[2016] UKFTT 0284 (TC)

TC05058

Appeal number: TC/2015/04543

CUSTOMS DUTY – Classification – Combined Nomenclature – Plastic bags used for pet food packing / packaging – Whether appropriate to headings 3923 or 4911 – Appropriate subheading – Tribunal's jurisdiction and burden of proof

FIRST-TIER TRIBUNAL
TAX CHAMBER

LAW PRINT & PACKAGING MANAGEMENT LIMITED — **Appellant**

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER STAKER

Sitting in public at Manchester on 25 February 2015

Robert Jenkins, International Trade Solutions, for the Appellant

Simon Charles, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant company appeals against three Binding Tariff Information rulings ("**BTIs**"), each dated 14 May 2015. The BTIs relate to three different types of plastic bags imported by the Appellant (the "**bags**"). The Appellant disputes the customs tariff classification of the goods in the BTIs.

Background

2. The Appellant company is a supplier of a range of packaging products.

3. On 27 May 2015, the Appellant applied for BTIs in respect of three types of plastic bags that it imports. All three are packaging bags for dog and cat food, which the Appellant supplies to its customers who are dog and cat food manufacturers. The applications for the BTIs were supported by technical information pertaining to the background and material composition of the bags.

4. On 14 May 2015, HMRC issued the three BTIs that are challenged in the present appeal, classifying the plastic bags under UK Tariff commodity code 3923.2100.00.

5. On 1 June 2015, the Appellant sought a review of the BTIs. In a review decision dated 2 July 2015, HMRC upheld the BTIs.

6. By a notice of appeal dated 28 July 2015, the Appellant commenced the present appeal before the Tribunal, contending that the goods should be classified under either Chapter 49, or alternatively commodity code 3923.2990.00.

7. The hearing of this appeal was held on 25 February 2015. At the invitation of the Tribunal, both parties submitted post-hearing submissions on the issue of the Tribunal's jurisdiction, the burden of proof, and whether an adjournment would be necessary in the event that there was insufficient evidence to decide the appeal.

Applicable legislation

8. The Combined Nomenclature is at Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff. Annex I was last relevantly amended by Commission Implementing Regulation (EU) No 1101/2014 of 16 October 2014.

9. Subsection A of Section I of Part One of the Combined Nomenclature contains general rules for the interpretation of the Combined Nomenclature (these general rules are commonly referred to as "**GIRs**"). These general rules are the following:

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

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

   (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.

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

   (a) the heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;

   (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, 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. Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.

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

(a) camera cases, musical instrument cases, gun cases, drawing-instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This rule does not, however, apply to containers which give the whole its essential character;

(b) subject to the provisions of rule 5(a), packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

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

10. Section VII of the Combined Nomenclature contains two chapters, Chapter 39 ("Plastics and articles thereof") and Chapter 40 ("Rubber and articles thereof").

11. Section VII contains two general notes, the second of which ("**General Note 2**") reads as follows:

> Except for the goods of heading 3918 or 3919, plastics, rubber and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall within Chapter 49.

12. One of the headings in Chapter 39 is heading 3923 ("Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics").

13. Within heading 3923, two subheadings are:

(1) 3923 21 00 ("Sacks and bags … Of polymers of ethylene"); and

(2) 3923 29 90 ("Sacks and bags … Of other plastics: Other").

14. Chapter 39 contains various notes, one of which (the first note under the heading "Subheading notes" ("**Subheading Note 1**")) reads in part as follows:

> Within any one heading of this chapter, polymers (including copolymers) and chemically modified polymers are to be classified according to the following provisions:
>
> (a) where there is a subheading named 'Other' in the same series:

(1) the designation in a subheading of a polymer by the prefix 'poly' (for example, polyethylene and polyamide-6,6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95 % or more by weight of the total polymer content;

(2) the copolymers named in subheadings 3901 30, 3903 20, 3903 30 and 3904 30 are to be classified in those subheadings, provided that the comonomer units of the named copolymers contribute 95 % or more by weight of the total polymer content;

(3) chemically modified polymers are to be classified in the subheading named 'Other', provided that the chemically modified polymers are not more specifically covered by another subheading;

(4) polymers not meeting (1), (2) or (3) above, are to be classified in the subheading, among the remaining subheadings in the series, covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series of subheadings under consideration are to be compared;

15. Within Chapter 49 is heading 4911: "Other printed matter, including printed pictures and photographs". This heading consists of two subheadings:

(1) 4911 10 ("Trade advertising material, commercial catalogues and the like); which consists of two further subheadings: "Commercial catalogues" and "Other"; and

(2) "Other"; which consists of two further subheadings: "Pictures, designs and photographs" and "Other".

16. Article 12.1 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code relevantly provides as follows:

> 1. The customs authorities shall issue binding tariff information or binding origin information on written request, acting in accordance with the committee procedure.

17. Article 9 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code provides as follows:

> Where the Commission finds that different binding tariff information exists in respect of the same goods it shall if necessary adopt a measure to ensure the uniform application of the customs nomenclature.

18. Regulation 3 of the Customs Reviews and Appeals (Tariff and Origin) Regulations 1997/534 ("**CRATOR**") relevantly provides as follows:

(1) Sections 13A to 16 of the [Finance] Act 1994, as they apply to the decisions mentioned in section 13A(2) of the Act, shall apply to the following decisions of the Commissioners, so far as they are made for the purposes of the EU provisions relating to binding tariff information or the EU provisions relating to binding origin information—

(a) any decision as to the tariff classification or determination of the origin of any goods;

(b) any decision as to whether or not binding tariff information or binding origin information is to be supplied;

(c) any decision as to whether or not any binding tariff information or binding origin information is to be annulled, withdrawn or revoked.

19. Regulation 4 of CRATOR relevantly provides as follows:

> Section 16(4) of the [Finance] Act [1994] (review jurisdiction) shall have effect as if decisions (b) and (c) mentioned in regulation 3(1) above were of a description specified in paragraph 1 of Schedule 5 and as if any decision mentioned in (a) of that regulation were mentioned in section 13A(2)(a) to (h) of that Act to the Act.

20. Section 13A(2) of the Finance Act 1994 lists types of decision that are a "relevant decision" for purposes of s 16 of that Act.

21. Section 16 of the Finance Act 1994 relevantly provides as follows:

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—

(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;

(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, a review or further review as appropriate of the original decision; and

(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

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

(6) On an appeal under this section the burden of proof as to [certain specified matters] shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established. …

(8) … references in this section to a decision as to an ancillary matter are references to any decision of a description specified in Schedule 5 to this Act which is not comprised in a decision falling within section 13A(2)(a) to (h) above.

The bags

22. A sample of each of the three bags to which the challenged BTIs relate was provided to the Tribunal at the hearing. Each of the bags is typical of a bag used as packaging of food for pet consumption, and indeed, is not dissimilar to a bag used as packaging for food for human consumption. Each bag was printed in different colours on 100% of its outer surface. The printing contained the name/logo/trademark of the manufacturer, a description of the product contained in the bag, information about the composition, analytical constituents and additives of the product in the bag, the weight of the contents of the bag, and a guide indicating how much of the product should be used daily. The printing also contained other information about the product contained in the bag, some of which was of a marketing or promotional nature (such as "a truly delightful culinary experience"). The printing also contained the manufacturer's address, contact details and website, and barcodes were printed on each of the bags. Different parts of the information were printed in different fonts and colours, sometimes in separate information boxes or balloons, and the printing further contained pictures. It is apparent that detailed and careful attention has been given to the layout and appearance of the overall design.

23. Technical details about the bags was provided in the Appellant's application for the BTIs, and this information has not been disputed by HMRC. The information included the following (percentages given in the next three paragraphs are percentages of the total weight of the structure of each bag).

24. Bag 1 consisted of an outer layer of polyethylene terephthalate ("PET") (13.6%), an inner layer of polyethylene (80.9%), adhesive (2%) and ink (3.5%).

25. Bag 2 consisted of an outer layer of orientated polypropylene ("OPP") (14.5%), an inner layer of polyethylene (80.9%), adhesive (2%) and ink (3.5%).

26. Bag 3 consisted of an outer layer of OPP (7%), a middle layer of metallised polyethylene terephthalate ("MET PET") (10.9%), an inner layer of polyethylene (76.2%), adhesive (3.2%) and ink (2.8%).

The witness evidence

27. Witness evidence was given at the hearing by Mr Timothy Law, the managing director of the Appellant company, and by HMRC Officer Greg Connew, the officer who issued the BTIs.

28. The witness statement of Mr Law stated amongst other matters as following.

29. The Appellant company acts as agent and reseller of bespoke packaging in the food industry. Its customers include manufacturers of pet food and human food. The manufacture of its printed bags is outsourced to overseas producers. The Appellant works with its overseas producers to determine a commodity code. The Appellant was using commodity code 3923.2990.00. On 17 February 2015, the Appellant had a visit from HMRC, who stated that the more appropriate code would be 3923.2100.00. The Appellant sought professional advice, and was advised to apply for BTIs on a sample of its products. Accordingly, the three BTI applications were submitted, and HMRC issued the three challenged BTIs.

30. The vast majority of the bags that the Appellant imports are constructed of more than one type of plastic film bound together in a laminate structure that includes inks and adhesives. Each different product is made up of different plastic constituents based on customers' needs and preferences. A common construction would be a polyester outer layer with a polyethylene inner layer. These layers have a thickness of between 100 and 200 microns depending on the intended use and required durability of the product. The three products that were the subject of the challenged BTIs had a polyethylene content between 81.1% and 85.6%. The primary function of the packaging supplied by the Appellant is to promote, preserve and protect the contents. Each bag is specific and individual in its appearance and intended use. The packaging is designed to allow manufacturers of foodstuffs to present their products in a retail environment in the most attractive way to ensure the maximum sales.

31. The printing of the bag is essential in that it not only determines what is contained in the package but also conveys important information about the nutritional content, feeding guidelines, storage requirements and attractiveness of the particular product. The printing is bespoke to each product and each customer. The printing is an essential part of the packaging without which the packaging would have almost no value, as the consumer would not be able to evaluate the particular value of the product if the printing was simple and lacked any vital information. The cost differential between a bag of the same materials with no print and a bag that is printed up to 10 colours would be about 70%.

32. In cross-examination, Mr Law said amongst other matters that the bags were imported in their final form, and that nothing was changed after importation. He accepted that it was only after the HMRC visit that the Appellant ever relied on heading 4911. In re-examination he said that the bags were empty when imported and that the dog food or cat food was added after importation.

33. The witness statement of HMRC Officer Greg Connew states amongst other matters as follows. He considered that the products were not appropriate to heading 4911 on the basis that the primary use of the products is to hold pet food, and whatever is printed on the bag is secondary or incidental to its primary function. He considered that the bags were correctly classified within commodity code 3923.2100.00 using GIR 1, 3(b) and 6, as well as General Note 2 and HSEN exclusion note (C) VII-39-14 and the HSENs for heading 3923 (first paragraph).

Each of the bags was made up of separate layers of different polymers, and in each case polyethylene far outweighed the other polymers present (GIR 3(b)). He also considered the BTI database, and considered that three BTIs issued by the German tax authorities supported his conclusion, while a previous BTI issued by HMRC related to a product that could not be considered similar.

34. In examination in chief, Officer Connew said that there is a database of all BTIs issued in the EU and that it is common practice to consult this before issuing a BTI.

35. In cross-examination, he said that when issuing the BTIs in this case he had used GIR 3(b) because the bags consisted of layers of different types of plastic. The reasoning applied in a BTI is set out in box 9 of the BTI. He accepted that the reasoning he applied in the BTI in the present case was different to the reasoning applied in the three German BTIs.

Other BTIs

36. The evidence included the three BTIs issued in Germany, and the other BTI issued in the United Kingdom, referred to in paragraph 33 above.

37. BTI reference DE1803/13-1 dated 28 January 2013, issued by the Hauptzollamt Hannover, relates to printed plastic party bags made of layers of polyethylene. These are classified under heading 3923 21 00.

38. BTI reference DE2086/13-1 dated 12 February 2013, issued by the Hauptzollamt Hannover, relates to printed re-closable plastic bags used for packaging 3 kilogram quantities of basmati rice, made of layers of polyethylene and PET. These are classified under heading 3923 21 00.

39. BTI reference DE11178/13-1 dated 1 July 2013, issued by the Hauptzollamt Hannover, relates to printed re-closable plastic bags used for the conveyance or packaging of goods, made of layers of polyethylene, PET and OPP. These are classified under heading 3923 21 00.

40. The previous UK BTI was BTI reference GB120111357 dated 14 December 2010, issued by the HMRC, which relates to printed plastic sleeves used for packaging, made of polyvinyl chloride ("PVC"). These are classified under commodity code 4911.1090.00.

The Appellant's submissions

Jurisdiction and burden of proof

41. The Tribunal has a full appellate jurisdiction to quash, vary or uphold HMRC's decision (reliance was placed on CRATOR regulations 3(1)(a) and (4); Finance Act 1994, s 16; *Honeywell Analytics Ltd v Revenue & Customs* [2015] UKFTT 586 (TC) ("***Honeywell***") at [1] and [5]; *Photron Europe Ltd v Revenue & Customs* [2011] UKFTT 334 (TC)).

42. The Appellant agrees that it bears the burden of proof in this case.

Merits

43. The Appellant's primary case is that the goods should be classified to heading 4911.

44. The Appellant's secondary case is that the goods should be classified to subheading 3923 2990.

45. The question whether the goods fall within Chapter 49 rather than Chapter 39 is determined by General Note 2 (paragraph 11 above). The goods will fall within Chapter 49 if the printing on the bags is "not merely incidental to the primary use of the goods".

46. The Appellant's primary case is that the goods fall within Chapter 49 because the printing on the bags is more than merely incidental to the primary use of the items. The primary use of the goods must be found in their objective characteristics and properties as defined by the wording of the relevant headings and sub-headings and notes to the Sections and Chapters (reliance was placed on *Vtech Europe PLC v Revenue and Customs* [2016] UKFTT 43 (TC) ("***Vtech***") at [35]). Heading 3923 is "Articles for the conveyance or *packing* of goods". "Packing" cannot be conflated with "packaging". Packing is only one function or use of packaging. Packaging performs a number of other functions including attracting the buyer's attention through marketing materials, instructions on usage, information on contents etc. These other functions are more than merely incidental to the "packing" function. Heading 4911 includes printed matter which serves the purpose of advertising, providing instruction on use and other key functions of the packaging.

47. Neither heading 3923 nor heading 4911 captures all of the objective characteristics of the packaging. The primary purpose is to be determined by deciding which is primary out of the packing and printed matter on the packing. The answer is the latter. The purpose of business is selling its products or services to make a profit. If the printed matter on the packaging was ineffective then the product would not sell and so frustrate this primary goal. Considerable cost and time is invested in the printing element of the packaging. The printed matter is "not merely incidental". General Note 2 could have excluded heading 3923 (in the way that it expressly excluded headings 3918 and 3919) but it did not.

48. The words "merely incidental" are not defined for purposes of the Combined Nomenclature. The Appellant relies on the dictionary definition of "incidental". The Appellant accepts that the printing on the bags would be "merely incidental" to the conveyance or packing purpose if it simply consisted of words such as "this way up" or "fragile" or "store in a cool place". However, in this case, the purpose of the printed matter on the products has little to do with the conveying or packing of goods. Adding the printed material on the bags incurs considerable time and costs, and adds significant value to the sale price of packaging to the Appellant's customers.

49. The Tribunal should not consider the other BTIs (paragraphs 36-40 above) (reliance was placed on *Vtech* at [64]-[65]). In any event, other BTIs applied a different reasoning to that applied by either of the parties in this case.

50. In the alternative, if the Tribunal finds that the goods fall within hearing 3923, then the relevant subheading should be determined under GIR 1 and 6 and Subheading Note 1. Heading 3923 includes a subheading "other" and therefore Subheading Note 1 applies. In this case, as the polyethylene content of the goods is less than 95% by weight, the effect of Subheading Note 1(a)(1) is that they cannot be classified under the subheading 3923 21 00 ("Of polymers of ethylene"). Subheading Note (1)(a)(2) is therefore irrelevant.

51. The polymer content of the goods could be considered as chemically modified as a result of the laminating process, requiring them to be classified as "other" (subheading 3923 29 90) by virtue of Subheading Note 1(a)(4).

The HMRC submissions

Jurisdiction and burden of proof

52. The Tribunal has only a supervisory jurisdiction to review the HMRC decision (reliance was placed on CRATOR, regulations 3(1)(a) and (4); Finance Act 1994, s 16(4); *Hasbro European Trading BV v Revenue & Customs* [2015] UKFTT 340 (TC) ("***Hasbro***")).

53. The burden of proof is on the Appellant to show that his grounds of appeal have been established (reliance was placed on Finance Act 1994, s 16(6)).

54. If there is a "shortfall in the evidence", this is of concern only for the Appellant who has the burden of proof. However, if the Tribunal decides that it needs scientific evidence to determine this appeal, it should grant an adjournment and issue appropriate directions.

Merits

55. HMRC agree that the question whether the goods fall within Chapter 49 rather than Chapter 39 is determined by the construction of General Note 2.

56. The "primary use" of the goods is to provide packaging for dog/cat food. The printing upon the exterior of the bags is "merely incidental" to that "primary use".

57. The "primary use" is clear from the following. The materials from which the bags are made have been chosen to keep the pet food which it will hold fresh/in good condition for a longer period of time. The bags are printed in a manner which made its apparent that they will hold dog/cat food (as opposed to some other foodstuff).

58. If something is described as packaging, the following characteristics are either inherent and/or "merely incidental" to such description:

(1) the item will hold/contain/fasten the product that it is intended to "packaged";

(2) the item will provide information about the product (some of which information may be required by law to be contained on the packaging);

(3) the item will seek to promote the product it contains, including by displaying the relevant brand/image, and informing potential purchasers about the benefits/features of the product;

(4) the item will assist the product be retailed (for instance by containing a bar code).

59. The printing therefore forms a central part of the primary use/purpose of the bags. Alternatively, the printing is "merely incidental" to the primary use/purpose, given that the vast majority of all products which convey or package goods have printing/other distinguishing marks upon their exterior which provides information about the item contained within. It would be both curious and lead to huge uncertainty if the classification of products depended upon the amount/scope of printing on exterior of packaging. Apart from anything else, the printing is "merely incidental" because if the bag was taken away, there would be nothing left.

60. HMRC are obliged to consider and have regard to the German BTIs so as to ensure consistency across all Member States. If the bags were to be classified as the Appellant seeks then this would result in a divergence (within the meaning of Article 9 of Regulation 2454/93). The products in the German BTIs were very similar. The product in the UK BTI was not similar.

61. As to which the correct subheading of Chapter 39, HMRC submit as follows.

62. Subheading Note 1(a)(1) is not applicable to subheading 3923 21 00 as it does not refer to products with the pre-fix "poly" but instead refers to "polymers of ethylene".

63. Subheading Note 1(a)(2) and (3) do not apply as the goods are neither copolymers or chemically modified polymers.

64. As to Subheading Note 1(a)(4), the each of the bags in this case consist of a combination of plastics, and in each case, the polyethylene predominates by weight. As a result, the goods have been correctly classified in the BTIs to subheading 3923 21 00 as "polymers of ethylene".

The Tribunal's findings

Jurisdiction and burden of proof

65. By virtue of the provisions set out in paragraphs 18-21 above, the Tribunal will have a full appellate jurisdiction if the BTI is a "decision as to the tariff classification … of any goods" (regulation 3(1)(a) CRATOR). However, it will only have a review jurisdiction (under s 16(4) of the Finance Act 1994) if the BTI is a "decision as to

whether or not any binding tariff information … is to be annulled, withdrawn or revoked" (regulation 3(1)(c) CRATOR).

66. In the absence of any authority to the contrary, the Tribunal would consider it evident that a BTI is a decision of the kind referred to in regulation 3(1)(a) CRATOR, rather than a decision of the kind referred to in regulation 3(1)(c). The Tribunal considers that the appeal in this case is an appeal against the BTIs rather than an appeal against the review decision. In any event, a review decision is a review of the original decision contained in the BTI, rather than a free standing decision as to whether a BTI should be annulled, withdrawn or revoked. Section 16(4) of the Finance Act 1994 refers to "any decision as to an ancillary matter, or any decision on the review of such a decision", which seems to confirm that for present purposes a review decision takes on the character of the decision that it reviews.

67. This conclusion is confirmed by the decision in *Honeywell* at [1] and [5], and it was common ground between the parties in *Hasbro* at [36]-[37]. The Tribunal therefore finds that it has a full appellate jurisdiction.

68. The burden of proof is on the Appellant to establish the facts on which his grounds of appeal are based on a balance of probability (s 16(6) Finance Act 1994; *Hasbro* at [38]).

Merits

69. Both parties agree that the first issue is whether the bags fall under heading 3923 or heading 4911, and both parties agree that this question falls to be answered through the construction of General Note 2. The bags will fall under heading 3923 unless it is found that the printing on the bags is "not merely incidental to the primary use of the goods" (the goods being the bags themselves).

70. The Appellant argues that General Note 2 provides that it does not apply to items falling under headings 3918 or 3919, thereby envisaging that it *may* well apply to items that would otherwise fall under heading 3923. The Tribunal agrees that it is implicit in the wording of General Note 2 that there may be plastic "Articles for the conveyance or packing of goods" that are printed with motifs, characters or pictorial representations which are not merely incidental to the primary use of the goods.

71. However, while that may be so, General Note 2 at the same time must be taken to envisage that there will be plastic "Articles for the conveyance or packing of goods" that are printed with motifs, characters or pictorial representations which *are* merely incidental to the primary use of the goods. Otherwise General Note 2 could have simply excluded *all* items under heading 3923 that are printed with motifs, characters or pictorial representations.

72. It is therefore necessary to identify what is the primary use of the bags. The Appellant notes that heading 3923 refers to "packing" rather than "packaging", and argues that there is a distinction between the two. The Appellant argues in effect that the primary purpose of "packing" is to contain and protect goods from the time that

they leave the manufacturer until the time of their final use or consumption. The Appellant argues that printed material on the packing that serves the purpose of marketing a product and of attracting the attention of potential buyers in a shop may be part of the purpose of "packaging", but that this this is no part of the purpose of, or even "merely incidental" to, the purpose of "packing".

73. No legal authority has been cited in support of the distinction contended for between "packing" and "packaging", either in the context of the Combined Nomenclature or in any other context. Nor has the Tribunal been provided with any dictionary definitions of "packing" and "packaging" that support such a distinction. Nor has any other material been provided to show for instance that in commerce and industry there is generally understood to be such a distinction.

74. In the absence of any legal authority or evidential basis for the claimed distinction, the Tribunal is not persuaded that any such distinction can be made for purposes of the Combined Nomenclature. The Tribunal can take judicial notice of the fact that where consumer products are sold in packing/packaging, in very many cases (possibly even in the overwhelming majority of cases), the packing/packaging will contain the kinds of information and material referred to in paragraph 22 above. Some of that material labels and identifies the contents of the packing to retailers and consumers. Some of that information (such as the barcodes) facilitates the handling of the product until it is sold to the final consumer. Some of that material may facilitate the storage of the product by the final consumer until it is used (such as use-by dates and storage instructions). Some of that material facilitates the use of the product after it is taken out of the packing (such as information on how to use the product). Some of that information may be required by law to be included on the packing of the product. As the Appellant notes, some of that material may also serve a marketing purpose. In practice, the printing of information and material having all these different purposes on the packing of a consumer product is normal and commonplace, and the Tribunal is satisfied that all such printing is today either part of or "merely incidental to" the primary use of the packing. It is noted that the packing or packaging of such products is typically discarded by the final consumer as soon as its contents have been consumed. The packing is not normally kept for any other purpose that is independent of the primary purpose of the packing.

75. The Tribunal therefore finds that the bags are correctly categorised under heading 3923.

76. That being the case, the remaining question concerns the identification of the appropriate subheading of heading 3923.

77. The composition of the bags is set out in paragraphs 23-26 above. All three bags contain a layer of polyethylene. Subheading 3923 21 00 refers to "polymers of ethylene". Both parties have argued the case on the basis that polyethylene is the same thing as, or falls within, the term "polymers of ethylene". The Tribunal therefore proceeds on that basis.

78. Both parties place reliance on Subheading Note 1. The Appellant suggests that because the polyethylene content of each of the bags is less than 95%, the effect of Subheading Note 1(a)(1) is that they cannot be classed under Subheading 3923 21 00 as "polymers of ethylene". HMRC in turn argues that because the polyethylene content of each of the bags is greater than the content by weight of any other kind of plastic, the effect of Subheading Note 1(a)(4) is that they must be classed under Subheading 3923 21 00 as "polymers of ethylene".

79. The Tribunal considers that both parties appear to have misunderstood the effect of Subheading Note 1. Subheading Note 1 uses the expressions polymers, copolymers, monomers and comonomers. The Tribunal does not have expertise in chemistry, and cannot take judicial notice of the meaning of these expressions. However, there was no dispute between the parties that polyethylene is a polymer. The reference in Subheading Note 1(a)(1) to "the constituent monomer unit or monomer units of the named polymer" suggests that a polymer is made up of monomer units. The wording of Subheading Note 1(a)(4) suggests that a polymer may be made up of different types of monomers. The wording of Subheading Note 1(a)(1), (2) and (4) suggests that in the cases to which those provisions apply, a polymer can only be designated as a particular kind of polymer if a particular type of monomer contributes 95 % or more by weight of the total polymer content.

80. The 2 July 2015 HMRC review decision understands this to be the case. It states that:

> … Subheading note 1(a)(1) does not mean that to be classified under 3923.21 the product must consist of 95% or more by weight of polyethylene. Subheading note 1(a)(1) states that a product under the prefix "poly" means that the constituent monomer unit, in this case ethylene, contributes 95% or more of the named polymer, for example, in polyethylene there is 95% or more by weight of ethylene.

81. Thus, Subheading Note 1 is concerned with how to determine the correct categorisation of a particular type of polymer. For instance, in the present case, if there was a dispute about whether the polymer used for the inner layer of bag 1 was correctly to be categorised as polyethylene or rather as some different type of polymer, Subheading Note 1 would assist in resolving that dispute. However, there is no such dispute in the present case. The parties are agreed as to which kind of polymer forms each layer of each bag (paragraphs 23-26 above).

82. The Tribunal finds that this is the sole issue with which Subheading Note 1 is concerned. There is nothing in the language of Subheading Note 1 to suggest that it is in any way concerned with the correct categorisation of a product made out of more than one different type of polymer. The Tribunal therefore finds that Subheading Note 1 is of no relevance or assistance to the issues in dispute in the present case.

83. The Tribunal turns then to the GIRs. GIR 6 states that "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*" (emphasis added). This means that GIR 1-5 are relevant

not only to the determination of the applicable heading, but also to the determination of the applicable subheading within a heading.

84. Taking the GIRs in order, as relevant, the Tribunal finds the following.

85. Each of the three bags contains both polyethylene falling under subheading 3923 21 00 as well as other plastics falling under subheading 3923 29 90. The effect of the first two sentences of GIR 2(b) is that the bags would *prima facie* be classifiable under both of those subheadings. The effect of the third sentence of GIR 2(b) is that their categorisation is therefore to be determined in accordance with GIR 3.

86. The effect of the first sentence of GIR 3(a) is that since each of the bags contains polyethylene, each bag would *prima facie* fall to be classified under subheading 3923 21 00, because the description "polymers of ethylene" is more specific than the general description "other plastics" in subheading 3923 29 (or the general description "other" in subheading 3923 29 90).

87. However, it is possible that the bags are to be regarded as "composite goods" within the meaning of the second sentence of GIR 3(a), given that they consist of two or three layers of different plastics that are laminated. This question was not the subject of specific argument at the hearing. It is noted that if the bags are "composite goods", the choice between the two subheadings would not be resolved by GIR 3(a), and it would be necessary to move on to GIR 3(b).

88. Under GIR 3(b), it would be necessary to determine which of the plastics in the bags gives the bags their "essential character". This question was not the subject of specific argument or evidence at the hearing. The polyethylene content of each of the bags is some 75-80%. However, the Tribunal notes that in the case of goods consisting of different materials, it is not necessarily the material that predominates by weight that gives the goods their essential character. In the absence of argument or evidence, it is difficult for the Tribunal to be able to judge whether it is the polyethylene content of the bags, or the other plastics, that gives them their essential character.

89. The Tribunal has given consideration to whether it should adjourn the proceedings in order to receive further evidence on this issue. However, the Tribunal has decided against that course. The Tribunal finds as follows. The polyethylene content of each of the bags is some 75-80%. To the Tribunal, each of the bags appears to have the same essential character, and polyethylene is the only material that all three bags have in common. For these reasons, if the Tribunal had to decide the question on the minimal material before it, it would find on a balance of probability that it is the polyethylene that gives the bags their essential character. It is the Appellant who bears the burden of proof, and it is for the Appellant to determine the legal and factual basis on which the Appellant wishes to base its appeal. The Appellant did not advance any ground of appeal or argument that it is the plastics other than the polyethylene that gives the bags their essential character. The Appellant is in the best position to know which of the plastics gives the bags their

essential character, and presumably could have and would have advanced such a ground of appeal if it were the case that it is not the polyethylene that gives the bags their essential character. In any event, despite the fact that the Tribunal invited post-hearing submissions on the question whether further expert evidence should be received, the Appellant did not request that this course be adopted (even though HMRC did not oppose such a course). In the circumstances, the Tribunal will not receive further evidence, and decides that it is the polyethylene that gives the bags their essential character.

90. The Tribunal therefore finds that the bags fall to be classified under subheading 3923 21 00, either because the analysis stops at paragraph 86 above, or, if the goods are "composite goods", because of the analysis at paragraphs 87-89 above.

91. The Tribunal has looked at the other BTIs referred to at paragraphs 36-40 above. The Tribunal accepts the importance of the uniform application of the Combined Nomenclature, and the value of tax authorities consulting previously issued BTIs when new BTI decisions are taken. However, previous BTIs need to be approached with the caution expressed in *Vtech* at [64]-[65]. Furthermore, previous BTIs will be of greater value where they establish a consistent practice amongst a number of different Member States, especially where the consistent practice is based on consistent reasoning. They will be of less value where they establish the previous practice of only a single other Member State, especially when confined to a single previous occasion.

92. It is noted that Article 9 of Regulation 2454/93 (paragraph 17 above) provides for the Commission to adopt measures where different BTIs are adopted in respect of the same goods, which implies an acceptance that Members States will not necessarily feel bound to follow the practice adopted in BTIs of other Member States. It is also noted that in an appeal before this Tribunal, decisions of courts of other Member States hearing appeals against BTIs may carry more weight than the BTIs.

93. The German BTIs lend some support to the conclusions reached above. However, they demonstrate the practice of only one other Member State, albeit on three different occasions, although not necessarily always for exactly the same reasons, and not necessarily in respect of identical products. It is noted that in BTI reference DE11178-13-1, relating to a plastic bag made of polyethylene, PET and OPP, the polyethylene was said to give the bag its essential character. Similarly, in BTI reference DE2086-13-1, relating to a plastic bag made of polyethylene and PET, the polyethylene was said to give the bag its essential character. This lends some support to the conclusion in paragraph 89 above.

94. The previous British BTI might be seen as contrary to the conclusions above, but it was not necessarily in respect of an identical product, and there is no suggestion that it was subsequently the subject of any Tribunal appeal. This BTI does not cause the Tribunal to doubt the conclusions it has reached above.

Conclusion

95. For the reasons above, the appeal is dismissed.

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

DR CHRISTOPHER STAKER
TRIBUNAL JUDGE

RELEASE DATE: 26 April 2016