tribunal in the *Ameona* case ([2013] UKUT 0394 (TCC)) had found that the bra could be regarded as an accessory of the breast form. The Upper Tribunal’s decision was reversed by the Court of Appeal ([2015] EWCA Civ 25), but the Supreme Court, in a judgment given by Lord Carnwath, allowed the taxpayer’s appeal.

225. In his judgment, Lord Carnwath, acknowledged the difficulties of applying the principles set down by the CJEU in very different contexts to the facts of the case (*Ameona* [43]), but, in broad terms, endorsed the Upper Tribunal’s approach in finding that the words “parts and accessories” were to be given their ordinary meaning in their context. On that basis the bra was an accessory to the breast form because it enabled the breast form to perform its function. That approach was not inconsistent with the principles set out by the CJEU in the *Unomedical* and *Turbon* cases (*Ameona* [44]).

226. The relevant passage from the Upper Tribunal’s decision to which Lord Carnwath refers at *Ameona* [31] appears at [57] of the report of the Upper Tribunal’s decision. It is as follows:

“... In our view, an accessory is not merely something which is used in conjunction with an item: an accessory must also contribute something to the item. We consider that an accessory must provide some additional functionality or enhance the performance of the item. An accessory is an optional improvement to the product whereas a part is something that is essential or integral to the functioning of the item.”

227. In the present case, the FTT found that the plastic and textile items were not simply things which were used in conjunction with a doll. The plastic and textile items enhanced the amusement or play value of the doll by “adding to the character of the doll and the role play scenarios in which a child can use a doll” (FTT [243]). In doing so, subject to the issues concerning the guidance given in the HSEs to which we refer below, in our view, the FTT applied the correct test to determine whether the plastic and textile items should be regarded as an accessory as applied by the Upper Tribunal and endorsed by the Supreme Court in *Ameona*.

The effect of the guidance in the HSEs

228. We have been directed by Mr Thomas to the guidance for heading 9503 in relation to “dolls” and “other toys” as set out in the HSEs.

(1) First, he refers to the third paragraph under the heading “(C) Dolls” which deals with parts and accessories of dolls falling with heading 9503. He notes that the items which are listed in that paragraph as examples of such parts and accessories, and which are clearly accessories rather than parts of dolls, are limited to items which are worn by dolls, namely “wigs, dolls’ clothing, shoes or hats”.

(2) Second, Mr Thomas points to the inclusion of dolls’ houses and furniture (paragraph (xiii)) and dolls’ tea and coffee sets (paragraph (xiv)) in the list of items under the heading “(D) Other toys” that are to be regarded as falling within that subheading.

Mr Thomas submits that the wording of these paragraphs demonstrates that, in this context, the term “accessories” is to be given a limited meaning and should be restricted to items that can be worn by a doll. The effect is that the plastic and textile items should be classified as “other toys”.

229. We reject this submission.

230. There is nothing in the wording of Note 3 to Chapter 95 or the headings or subheadings within Chapter 95 to suggest that a more restrictive view of the term “parts and accessories” should be adopted for the purposes of items falling within this subheading.

231. As regards the guidance in the HSEs, the list of examples of items which are to be regarded as parts and accessories of dolls is clearly not intended to be exhaustive, as the FTT notes at paragraph [242] of its decision. Leaving to one side the differences between the French and the English versions of the HSEs, the inclusion of dolls’ houses and tea sets as items in the “other toys” heading is simply a reflection of the fact that they are regarded as items in their own right and should not be regarded as accessories of other articles such as dolls.

232. If the draftsman had intended there to be a separate principle that only items which can be worn by a doll can be treated as accessories of a doll, he or she would either have said so expressly in Note 3 or, at the very least, referred to such principle in the guidance in the HSEs. Absent any such reference, our conclusion is that there is no such principle. The correct test is that drawn from the case law to which we have referred above. The FTT sought to apply the correct test and the conclusion to which it came regarding the application of that test to the plastic and textile items cannot be impugned.

Other submissions

233. As we understood them, Mr Thomas's other submissions – that the plastic and textile items have no inherent connection with dolls by virtue of their objective characteristics and that the items have their own independent play value or utility – were essentially part of a submission that, applying the correct test, the plastic and textile items should not be regarded as “accessories” of dolls. For the reasons that we have given the FTT applied the correct test and was justified in the conclusions to which it came.

234. We did not understand Mr Thomas to submit that these items were not for use “solely or principally” with dolls for the purposes of Note 3. In any event, the FTT's decision, on the evidence before it, was clear that these items were “specifically identifiable” as accessories of dolls and as having “no function as objects of amusement otherwise than when used on or with a doll or toy” (FTT [245]). We did not understand Mr Thomas's submissions to be a challenge to those findings. But, to the extent that they were, we reject them.

Decision

235. We dismiss HMRC's cross-appeal in relation to the plastic and textile items.

Ground 3: the burden of proof

The FTT Decision

236. At paragraphs [45] to [52] of its decision, the FTT describes evidence given by Mr Christian Cook, the Finance Director of BAB, in relation to the attempts made by BAB to reconcile its records with the assessments to duty made by HMRC in the C18s. In summary, Mr Cook's evidence was that he identified a difference between the value of the items contained in BAB's records and the value on which HMRC had charged duty. In some cases, there was insufficient evidence in BAB's records to reconcile the differences and Mr Cook used various methods to estimate the duty that was due.

237. The FTT records (at FTT [47]) that Mr Cook gave various reasons for the differences in the figures. These included: cases where BAB had no record for the items listed in the C18s; cases where, although the prices of goods in BAB's records matched those on the C18s, there were additional costs on which duty had been charged; cases where BAB has a record of the relevant code used for import (the “EPU code”) but did not have detailed information of the goods imported under that code; and cases where the prices shown in the C18s differed from BAB's records.

238. Mr Cook's evidence was that, for those cases where BAB had insufficient records to identify precisely the goods which had been imported under a particular EPU code, he had estimated the amount of duty due. Mr Cook's evidence of the process which he used to estimate the duty is set out at paragraph [48] of the FTT decision. In summary, in cases where Mr Cook could identify the relevant suppliers, he attributed the discrepancy in the figures to those suppliers proportionately and made an estimate of the duty by reference to the nature of the goods typically supplied by the relevant supplier. In cases where there was no information as to the suppliers of the goods, he used the proportions of supplies made under other EPU codes to provide a starting point for this process.

239. The FTT did not specifically address these differences in its decision. The FTT made a decision in principle on the correct classification of the various different items, but it made no decision on the quantum of BAB's liability. Instead, it invited the parties to reapply to the Tribunal if, having obtained a decision on the classification of the various items in principle, they were unable to agree on questions of quantum (FTT [259]).

The parties' submissions

240. Mr Thomas submits that the FTT made an error of law in not finding that BAB had failed to discharge the burden of proof in relation to those matters for which it could not produce evidence of the goods which were imported.

241. He says that:

(1) the burden of proof in customs appeals is on the appellant (s16(6) Finance Act 1994 and *Cooneen* [38]);

(2) the importer of goods is responsible for the accuracy of the information provided in customs declarations (article 199 Commission Regulation (EEC) No. 2454/93 of 2 July 1993 (“**The Implementing Regulation**”) which lays down provisions for the implementation of the Code);

(3) there is no basis in law for the pro rata exercise undertaken by Mr Cook; goods have to be classified by their objective characteristics;

(4) if BAB is not in a position to identify the nature of the goods imported under the declarations referred to in these categories, it cannot call into question the validity of the C18s.

242. Mr Sykes submits that BAB has tried to resolve the discrepancies between its records and those of HMRC. HMRC has not been able to provide information to substantiate the basis on which duty in the C18s has been charged. The decision of the FTT was a sensible and practical one. It was a case management decision. The Upper Tribunal should exercise some caution before overturning a case management decision made by the judge at first instance who had heard all of the relevant evidence.

Discussion

243. We can deal with this issue briefly.

244. Pursuant to s16(6) Finance Act 1994, the burden of proof in customs and excise appeals is on the appellant other than in relation to the specific matters which are set out in subparagraphs (a) to (c) of that sub-section.

245. The burden is therefore on BAB to show on the balance of probabilities that the assessments contained in the C18s were wrong, in whole or in part.

246. We therefore agree with Mr Thomas that, to the extent that BAB has failed to provide any evidence of the nature of the goods that were imported under a particular EPU code, the assessment in the relative C18 must stand.

247. As a matter of principle, however, we do not go any further than that. It is for the FTT in appropriate cases to examine the evidence that is put forward by an appellant to challenge an assessment and to determine if it meets the appropriate standard of proof.

248. In this case, as a consequence of its decision not to address questions of the quantum of liability, the FTT made no relevant findings of fact. It might be assumed that the FTT accepted Mr Cook’s evidence and regarded Mr Cook’s evidence as meeting the burden of proof, but there is no clear finding to that effect. Mr Cook has not appeared before us and we are in no position to make any decision on the weight of his evidence in relation to the C18s.

Conclusion: the burden of proof

249. For this reason, we allow HMRC’s appeal to the extent that we have described above, and we set aside the FTT Decision. We remit this issue to the FTT. Given that the FTT has made its decision in principle and left it to the parties to refer any matters on the quantum of

liability to the FTT once the questions of principle regarding classification of goods have been determined, this issue should be determined alongside any issues on the quantum of liability that are referred to the FTT. If at all possible, this issue should be heard by the same panel. If no such issues are referred, this issue can be determined separately.

SUMMARY OF CONCLUSIONS

250. In summary, our conclusions on the issues before us are as follows:

- (1) The FTT's decision in relation to clothing and wigs contained an error of law, but we will not set aside the decision in this respect; the clothing and wigs should be classified as parts and accessories of stuffed toys within the Toys Subheading (within subheading 9503 00 41).
- (2) The FTT's decision in relation to footwear contained an error of law, but we will not set aside the decision in this respect; the footwear should be classified as parts and accessories of stuffed toys within the Toys Subheading (within subheading 9503 00 41).
- (3) The FTT's decision in relation to plastic and textile hearts contained an error of law and we set aside and remake the decision in this respect; the plastic and textile hearts should be classified as parts and accessories of dolls within the Dolls Subheading (within subheading 9503 00 29).
- (4) The FTT's decision in relation to animal accessories involved an error of law. We will set aside and remake the decision in this respect; the animal accessories should be classified within the Toys Subheading (within subheading 9503 00 49, toys representing animals or non-human creatures – other).
- (5) We allow HMRC's cross-appeal and set aside the FTT's decision to the extent that it relates to the clothing sets; the clothing sets should be classified in the Sets Subheading (9503 00 70).
- (6) We dismiss HMRC's cross-appeal in relation to the other plastic and textile items. The plastic and textile items should be classified as parts and accessories of dolls within the Dolls Subheading (within subheading 9503 00 29).
- (7) We remit to the FTT the question raised on HMRC's cross-appeal as to whether the evidence provided to the FTT met the burden of proof in relation to two of the C18s.

Signed on Original

MRS JUSTICE JOANNA SMITH

ASHLEY GREENBANK

UPPER TRIBUNAL JUDGES

Release date: 29 March 2021