



TC05339

Appeal number: TC/2014/06604

*CUSTOMS DUTY – classification of artificial turf as other golf equipment
or other textile floor covering under the Combined Nomenclature – appeal
allowed in part*

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

HUXLEY (UK) LIMITED

Appellant

- and -

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

**TRIBUNAL: JUDGE HARRIET MORGAN
MEMBER MR CHARLES BAKER**

**Sitting in public at the Royal Courts of Justice, Strand, London on 12 and 13
January 2016**

Mr Jeremy White, as Counsel for the Appellant

**Mr Simon Pritchard, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, as Counsel for the Respondents (“HMRC”)**

DECISION

5 1. The appellant appealed against HMRC's decision of 27 June 2014 to issue a C18 Post Clearance Demand Note (with the reference C18163960) on the basis that the appellant had not correctly declared the import of the goods (as described in 6) for the purposes of the Combined Nomenclature ("CN") so that additional customs duty of £31,494.65 and import VAT of £6,250.08 is due for the period from 17 June 2011 to 6 January 2014.

10 2. On review on 13 November 2014, HMRC upheld their decision that the goods had been wrongly declared on import but held that the customs duty due should be reduced as imports made on 17 June and 26 June 2011 should not be included in the C18. This was essentially because HMRC was out of time to impose duty for those periods. On 26 November 2014 HMRC wrote to the appellant confirming the amount
15 of the reduction as £690.34 of import duty

3. The appellant also appealed against HMRC's decision of 26 November 2014 that additional duty and VAT was also due on the same basis in respect of imports made from 7 January 2014 to 24 January 2014 of £8,259.82 of import duty and £1,651.96 of VAT.

20 4. The appellant had declared the goods as subject to duty at 2.5% under the CN heading 95063990 00 as "other golf equipment". HMRC considered that the goods should be declared as subject to duty at 8% under the CN heading 57032098 00 as "carpets and other textile floor coverings".

Facts

25 5. We have based our findings of fact on the material presented, including samples and demonstrations of the goods in question, the witness evidence of Mr Paul Huxley who attended the hearing to give oral evidence and the evidence of Mr Randy Reddick, Mr Ian Lowesley and Mr Colin Jenkins as set out in their witness statements. We have given most weight to the evidence of Mr Huxley who is a
30 director and co-owner of the appellant (together with his brother Mr Barry Huxley). We found him to be a credible witness. The roles of Mr Reddick, Mr Lowesley and Mr Jenkins in relation to the appellant are explained below. The statements of these witnesses support the evidence of Mr Huxley and have been taken into account in that context.

35 6. The goods in question are:

(1) Huxley Premier Golf Green Turf (Nylon) which requires special Huxley "Turfill" infill ("**Green Turf**").

(2) Huxley Premier Putting Green Turf (Nylon) which requires special Huxley "Turfill" infill Huxley Premier Tee ("**Putting Turf**").

(3) Huxley Premier Tee Turf 2 (PTT2) which does not require an infill and Huxley Premier Nylon Tee Turf (NTT2000) (together “**Tee Turf**”).

(4) Huxley Golf Fringe Turf (4SA 20 mm and 4SA2 35mm) (“**Fringe Turf**”) (together “**the Products**”).

5 7. Mr Huxley and his brother operated a grass machinery business for a number of years. Around 15 years ago, when this business began to struggle, they identified a need from their golf course customers for all weather synthetic turf for golf. It was apparent that golfers want to play and practice all year round. As grass does not grow
10 all year round, golf courses do not have time to recover from constant wear. A solution was required to enable natural grass to recover and provide a good alternative all year round surface suitable for golf when the natural grass surfaces are in poor condition. Also golfers need good quality golf practice surfaces which look and feel like natural grass regardless of the weather and time of year and without the associated wear and high maintenance costs.

15 8. On researching the market the appellant found that no other businesses appeared to be fulfilling this need. Artificial turf suitable for lawns, landscaping, hockey, tennis and general purpose uses had been installed in golf applications and found to be unsuitable. For example, on such artificial greens the roll of the golf ball was unrealistic or quickly became untrue and was too fast, the artificial grass used for tees
20 would not hold a normal golf tee peg, as it is not sufficiently dense or of the right height, such artificial turf would not provide the golfer with a firm and stable stance and it would not stand the wear and tear of golf use.

25 9. Mr Huxley and his brother decided there was an opening for the appellant to create a niche market by developing a range of synthetic surfaces especially designed and purpose made for the requirements of the golf market. Having sold their previous grass machinery business, Mr Huxley and his brother focused on this market.

30 10. On hearing that US synthetic turf had been used successfully for golf, they visited the US to research this and purchased some US turf to experiment with its sale in the UK. Within a few months they found that the US turf they had sourced did not provide the solution as it was far too dark, the green speeds were too quick and the maintenance requirements were too high. The US installation techniques were not satisfactory in the UK’s unpredictable wet weather.

35 11. As a result of this Mr Huxley and his brother decided to develop their own specifications and installation techniques given there was nothing suitable on the UK or US market. They approached Mr Randy Reddick, who then owned a synthetic grass manufacturing business based in Dalton, Georgia in the US. They had first met Mr Reddick in 1996 when he visited the UK. They thought he had the right credentials to advise them, having been involved in the synthetic turf industry in Dalton for many years. Dalton is considered by many to be the main US centre for
40 synthetic turf (and arguably is the main centre in the world). Mr Reddick exited from that business in 1998 but then founded another business, which is also based in Dalton, and he continued to advise the appellant in that capacity.

12. For the last 15 years or so Mr Reddick’s business in Dalton has been supplying the appellant with synthetic turf specifically designed for golf according to the specifications discussed between Mr Huxley and his brother and Mr Reddick. It arranges for the turf to be manufactured especially for the appellant by various companies in Dalton which are sourced for their ability to work to these specific requirements. It currently supplies the appellant with the Green Turf, the Putting Turf and the Tee Turf.

13. Subsequently Mr Huxley and his brother investigated using a business in China to supply turf. In 2010 they approached Mr Ian Lowesley who was then the owner and managing director of a business in China, which provides a specialist sourcing and procurement service for Western companies seeking suitable manufacturers in China. Mr Lowesley noted in his witness statement that he had had trouble sourcing a manufacturer in China which was able to make turf to the particular specifications required by the appellant. He visited many manufacturers but the turf produced for lawns, landscape and general purposes or soccer pitches was not suitable for the special golf requirements of the appellant. One manufacturer was found who it seemed was capable of producing the fringe turf. Mr Lowesley’s business arranged the first shipment following several trials in December 2010 and continues to arrange the supply of the Fringe Turf.

14. We accept the position as set out in 15 to 29 on the basis of Mr Huxley’s evidence, as supported by evidence from Mr Reddick and Mr Colin Jenkins, and also having examined samples of the Products and on the basis of the demonstration by Mr Huxley of the use of some of the Products as further set out below.

15. The key specifications for golf surfaces are as follows:

- (1) Putting greens must enable a pure roll of the ball at a consistent and acceptable speed. This is typically measured at around 9 to 11 feet for average use on a Stimpmeter (a special machine for measuring this).
- (2) Golf greens must offer a good/pure ball roll together with good ball reception, meaning realistic reception of the golf ball when it lands.
- (3) Golf tees and practice tees must provide a stable and level foothold for the golfer, a tightly mown dense grass surface to provide good ball-striking characteristics and the ability to receive and hold a tee peg, which holds the ball higher off the ground when golfers choose to use a driver.
- (4) Golf green fringes (also known as aprons or collars) must be sufficiently dense to enable the ball to sit on top of the grass and for a “chip shot” to be played. Fringes are the areas immediately around the green which separate the greens from the fairways which are mown to leave the grass higher than the green but lower than the fairway.

16. The Products are all designed specifically for use in the golf industry with key characteristics which “normal” artificial turf for use as lawn or landscaping (or other purposes) does not have.

17. The characteristics of Green Turf are as follows:

- 5 (1) It is made of special nylon which is selected despite its high price as it ensures significantly more “memory” keeping its required true playing surface for the ball and the required density for walking on than the polypropylene or polyethylene material used for artificial lawn grass. So the “face weight” (ounces of yarn per square inch) is much higher than is required for lawn grass.
- 10 (2) The type of fibre used is A&O NT5530 Yarn 8 Ply 4400 Denier Nylon. This material has a width of 5.487 mm and a thickness of 1.016mm. It has a “face weight” of 42 oz per square yard.
- (3) It has a unique stitch rate/gauge combination of 1 quarter of an inch for the gauge and 19 stitches per 3 inches. This combined with the height of the fibres gives an “open construction” to allow large Huxley Turfill infill to be used.
- 15 (4) It is made to a specific consistent and level height, using a tip shearing process, to give a pile height of 1 inch.
- (5) It has a “K29 Primary backing” required to hold the heavy face weight without tearing.
- 20 (6) It requires large size Huxley Turfill infill to be inserted to keep the yarn fibres in place.
- (7) It requires specialised and skilled installation, in particular due to the use of the infill, over a specially prepared base.

18. The combination of the above features is required to ensure that the Green Turf fulfils the requirements set out above and, in particular, the correct ball impact for receiving full golf shots from a distance, a realistic reaction to ball spin, a pure ball roll to avoid deviation of putts and chips and the correct ball roll speed of 7 to 9 for average use measured on the Stimpmeter.

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19. We examined a sample of the Green Turf and Mr Huxley demonstrated its use for putting shots compared with an artificial turf not designed for this purpose. It was clear that the true ball roll was much better on the Green Turf. Mr Huxley also demonstrated that the Green Turf enables a ball to be hit in either direction along the turf with no noticeable directional bias. This was not possible on the other general purpose turf. Mr Huxley was not able to demonstrate this product’s use for receiving longer shots due to the constraints of the court room. We found the look and feel of this product to be different to other general purpose artificial turf of which we received samples.

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20. The characteristics of Putting Turf are as follows:

- 40 (1) It is made of the same special nylon as that used for the Green Turf for the same reasons. This material has a width of 5.487 mm and a thickness of 1.016mm.

(2) It has a “face weight” of 48 oz per square yard. This is very dense to the pile height to ensure the smooth roll of the ball and to enable the golfer to have a firm stance which is essential for putting.

5 (3) It has a unique stitch rate/gauge combination of 3 sixteenths of an inch for the gauge and 25 stitches per 3 inches. This combined with the height of the fibres gives an “open construction” to allow large Huxley Turfill infill to be used.

(4) It is made to a specific consistent and level height, using a tip shearing process, to give a height of 9 sixteenths of an inch.

10 (5) It has a “Urethane Secondary Backing” required to hold the heavy “face weight” without tearing.

(6) It requires Huxley infill to keep the fibres in place.

(7) It requires specialised and skilled installation, in particular, due to the use of the infill, over a specially prepared base.

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21. The above features are required to ensure that the Putting Green fulfils the above requirements, in particular, that it provides a pure ball roll all year round with a consistent speed of 9 to 11 feet as measured on the Stimpmeter, the correct ball impact and good reaction to spin when using chipping shots. It also provides a firm
20 stance for the golfer which is essential for putting.

22. We examined a sample of this product and Mr Huxley demonstrated its use for putting shots compared with that of artificial turf not designed for this purpose. It was clear that the true ball roll was much better on the Putting Turf. Mr Huxley also demonstrated that this Putting Turf enables a ball to be hit along the turf in either
25 direction with no directional bias which was not possible on the other turf. We found the look and feel of this product to be different to the artificial lawn turf produced.

23. The characteristics of Huxley Premier Tee Turf 2 are as follows:

30 (1) It is made from special crinkled polypropylene yarn (Fibrex 8 Ply 6000 Denier Polypropylene). This material has a width of 6.40 mm and a thickness of 1.60 mm.

(2) It has a “face weight” of 84 oz per square yard. This is very dense to hold the tee peg.

35 (3) It has a unique stitch rate/gauge combination of 1 quarter of an inch for the gauge, which is effectively 1 eighth of an inch, as an extra stitch row is inserted to increase density for holding the tee peg, and a stitch rate of 24 per 3 inches.

(4) It is not tip sheared but has a level and consistent pile height of 1 and 3 eighths of an inch again to enable tee pegs to be held.

40 (5) It has a “Radix 2 Backing” to hold the very heavy “face weight” without tearing.

(6) It does not require Huxley infill.

24. The above features are required to ensure that this Product has a tall and very dense pile with strong backing so that it can hold a long tee peg. Although tip shearing is not required, the “face weight” is again greater than for lawn or landscape turf. Some tee turf requires a special infill but the appellant’s is made from a special crinkled polypropylene yarn which avoids the need for infill while ensuring the density to provide a firm foothold for the golfer and the ability and pile height to take a tee peg. As there is no need for infill this product requires little maintenance and stands up to intense use through the year which would not be possible with natural grass.

25. We examined this product compared with other artificial turf and it was clearly different in appearance and feel. We accept that artificial turf which is not designed in this same way would not hold a tee peg.

26. The objective characteristics of Huxley Premier Nylon Tee Turf are as follows:

(1) It is made from special fibre, 8 Ply 4200 Denier STR Nylon. This material has a width of 5.278 mm and a thickness of 1.021 mm.

(2) It has a face weight of 48 oz per square yard. This is very dense for the 9 sixteenths of an inch pile height to give the correct feel for a short iron game and very high durability.

(3) It has a unique stitch rate/gauge combination of 1 quarter of an inch for the gauge and a stitch rate of 24 per 3 inches.

(4) It is tip sheared to give a pile height of 9 sixteenths of an inch again to enable a short iron game.

(5) It has an “8 mm urethane Foam backing with PP needle punch fleece” for required durability and flexibility”.

(6) It does not require Huxley infill.

27. The above features are required to ensure that this Product provides a durable and hard wearing surface for intensive use throughout the year, a correct ball striking feel when using short irons as the golf club strikes the turf and to allow golfers to pinch the ball against the turf and impart spin. The tip shearing provides a smooth dense surface required for short iron/iron play practice. We examined this product compared with other artificial turf and it was clearly different in appearance and feel. We accept that artificial turf which is not designed in this same way would not hold a tee peg.

28. The objective characteristics of the Fringe Turf are as follows:

(1) It is made from special fibre, 10000 Denier Fibrillated Polyethylene Monofilament incorporating a Polyprop “thatch” layer. This has a width of 8 mm and a thickness of 1.2 mm.

(2) It has a face weight of 1275 grammes and 1100 grammes per square meter (for the two different types of Fringe Turf respectively) to provide the required density.

(3) It is produced at two heights to replicate the fringe.

5 29. We accept Mr Huxley's evidence that the above characteristics, being the high
density and integral thatch, enable the golf ball to sit on top of the turf so that a
realistic golf shot can be played with short irons and that the density enables the
golfer to pinch the ball against the turf and impart spin. Mr Huxley was not able to
10 demonstrate the use of the Fringe Turf due to the constraints of the court room. In
this case, we found the look and feel of the fringe Turf to be similar to that of the
other artificial turf samples we examined. This was the Product with the least
discernible difference to other artificial turf products both in look and appearance and
in terms of the specifications.

15 30. Mr Huxley noted that natural grass grown for lawns and landscaping is not
suitable for golf. Natural grass has to be specifically adapted using special grass
cultivars laid over sophisticated and complicated bases, intensive and specialised
maintenance (including expensive irrigation) and frequent mowing cycles at different
heights for greens, fringes, tees and fairways.

20 31. Mr Huxley noted that the fact that there are many high profile users of Huxley
products, comprising both golf courses and golfers, provides evidence of the essential
need for the Products for specialist golf use. He listed many well known golf courses,
golf associations and professional golf players as customers.

25 32. Mr Huxley confirmed that the Products are imported by the appellant in rolls of
the relevant material which are then cut to the required size. Mr Huxley said that the
price of the Products is much greater than that of artificial turf for lawn or landscaping
which reflects the specialist nature of the design features and the more expensive
materials required. The Products are as much as 3 to 4 times more expensive than
30 such artificial lawn turf. Mr Huxley said that price was a key differentiator between
the Products and such artificial lawn turf. That is a key reason why, in his view, it
would be most unlikely that the Products would be purchased for such use. He
queries why in any event anyone would want to buy a specialist product for golf use if
they only wanted to use the turf for their garden with no intended golf use.

35 33. Mr Colin Jenkins, a professional golfer for over 30 years, gave evidence in a
witness statement. In addition to being a professional golfer he is involved in golf in
a number of other ways; as the owner and manager of golf courses, an operator of
adventure golf courses, the founder of a golf magazine and the operator of a golf
consultancy business which specialises in giving advice on all aspects of golf facility
design and operation. He met Mr Huxley and his brother about 15 years ago. At that
40 time, as he was very much aware of the shortcomings of natural grass (as set out
above) and that ordinary artificial grass was not suitable as a golf surface, he was very
interested in the appellant's products. Having sampled them himself he began to
recommend the products and has purchased Huxley products for use at his golf
centres. The evidence in his witness statement supports the conclusions above.

34. The evidence of Mr Reddick and Mr Jenkins supports the conclusion that the appellant is very well known in the golf industry as a specialised supplier of golf surfaces. Mr Huxley noted that the appellant is not any longer the only business supplying such specialist artificial turf but, outside the US, Mr Huxley considers it is the best known.

35. The appellant produced a number of advertising materials and extracts from these are set out below. We have set out in the discussion the relevance of these advertising materials.

(1) “Huxley Premier Tee Turf’s exceptional pile density avoids the need for an infill ... Golfers can choose to play balls directly off the turf or from a standard tee peg inserted into the pile”.

(2) “Huxley Nylon Tee Turf is a high performance surface for play without a tee peg, providing superb ball striking characteristics with minimal maintenance requirements”.

(3) “Huxley All-Weather Putting and Chipping Greens are installed using our tournament quality putting turf, which is specially designed and manufactured to enable golf professionals and amateur golfers to practice and improve their short game on a true and consistent top quality surface all year round”.

(4) “Huxley All-Weather Golf Greens provide a first class professional quality surface that is ideal for both short game practice and for low maintenance greens on a golf course. That will receive a full golf shot or chip realistically, while also providing a true ball roll for putts”.

(5) “Huxley Premier Tee Turf 2 (PTT2) offers the following key benefits:

- Exceptional pile density allows installation without filler, minimizing maintenance requirements
- Balls can be played straight off the surface or from a standard tee peg pushed into the pile
- Suitable for installation by golf course staff with guidance from Huxley Golf
- Can be lifted for cleaning, renewal or repositioning to help spread the wear
- Hard-wearing, silent and comfortable underfoot – looks, feels and plays like natural turf”

Law

36. The European Union (“EU”) operates a harmonised system in respect of customs duty. In outline, all member states are required to apply the same set of rules

to determine the classification of goods by reference to which the rate of duty is determined.

37. The rules which member states must apply in determining the classification of goods entering the EU for customs duty purposes is governed by Council Regulation (EEC) NI 2658/87 of 23 July 1987 (the "**CN Regulation**"). Annex 1 to that regulation sets out the CN which provides a classification for all goods in international trade and the duty payable on each category. The CN is subject to revision/renewal by Commission regulation each year with effect from the following 1 January.

38. Article 1(2) of the CN Regulation states that the CN shall comprise:

(1) 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 (the "**Harmonised System**").

(2) Community sub-divisions to that nomenclature, referred to as CN subheadings, preliminary provisions, additional section or chapter notes and footnotes relating to CN headings.

39. The classification of goods in the CN is governed by the principles set out in Section 1 of Annex 1 of the CN Regulation known as the general interpretative rules ("**GIR**"). Under GIR classification is determined according to the terms of the headings and related section or chapter notes. These principles have the force of law. The GIRs of relevance are set out below and summarised in the discussion.

40. Essentially under these rules the CN is structured by reference to sections, then chapter numbers with chapter titles, then headings and subheading. The first two numbers constitute the chapter number, the next two numbers (plus the chapter numbers) constitute the heading and the final four numbers (where applicable) constitute the subheading. Each section and chapter within the CN has notes which provide guidance in respect of their application.

41. Rule 1 of the GIR provides:

"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."

42. Rule 3 provides for classification of goods which fall to be classified under two or more headings as follows (setting out only the parts of this rule of relevance in this case):

"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....

(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.”

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43. Rule 6 of the GIRs provides 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 subheadings noted and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context otherwise requires.”

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44. The Harmonised System is administered by the Customs Cooperation Council which issues and updates explanatory notes known as HSEs on the various headings and subheadings in the Harmonised System. HSEs are not legally binding but are a relevant aid to the interpretation of the CN. They have been held by the European Court of Justice to be highly persuasive and an important aid to the interpretation of the scope of the various headings although they do not have any legally binding force (*British Sky Broadcasting Group plc and another v Revenue & Customs Commissioners* (Cases C-288/09 and C-289/09) [2011] All ER (D) 239 at [63]).

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45. Article 12 of the Community Customs Code (Council Regulation 2913/92/EEC) provides for the issue by customs authorities of Binding Tariff Information rulings which give their opinion of the proper classification of the relevant goods.

25 *Chapter 57 of Section XI of the CN*

46. HMRC argue that the Products fall within chapter 57 of section XI of the CN which has the title: "Carpets and other textile floor coverings."

47. Note 1(t) to section XI states that this section does not cover:

“(t) Articles of Chapter 95 (for example, toys, games, sports requisites and nets).”

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48. In chapter 57 the notes state :

"1. For the purposes of this chapter, the term "carpets and other textile floor coverings" means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes.

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2. This chapter does not cover floor-covering underlays"

49. Heading 57.03 reads as follows (and the entry which HMRC consider applies is highlighted):

"5703 Carpets and other textile floor coverings, tufted, whether or not made up.

5 5703 10 00 - Of wool or fine animal hair

5703 20 - Of nylon or other polyamides

- - Printed

5703 20 12 - - - Tiles, having a maximum surface areas of 1m²

10 5703 20 18 - - - Other

- - Other

5703 20 92 - - - Tiles, having a maximum surface area of 1 m²

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5703 20 98 - - - Other

50. The HSEs for Chapter 57 contains a general note:

20 "This Chapter covers carpets and other textile floor coverings in which textile materials serve as the exposed surface of the article when in use. It includes articles having the characteristics of textile floor coverings (e.g., thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other furnishing purposes ... The above products are classified in this Chapter whether
25 made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.) in the form of carpet squares, bedside rugs, heather rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up...They may also be impregnated
30 (e.g., with latex) or backed with woven or non woven fabrics or with cellular rubber or plastics.

51. The HSEs relating to heading 57.03 state:

35 "This heading covers tufted carpets and other tufted textile floor coverings produced on tufting machines which, by means of a system of needles and hooks, insert textile yarn into a pre-existing backing (usually a woven fabric or a non woven) thus producing loops or, if the needles and hooks re combined with a cutting device, tufts. The yarns forming the pile are then normally fixed by a coating of rubber or plastics. Usually before the coating is allowed to dry it is either covered by a secondary backing of loosely woven textile material, e.g., jute, or foamed rubber...The heading
40 also covers tufted carpets and other tufted textile floor coverings made using a tufting gun or made by hand..."

Chapter 95 of Section XX

52. Chapter 95 in section XX is stated to apply to "Toys, games and sports
5 requisites; parts and accessories thereof".

53. Note 1(v) to Chapter 95 provides that:

10 "This chapter does not cover....tableware, toilet articles, carpets and other
textile floor coverings, apparel, bedlinen, table linen, toilet linen, kitchen
linen and similar articles having a utilitarian function (classified according
to their constituent material)."

54. Heading 9506 applies to:

15 "Articles and equipment for general physical exercise, gymnastics,
athletics, other sports (including table tennis) or outdoor games, not
specified or included elsewhere in this chapter; swimming pools and
paddling pools."

55. The relevant subheadings are as follows (and that which the appellant considers
applies is highlighted):

“- Golf clubs and other golf equipment

9506 31 00 - - Clubs, complete

20 9506 32 00 - - Balls

9506 39 - - Other

9506 39 10 - - - Parts of golf clubs

9506 39 90 - - - Other."

56. The HSENs for chapter 95 state:

25 "This Chapter covers toys of all kinds whether designed for the
amusement of children or adults. It also includes equipment for indoor or
outdoor games, appliances and apparatus for sports, gymnastics or
athletics, certain requisites for fishing, hunting or shooting, and
roundabouts and other fairground amusements."

30 57. HSEN (A) for heading 95.06 states it covers "wall bars; ... assault course
climbing walls" and HSEN (B) (2) states it covers "Requisites for other sports and
outdoor games (other than toys presented in sets, or separately, of heading 95.03)"
and it includes "diving stages (platforms), chutes" within the expression "other water-
sport equipment".

Rights of appeal

58. The appellant has a right of appeal to the tribunal against a decision of this kind under s 16(1) of the Finance Act 1994:

5 (1) Under sub-s (5) "the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary the decision and power to substitute their own decision for any decision quashed on appeal".

(2) Under sub-s (6):

10 "On an appeal under this section the burden of proof as to [matters not relevant to the present dispute] 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."

59. The burden is in the appellant therefore to satisfy the tribunal that it should exercise its powers under s16 (5) to quash or vary HMRC's decision or substitute their own decision.

Appellant's submissions

60. The Products fall within the general heading in chapter 95 of section XI as "Toys, games and sports requisites" and specifically within the heading "other golf equipment" and then "Other" (see 55).

20 61. The term "equipment" is to be give a wide meaning as indicated by the items included within this chapter and the related HSEs:

(1) Heading 9506 includes "swimming pools"; and the one dash subheading after 9506.19 includes "other water-sport equipment".

25 (2) HSEN (A) for heading 95.06 states it covers "wall bars; ... assault course climbing walls" and HSEN (B)(2) includes "diving stages (platforms), chutes" within the expression "other water-sport equipment".

62. It follows that the expression "other golf equipment" in subheading 9506.39 includes goods which become fixtures and fittings to the land as the Product may do here.

30 63. HMRC appears to argue that the term "sports requisites" in the title to chapter 95 is to be given a restricted interpretation by reference to the word "requisite" so that an item would have to be essential to the playing of golf or solely for the playing of golf to be included. The title to chapter 95 does not have the force of law (as stated in GIR 1). In any event, there are no words in the law which support this view. When
35 the CN intends such a meaning it explicitly says so which is not the case here.

64. HMRC state that sand for an athletics area would be classified in heading 2505 (sand) and would not be classified as sports equipment in chapter 95. This statement infers that sand is always excluded from sports equipment because it is a natural

product or because it forms part of the land or because there is a separate heading for sand.

65. If this argument were applied to climbing walls, the fact that reconstituted stone may be classified outside heading 9506, would exclude climbing walls from heading 9506; and it would follow that heading 9506 HSEN (A) is incorrect. On the contrary, HSEN (A) is correct; and reconstituted stone with a specific sports use as a climbing wall is classified under heading 9506. Similarly any special sand that has special characteristics for sports use would not automatically be classified under chapter 25 (applicable to sand). The classification of such special products would instead be determined by the GIRs.

66. HMRC say natural grass is not golf equipment and, therefore, synthetic grass is not golf equipment. However, natural grass is not generally regarded as equipment because it is natural thing and because of its associated objective characteristics (that it is planted, watered and mown) and not because it is a surface. As set out above, surfaces are not excluded from being sports equipment (see the HSEs referred to above). The principal material objective characteristic shared by natural grass used to play golf on and synthetic grass used to play gold on is that it provides a surface. Since that objective characteristic does not take natural grass out of chapter 95, the classification of natural grass is irrelevant. The same arguments apply as regards HMRC's assertion that, as sand is not equipment, it follows that artificial turf is not equipment.

67. To fall instead within chapter 57, as HMRC argue, the Products would have to be a type of "floor covering". It is not within the natural meaning of this term to regard artificial turf for use on land as a form of "floor covering". The Oxford English Dictionary definition of "floor" looks at the term in a number of contexts, both indoor and outdoor. However, in the context of chapter 57 and the type of articles included there, the definitions relating to external areas are not in point. Rather the definition of relevance relating to the term, as used in a house or other structure, means "the layer of board, brick, stone etc in an apartment, on which people tread; the under surface of the interior of a room." HMRC point to the French wording "Tapis et autres revetements de sol". They note that "revetements" means "surface, coating, covering" and "sol" means ground, floor. However, it is not correct to approach the definition in that way. "Revetements de sol" is a noun the meaning of which is as follows; "floor covering is a material construction, natural or manufactured, which covers the floor. Like any other coating, it serves as protective or decorative but it is specifically adapted to withstand the passage of people animals or machines". This meaning aligns with that of term used in English.

68. Moreover under note 1(v), chapter 95 does not apply to "carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent materials)". The Products do not have a utilitarian function; they have a sports function. They are not therefore excluded from chapter 95.

69. On the other hand note 1(t) to Section XI excludes from that section, which includes chapter 57, “Articles of Chapter 95 (for example, toys, games, sports requisites and nets)”.

5 70. The overall consequence of the above is that, as the Products are prima facie classifiable under chapter 95, they are classifiable under chapter 95 only. This follows from GIR 1 without the need to look to GIR 3. In effect the interpretive notes referred to above distinguish between chapter 57 and chapter 95 on the basis of whether the goods have a utilitarian function, which the Products do not.

10 71. If, contrary to the appellant’s view, the Products are prima facie classifiable under heading 9506 and one or more other headings, under GIR 3 the Products should nevertheless be classified under 9506 either because that heading is more specific or because is it the heading which occurs last in numerical order.

Caselaw

15 72. It is established in the case law that the decisive criterion for classification is the objective characteristics and properties of the goods, as defined in the headings, as usefully summarised in the judgment given by the Court of Justice of the European Union (“CJEU”) in *Metherma GmbH & Co. KG v Hauptzollamt Dusseldorf* Case C-403/07 at [46] and [47]. Under this test:

20 (1) Presentation (including marketing material) is not necessarily an objective characteristic and property of the goods. Presentation is certainly an objective characteristic when specified in the heading or necessarily implied from the words of the heading. Otherwise marketing material is evidence of actual use, which may demonstrate intended use inherent to the product.

25 (2) The function of the goods (meaning, what they do) is always an objective characteristic and property of the goods.

30 (3) Intended use may be an objective characteristic. However the intended use must be natural use or use in practice (see *Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafen* (Case C-480/13)). A “subjective use” (for example something particular to the importer that is not generally the case) or, a hypothetical use, is not an objective characteristic. Therefore the legal test is objective intended use. Whereas classification cannot be based on actual use alone (gleaned from marketing material or otherwise), actual use may demonstrate that the declared function is in fact the objective function.

35 (4) Subjective function is not an objective characteristic. For example, artificial grass with ordinary fibres unsuitable for sports use will not be classified under heading 9506 no matter how it is marketed.

40 73. The goods under heading 9506 have objective characteristics and properties such as special fibres that enable the goods to perform the function of providing a surface for sports use and golf use in particular. In contrast, the ordinary fibres

appearing in carpets and artificial grass for landscaping do not enable carpets and artificial grass for landscaping to perform the function of providing a surface for sports use.

5 74. It is clear from the witness evidence that the Products were specifically designed and made to meet the special requirements and objectives of golf. The evidence is that artificial turf, not specifically designed for golf use, is unsuitable for golf use. Mr Huxley explained that US synthetic turf he initially tried out was found to be unsuitable for golf use in the UK. The appellant, therefore, developed the Products to address these concerns and to meet the requirement for golf surfaces. In particular Mr Huxley refers to certain objective characteristics of the Products, namely, cost, use of special nylon, unique stitch rate/gauge combination, specific height, tip shearing, specific infill, appearance, pure ball roll (9-11 feet on a Stimpmeter), special crinkled polypropylene yarn, the ability to take a tee peg, very dense pile and the "thatch" layer.

15 75. The objective characteristics of the Product are also clear from the marketing materials and the fact that the Product is more expensive than normal turf. It is proper to ask how the goods have been used to determine whether the objective intended use can be demonstrated. The user list bearing the names of many famous golfers and golf courses clearly demonstrates the objective intended use of the disputed products.

20 *BTIs*

76. There are a number of BTIs which classify artificial grass under heading 5703. However none of those BTIs describe the relevant goods as having a sports function (whether UK or the German and Spanish BTIs referred to by HMRC). As a result, all of these BTIs are neither relevant, nor binding nor persuasive nor useful in this case.

25 77. In contrast there are BTIs which do describe the relevant goods as having a sports function which are classified under heading 95.06:

30 (1) An Austrian BTI with the reference AT2012/000351 which relates to the following: "long about 250cm and 30 cm wide for the putt training on the golf course - the mat is made of plastic wherein the surface of a 5mm high pile of plastic (grass imitation) - at one end of the mat is a ca 10cm high ramp made of plastic with two depressions (putting)".

(2) A German BTI with the reference DE11518 which relates to "Track putting mat" which includes "Ball stopper unit, Silicon Putting Cup ... The mat has marks."

35 (3) A French BTI with the reference FR - PRO - 20110005293 which relates to "Indoor golf mat 1 2 Holes, 1 plastic base with ball system back automatique, 1 metal golf club and golf balls."

40

Non EU decisions

78. The dispute is at the 4 character heading level. Therefore the classification decisions of other signatories of the Harmonized System Convention are of persuasive authority.

5 79. In a US decision made on 25 April 1995 (reference: NY 809453) the “Golffmat System” was classified under heading 9506. It was specifically noted that the articles “were principally used in the practice of sport”. The decision maker contrasted NY 859739 “where there was no clear and conclusive indication of primary use or application”.

10 80. In the Indian case of *Floor & Furnishing India (P) Ltd. v Commissioner Of Customs* in the Customs, Excise and Gold Tribunal – Delhi, on 13 March, 2002, the Tribunal excluded artificial turf from heading 9506 only because there was no evidence that the goods were intended to be used for a specific technical use such as a surface for a particular sport. The clear inference is that, if there had been evidence of
15 specific sports use, then the artificial turf in question would have been classified under heading 9506.

81. In the South African case of *Durban North Turf (Pty) Ltd v The Commissioner of the South African Revenue Service* in the Kwazulu-Natal High Court, Pietermaritzburg, Republic of South Africa, Madondo J gave a well-reasoned
20 judgment classifying the relevant goods under heading 9506 as follows:

“[46] Being essentially intended to provide an artificial surface for playing hockey game, the Poligras 2000 is distinguished by its principal function from a carpet which is essentially intended to cover the floor surface or any other surface, as a protective covering. ...

25

[49] The design, development and manufacture of Poligras 2000, in my view, sufficiently demonstrate that it is not a carpet or any other floor covering as the respondent contends. It constitutes and provides an artificial surface on which a hockey game is played. ...

30

[56] The hockey pitch (Poligras 2000) is not specified or included in the examples given in tariff heading 95.06. However, in my view, there is nothing in the examples which is inconsistent with the proposition that the synthetic turf in issue falls within the category of goods described in tariff heading 95.06 or similar goods of sporting....

35

[61] It is apparent from the expert witness’s evidence that in hockey the artificial turf is not only a substitute for natural grass, but equipment without which a professional game cannot be played. An artificial turf makes it possible for the players to play the game utilising all the available technical skills required in the modern game....

40

[71] In my view, what matters most is not what the respondent has considered the product to be, but what its essential characteristics, properties and principal function are. When determined objectively the nature, form, character and the function of the product render it classifiable under tariff heading 95.06 and sub-heading 9506.99 and not under tariff 57.03 and sub-heading 5703.30 as the respondent classified it. In the premises, I come to the conclusion that the product in question ought to have been classified under tariff heading 95.06 and sub-heading 9506.99.”

82. Similarly to the situation in the Indian case, the Products in this case are specifically designed for playing golf, they have special features (technical characteristics) for golf use which distinguish them from both ordinary floor covering and landscaping turf and they are solely or predominantly suitable for use in playing golf.

83. Finally, the appellant argued that if the tribunal finds that the Products do not fall within either chapter 57 or chapter 95, they should be classified under chapter 39 (articles of plastic).

HMRC’s submissions

84. The classification of the Products is important given that it dictates the customs duty payable on import. If it is cheaper to import artificial grass that purports to be for use for golf use than turf for more general use, it is likely to cause EU imports to be diverted through the UK and to cause confusion and criticism for lack of certainty. A customs officer at a port cannot be expected to differentiate between artificial grass on that basis. Moreover the appellant's argument for this product to be regarded as sporting equipment is illogical. A playing surface for golf cannot properly be described as being part of the equipment.

85. The correct approach to classification is as set out in the *Metherma* case. It was established in that case that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product. That inherent character must be capable of being assessed on the basis of the product's objective characteristic and properties. This test is not asking what use the goods can be or are put to, as that is essentially a subjective matter. Rather the test looks to inherent use meaning the use that is defined by the product itself. So, for example, a wheel is defined by its shape. The actual use of the product is irrelevant as that is a subjective matter; we are here concerned with objective characteristics only. Mr Pritchard referred to the facts of the *Metherma* case itself and to *Sysmex* and *Farfalla Fleming v Hauptzollamt München-West* (Case C-228/89) [1990] ECR I-3387, as supporting the view that the use of the Products in this case for golf purposes is “subjective use” which is not to be taken into account in classifying the Products. (Further details of these cases are set out in the discussion).

86. In this case, there is nothing inherent in the objective characteristics of the Products which mean that they can only be used for golf. Whilst the intended use of

the Products may be golf, they could be used for other purposes, for example, as artificial turf in a garden. The appellant seeks to distinguish its turf from artificial turf used in other ways on the basis of superior qualities such as ball roll, receptiveness to the ball and ability to withstand a shot with an iron club. However, these are not external objective characteristics that can be appraised by the customs authority. Mr Huxley conceded when he gave evidence that the real reason a person would be dissuaded from using the appellant's turf, in place of any other artificial turf, is the price but it is clear from the *Farfalla* case that price is not an objective criterion which can be taken into account in customs duty classification.

10 87. The appellant draws a comparison with natural turf used on golf courses and this is revealing. If grass seeds or natural turf were to be imported, where that grass type or turf is specifically suitable for golf, it could not be said that the objective characteristic of that seed or turf is as sporting equipment. The same applies to artificial turf such as the Products.

15 88. Moreover Note 1(v) explains that Chapter 95 "does not cover carpets and other textile floor coverings... and similar articles having a utilitarian function". This, therefore, excludes artificial turf as it comes within that definition as a textile floor covering. The appellant argues that it is not excluded as it does not have a utilitarian function. However, the reference to having a utilitarian function relates to "similar articles" and not "carpets and other textile floor coverings". In any event the turf does have such a function. Looking at the meaning in the French wording, the phrase means having a utility function in the sense of being something useful. It is difficult to see that any form of artificial turf cannot be said to provide a useful function (such as, as a floor covering for walking upon).

25 89. The title for Chapter 95 state that it covers "requisites" for other sports and outdoor games and the HSEs also refer to such "requisites" for sport. The Products are not "requisites" to golf. They are not essential or necessary to the playing of golf. Instead, the Products are merely a surface of artificial materials used in chosen areas such as tees and putting greens. Artificial golf turf is not in the same category as a golf club or golf ball since it is not fundamental to the playing of golf. Golf can be played on a variety of surfaces (such as grass, sand and artificial turf) but that does not mean that all surfaces can be categorised as equipment required for the playing of golf. Similarly it cannot be said that the objective characteristics of sand that has been imported to be used in a golf bunker or in an athletic jump pit is "equipment" or a "requisite" for sport.

30 90. Similarly artificial turf is not "equipment for golf". The equipment needed for golf is golf balls and golf clubs. It cannot be said that grass is equipment for golf, nor is artificial turf. In the case of cycling, for example, the "equipment" includes a bike, helmet and cycle shoes. It does not include the road.

35 91. The appellant counters these views by looking to the example of an assault climbing wall. That is demonstrably a piece of "equipment" used to climb over with moulded hand grips. The appellant also refers to a swimming pool or paddling pool.

But this refers to the whole item. The Products are more akin to the import of tiles that could be used to build a swimming pool.

5 92. The objective characteristics of the Products means they fall to be classified under chapter 57 and specifically within heading 5703. Under that heading the objective characteristics which must be demonstrated and which the Products have are as follows:

10 (1) The product must be comprised of textiles. The appellant does not dispute that this is the case here; the Products are all types of artificial grass made using strands of nylon that are tufted into a base of woven fabric with a synthetic backing.

(2) The Products are presented as rolls.

(3) The textile must serve as the exposed surface when in use. Here that is the nylon or other man made textile.

15 (4) The Products contrast with items such as terry towelling because they are "stiff thick and strong".

(5) The Products are a "floor covering"; they cover the floor and can be walked on or stood on.

20 93. The appellant's argument is that its artificial turf is not a "floor covering" because "floor" refers to inside surfaces only. In fact the Products can be used both inside and outside. The appellant cannot cherry pick the definition of the term "floor covering" from the dictionary which gives it the best result. The Oxford English Dictionary defines floor as including "a surface on which something rests; a foundation". The appellant asserts that those formulating the CN cannot be taken to have intended for floor to be given that meaning and so that definition can be ignored.
25 But if the purpose of using the definition is to understand the intended meaning it is impermissible to ignore the definition because it suits the argument. If there is any doubt as to the meaning regard must be had to the French wording: "Tapis et autres revêtements de sol". "Revetements" means "surface, coating, covering" and "sol" means ground, floor. The appellant provided a different definition of the term used as
30 a noun. This definition also contains references to outdoor areas such as in the "history" section a reference to "cobble used as paving".

BTIs

35 94. BTIs can be used as evidence to support an interpretation although they are not determinative. In the case of *Staatssecretaris van Financiën v Sony Supply Chain Solutions (Europe)* (Case C-153/10) the CJEU gave the following description of the approach member states should take to BTIs:

40 "the fact that the customs authorities of another Member State have issued a BTI for specific goods to a person not party to the dispute, before a court against whose decisions there is no judicial remedy under national law, which seems to reflect a different interpretation of the CN headings from that which that court considers it must adopt in respect of similar goods in

question in that dispute, most certainly must cause that court to take particular care in its assessment of whether there is no reasonable doubt as to the correct application of the CN (see *Intermodal Transports*, paragraph 34) ...”

5 95. There are no BTIs or foreign rulings which support the appellant's position. Rather they support HMRC's position; the BTIs listed in the Annex all relate to artificial grasses all of which were classified under chapter 57. The BTIs which classify the goods under chapter 95 do not relate to artificial turf of the kind the
10 appellant imports; in each case the putting or golf surface referred to is part of a larger system.

Non- EU cases

96. Non-EU classifications should not be given significant or material weight. Without evidence on foreign law the tribunal cannot know what approach non-EU
15 states take when it comes to interpreting the customs code as regards whether they interpret the code in the same way as under EU law.

97. As regards the non-EU classifications:

(1) As regards the US authority the appellant refers to, the appellant asserts there are some similarities in parts of the golf mat systems considered in that case. This is not correct. That system comes with a
20 foundation platform, a stance mat, grass panels and a golf tee. None of these are found in the Products.

(2) As regards the South Africa case relating to a hockey pitch:

(a) At [65] it was noted that the pitch was marked out by white lines on the hockey pitch, which was imported ready sized and ready to be laid. This is very different to these Products which
25 are imported in rolls and cut to size in the UK.

(b) At [58] it was concluded that "For an article or item to be said to be sports equipment, in my view, it must be essential and necessary for the playing of the sport in question. It
30 appears from the evidence of Derek Field, an expert witness, that in the case of a hockey sport an artificial surface is now the norm, not an exception." It cannot be said to be the "norm" for golf to be played on artificial turf.

(c) At [60] the court said "no games of championship standard are played on any other surface than the artificial one". Mr Huxley said in evidence that his turf is an alternative to grass. The major golf competitions are played on grass.
35

(3) In the Indian case the appellant refers to, the turf was not classified under chapter 95. Reference in the decision to the absence of evidence regarding use is not the same as saying that, if such evidence had been
40 made available, then the outcome would necessarily have been different.

The appellant recognised in its submissions that it is not clear whether India has the same rules regarding the relevancy or not of actual or intended use. Little if any weight can be placed on this decision.

5 **Discussion**

Approach to classification

98. The issue is the correct classification of the Products under the CN. HMRC argue that the Products are to be classified under a subheading of heading 5703 (in chapter 57 of section XI of the CN) essentially as “other textile floor coverings”. The appellant’s position is that the correct classification is under a subheading of heading 9506 (in chapter 95 of section XX of the CN) as “other golf equipment”.

99. It is not disputed that the correct approach is to seek to determine the classification according to the rules in the GIR:

15 (1) Rule 1 of the GIR provides that classification is to be determined according to the headings and any relative section or chapter notes (and provided such headings or notes do not otherwise require, according to the following GIRs). The titles of sections, chapters and sub-chapters are provided for ease of reference only.

20 (2) Under GIR 3 if goods are prima facie classifiable under two or more headings, the heading, which provides the most specific description is to be preferred to headings providing a more general description. When goods cannot be classified in that way, they are to be classified under the heading which occurs last in numerical order among those which equally merit consideration.

25 (3) There are special rules for mixed or composite goods but the parties were agreed that those are not in point here.

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

100. It is established that the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter (or subheading as appropriate). This is the test set out in the *Metherma* case to which both parties referred. In that case the CJEU went on to say that the intended use of a product may constitute such an objective criterion for its classification [at 47]:

“if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties.”

5 101. The appellant says that the inherent use of the Product, as golf equipment, is clear from the objective characteristics of the Products such as the special fibres and techniques used to create the different Products. The appellant asserts also that it is legitimate to look to the marketing materials and evidence as to the actual use of the Products in support of this.

10 102. HMRC submit that the intended use of the Products for golf purposes is purely subjective and so is not to be taken into account in determining the correct classification. In their view the Products do not have objective characteristics which distinguish them as being for any such particular golf use. They could equally be used as artificial turf for a lawn. HMRC argue that a customs officer cannot be expected to distinguish between, for example, a roll of artificial turf for use on a lawn
15 or for landscaping purposes and the Products, intended for golf use. They note that price is a differential but argue that is not a relevant characteristic on the basis of the cases. HMRC say that the objective characteristics of the Product in fact are those of “other textile floor coverings”. In support of their view that the intended use of the Products is subjective use which is not to be taken into account, HMRC referred to the
20 decisions of the CJEU in *Sysmex* and *Farfalla Fleming*.

103. The issue in the *Sysmex* was the classification of a product which was used to test white blood cells. It was noted by the CJEU that in fact the product had other possible uses, for example, as a dye. An expert had given evidence that the product could be used as a blue dye but that its use in that way was so weak (as it gave little
25 colour and was easily washed out) that the CJEU concluded (at [42]) that “the use of the product as a colouring matter is no more than a purely theoretical possibility” and therefore “it follows that the use of the product at issue as a laboratory reagent constitutes, in the light of its objective characteristics and properties, its exclusive use”.

30 104. In the *Farfalla Fleming* case the CJEU considered whether glass paperweights could qualify for an exemption from customs duty as original works of art as they were executed by famous glassware artists and served no functional purpose as paperweights. The CJEU confirmed (at [13]) that the decisive criterion for the customs classification of goods must be sought generally in their objective
35 characteristics and qualities. They then went on to state (at [20]) that since the customs authorities can rely only on objective criteria relating to the external characteristics of goods, even where these goods are hand-made by artists, they must be regarded as goods of commercial character because they appear similar to comparable articles manufactured industrially or as works of craftsmanship. It
40 therefore found as follows:

“That conclusion is not invalidated by the fact that the paperweights in question are produced by hand in limited editions by well-known artists and are collected by collectors and displayed in museums without ever

being used as paperweights. Just as an artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification.”

105. Although not cited to us we note that the Upper Tribunal has held in the case of *E.P. Barrus Ltd and another v Revenue and Customs Commissioners* [2013] UKUT 0449 essentially that a product’s “targeted use” as shown in advertising materials should not be taken into account in classification. This was based on the views expressed by the Advocate General in *Kamino International Logistics BV v Staatssecretaris van Financiën* (Case C-376/07). The Advocate General rejected the idea that a product’s “intended commercial use”, in other words, its “target’ use” should be taken into account in order to determine its “normal use”. The concern was (at [74]) that if significance is attached to elements such as the product’s declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. At [75] it was noted that this was in accordance with the case law which:

“while in principle accepting the possibility of taking a product’s intended use into account in order to determine its customs classification, has, nevertheless, stressed that that intended use must be based on specific and objective criteria.”

106. On the basis of the above case law, therefore, it is clear that the intended use of the Products is relevant to their classification only if that use is capable of being assessed on the basis of the Product’s objective characteristics and properties. In looking at intended use, the CJEU in *Sysmex* acknowledges that an item may have more than one use but a use which is highly theoretical is to be disregarded. The CJEU held in *Farfalla Fleming* that, the fact that a paperweight was made as a piece of art and accordingly had a higher value than a normal paperweight, did not mean it could be classified differently to other paperweights on the basis that these were not objective criteria which the customs authorities could assess. The Upper Tribunal, as based on the decision in *Kamino*, warns against looking at “targeted” or “marketed use” due to the potential for abuse and states that, in that context, marketing materials are to be disregarded. We note that this does not mean that marketing materials may not be relevant to the extent that they contain information as regards the objective characteristics of the relevant product which demonstrate intended use.

107. From this the starting point is that the Products can be classified according to their intended use, which it is not disputed is as specialist artificial turf for golf use, only if that particular use can be discerned from the composition and design of the Products themselves. The position as regards the Products other than the Fringe Turf is set out in 108 to 129 (and accordingly references in those paras to the Products are to Products other than the Fringe Turf) and as regards the Fringe Turf in 130 to 132.

Classification of the Products other than the Fringe Turf

108. On the basis of the evidence set out in 15 to 29 above, our view is that (leaving aside the Fringe Turf), the Products have such an intended use, specifically as a golf green, a putting green and tee green, which can be determined from the design and characteristics of those Products:

(1) As regards the Green Turf and the Putting Turf the relevant objective characteristics and properties are the combinations of the special materials and fibres used, the particular combination of gauge and stitch rate, the “face weight” of the fibres, the particular consistent pile height achieved with shearing and the type of backing used which gives an “open faced construction” into which infill can be inserted to give the required surface.

(2) As regards the Huxley Premier Tee Turf those objective characteristics and properties are the special crinkled polypropylene yarn, the very dense “face weight”, the stitch rate/gauge combination, the particular pile height and the strong backing.

(3) As regards the Huxley Premier Nylon Tee Turf those objective characteristics and properties are the special fibres, the heavy “face weight”, the stitch/gauge combination, the particular pile height achieved with tip shearing and the special backing with fleece.

(4) In each case it is clear that it is the particular combination of the above features which gives each Product its essential character as a surface for use as the particular golf area in question due to its resulting characteristics, such as, that a golf ball can be struck along the relevant turf in both directions with little or no directional bias, that a golf balls runs along the turf at the appropriate speed, that the turf is receptive to the ball and that the relevant turf can hold a tee peg (as set out in further detail in 15 to 29 above).

109. We note that the intention behind the objective criterion test is that customs authorities should be able to determine the nature of goods for duty purposes at the point of entry on import. That is why subjective criteria, which are not apparent from the characteristics of the item itself, are not applicable in determining classification. HMRC assert that the criteria which the appellant refers to, such as superior ball roll and receptiveness to the ball, are such subjective criteria. They also note that rolls of the Product when presented at customs would not look dissimilar to rolls of other types of artificial turf, which may not have this combination of features. They state that customs officers would not be able to make a distinction leaving the way open to abuse.

110. We do not regard the features we have identified above as subjective criteria. They are features inherent in the relevant Products themselves albeit that the significance of those features would be unlikely to be fully appreciated by a person who does not have specialist knowledge of the design of artificial turf without further explanation or evidence. That such technical information and evidence may need to be presented with the goods to demonstrate the significance of their particular

objective features, we do not think of itself means that the criteria are not sufficiently objective.

5 111. A premise, in effect, that all goods which have a similar visual or textual appearance must be categorised in the same way seems to us an overly simplistic one that is not justified by the detailed categorisation available under the CN. Many goods must have technical specifications such that the true nature and significance of their objective characteristics can only be known on the provision of supporting technical explanatory evidence.

10 112. In this case we would expect that satisfactory evidence of the particular design features of the relevant Products and their significance could be presented at the point of entry. In this respect, we would regard evidence of actual use, including in marketing materials which explain the objective features and their significance, and evidence of price as relevant. The decisions in *Kamino* and *Barrus* do not preclude marketing materials being taken into account when those contain evidence as to the
15 objective characteristics of the relevant goods. This is not a case where the goods simply do not have objective characteristics demonstrating their intended use. Rather it is one where there are objective characteristics but their function and effect, in the absence of the examiner being an artificial turf specialist, needs to be evidenced.

20 113. The pricing of the relevant Products demonstrates that the use of the Product for any other purpose than that of specialist turf for golf is highly theoretical and so (on the authority of *Sysmex*) to be disregarded. We do not consider the decision in *Farfalla Fleming* detracts from this. The court found in that case there were simply no objective characteristics to distinguish the paperweights in question from less valuable ones. Moreover the pricing demonstrates that this is not a case where the
25 marketed use is different to the intended use as seemed to be the concern in *Kamino*.

30 114. The next question is whether the fact that the intended use of the relevant Product, as evident from its objective characteristics, as specialist golf artificial turf, means that it falls within heading 9506 as “other golf equipment”. The Oxford English Dictionary definition of the word “equipment” is as “the action or process of equipping or fitting out”, “the state or condition of being equipped; the manner in which a person or thing is equipped” and “anything used in equipping such as furniture, outfit; warlike apparatus; necessities for an expedition or voyage”. In this context we interpret this to mean simply any item which is needed to enable a person to play golf in all its forms (whether in competition or for practice).

35 115. It is clear that a suitable surface of the required kind is needed to play golf and, on the evidence given, that natural surfaces are not always suitable. Where, in a golfing context, a surface is specially made and designed for use in place of a natural surface, we consider the surface to be part of the equipment required for playing golf. The special surface (albeit replicating a natural one) is no less part of what is required
40 than the clubs or the balls. We note also that the items included in the heading itself and in the HSENs includes a broad variety of items such as swimming pools and climbing walls.

116. We note HMRC's view that the Products are not "sports requisites" within the meaning of the title to chapter 95 and the HSEs. We note that the title to chapter 95 is not legally determinative of the categorisation as set out in GIR1. In any event we do not consider that the term has the meaning HMRC assert. The dictionaries we have consulted define the term "requisite" as meaning "necessary in the circumstances". Each of the relevant Products has an inherent use as a particular type of surface for the playing of golf, as a green, a putting green or a tee area. They are specially designed and manufactured surfaces, used on golf courses when the natural surface is not suitable or to enable indoor practice. In our view, in those circumstances, the Products are required or needed for the playing of golf on a satisfactory basis. We do not think that the term implies that the item has to be required for use in all circumstances and on all occasions. Therefore, the fact that, at other times of the year or in different conditions, the sport can be played satisfactorily on another surface, does not affect our conclusion.

117. We cannot see that the classification of natural grass or sand affects the position. That the Products are used in place of natural grass does not in our view mean that they should be categorised in the same way as natural grass. The Products fall to be categorised according to their own objective characteristics as set out above.

118. We conclude for the reasons set out above, that the Products (other than the Fringe Turf which is dealt with at 131 and 132 below) can be classified on a prima facie basis under heading 95.06 as other golf equipment and under the subheading "other".

119. In the appellant's view, if those Products are, as we have decided, prima facie classifiable under chapter 95, that is the end of the matter. We do not need to consider whether those Products are within chapter 57 as "other textile floor coverings". The appellant interprets Note 1(v) to chapter 95 as meaning that the items specified in that note being "carpets and other textile floor covering ...and similar items having a utilitarian function" are excluded from chapter 95 only if they have a "utilitarian function". On that view even if the relevant Products can be viewed as "other textile floor coverings" they do not have a "utilitarian function", rather they have a sporting function, and therefore are not excluded. Further the appellant argues this means that the Products are only included in chapter 95. The appellant sees the note as seeking to classify the listed items in chapter 95 or chapter 57 according to whether they have a "utilitarian function" or not. If they do not, in the appellant's view, they are exclusively within chapter 95.

120. HMRC argue that the "utilitarian function" wording relates only to "similar articles" after which it appears and not to the preceding items listed being "carpets or other textile floor coverings". In any event they assert that the Products do have a utilitarian function in that they can be walked on.

121. Our view is that the appellant's view is the better one. If the intention was simply to exclude the specified items on the basis they fall within chapter 57, as HMRC in effect argue, the note could simply have said that. There are many examples in the CN where the notes refer to items being excluded from a chapter by

reference to their inclusion in another chapter. However, the listing of the specified items, without specific reference to chapter 57 but with the reference to a utilitarian function, supports the appellant's view that the intention is to seek to distinguish between items on the basis of whether they have such a function or some other function. On that basis, therefore, we agree with the appellant that the Products fall within chapter 95 only on the basis that they have a sporting function. It follows from our determination that the Products have objective characteristics for use as specialist golf equipment that they have that function and not a "utilitarian" one.

122. However, we have gone on to consider whether the Products could be classified under chapter 57 in case we are wrong on that. The relevant heading in chapter 57 is "carpets and other textile floor coverings". Note 1 to chapter 57 states that this means floor coverings in which textile materials serve as the exposed surface of the article when in use and includes articles having the characteristics of textile floor coverings but intended for use for other purposes. Heading 5703 refers to "carpets and other textile floor coverings, tufted, whether or not made up" and the relevant subheading is "of nylon or other polyamides" and then "other".

123. The HSEs state that the chapter covers "carpets and "other textile floor coverings in which textile materials serve as the exposed surface of the article when in use". It includes "articles having the characteristics of textile floor coverings (e.g., thickness, stiffness and strength) but intended for use for other purposes (for example, as wall hangings or table covers or for other furnishing purposes)". The HSEs continue that such products are classified in this chapter "whether made up (i.e., made directly to size, hemmed, lined, fringed, assembled, etc.) in the form of carpet squares, bedside rugs, heather rugs, or in the form of carpeting for installation in rooms, corridors, passages or stairs, in the length for cutting and making up... They may also be impregnated (e.g., with latex) or backed with woven or non woven fabrics or with cellular rubber or plastics".

124. The HSEs list a number of different sorts of carpets, rugs, door mats, bath mats, tiles which fall under the different headings in this chapter, such as "carpets and other textile floor coverings which are knotted or those which are woven (not tufted or flocked)". The HSEs for heading 5703 states that this covers "tufted carpets and other tufted textile floor coverings produced on tufting machines which, by means of a system of needles and hooks, insert textile yarn into a pre-existing backing (usually a woven fabric or a non woven) thus producing loops or, if the needles and hooks re combined with a cutting device, tufts". The HSE goes on to further describe the process used. Finally the HSEs note that products of this heading are distinguished from the tufted textiles of heading 58.02 by, for example, their stiffness, thickness and strength, which render them suitable for use as "floor coverings".

125. It is not disputed that the Products are made of textiles of the type specified in the relevant heading of chapter 57 which are tufted in accordance with the processes described in the HSEs and that those textile materials (the fibres) serve as the exposed surface of the article when in use. However, we have some difficulty in seeing that the Products are "floor coverings" for this purpose. We accept that the term "floor" as stated in the Oxford English Dictionary may on its natural meaning

refer to outdoor areas as well as indoor. However, when used in this particular context, it is clear that what is primarily intended is a floor in a building and, therefore, items which are a covering of such a floor.

5 126. The term “carpet” clearly indicates internal use. The reference to “and other
textile floor coverings” indicates that such textile floor coverings are of a similar
nature to carpets (from the use of “and other”). None of the items listed as
specifically falling within this in the HSEs relate to outdoor surfaces. The HSEs
refer to articles having the characteristics of textile floor coverings (such as thickness,
10 stiffness or strength) but intended for use for other purposes. However, the purposes
specified do not extend to purposes such as being used in the garden but are limited to
“furnishing purposes” such as “wall hangings or table covers”. The indications in the
heading itself, the notes and the HSEs are that what is intended to be caught
primarily are relevant items used within a building context and not items laid on the
external ground such as those used in place of grass.

15 127. For that reason, we find it difficult to see that the relevant Products fall within
chapter 57 at least to the extent they are for external use. However, we note that some
of the BTIs to which HMRC refer (as set out in the Annex) classify artificial turf for
external use under chapter 57. We also note that some of the Products can be and are
used internally to create practice areas. We would nevertheless not regard such
20 Products as falling within chapter 57 as “other textile floor coverings”. Whilst it is
clear that such Products do provide a covering of a surface which can be walked on,
their primary function, as evident from their objective characteristics is to provide a
surface for the playing of golf and not, as carpets or other floor coverings, to provide a
way of covering a floor for walking or sitting upon (albeit that is clearly possible) or
25 for decorative purposes.

128. In conclusion, even if it could, contrary to our view, be held that the relevant
Products prima facie fall within both chapter 57 and chapter 95, our view is that the
more specific heading, relating to “other golf equipment” is to be preferred as more
closely reflecting the intended use of the Products as evidenced by their objective
30 characteristics and, failing that, as the last heading numerically.

129. We have not otherwise drawn any conclusion from the BTIs referred to as
regards the categorisation of these Products. The ones which categorise the items
under chapter 57 give no indication of what, if any, specific function that turf had.
Those referred to by the appellant which categorise the items in chapter 95 relate to
35 somewhat different items in the nature of a self contained golf practice area or mini
golf kit.

130. We have not found it necessary to place any reliance on the non-EU authorities.
We note, however, that the South African case does provide authority that turf of this
kind is correctly to be included in chapter 95. The surface in that case was marked
40 out by white lines and it was regarded as essential to use such a surface in all
conditions, which is not the case here. However, those are not, in our view, material
distinctions.

Classification of Fringe Turf

131. We have reached a different conclusion as regards the Fringe Turf. Applying the same analysis to the categorisation of the Fringe Turf as set out above, we find that the intended use of this Product as golf equipment is not readily ascertainable from its objective characteristics.

132. The appellant points to the special fibres used, the “thatch layer”, the density of the fibres and height of the pile as the features of the Product which demonstrate that its inherent use is as golf equipment. Mr Huxley gave evidence that these features enable the golf ball to sit on top of the turf so that a realistic golf shot can be played with short irons on to the green and that the density enables the golfer to pinch the ball against the turf and impart spin. However, whilst we accept that these features mean that the Fringe Turf is suitable for use as a golf playing surface in the manner Mr Huxley describes, they do not (unlike the more distinct features of the other Products) obviously render it intended for that particular use as opposed to any other use to which artificial turf may be put. The Fringe Turf is not readily distinguishable, from those characteristics, as intended for use as golf equipment.

133. As noted, we have some reservations about whether artificial turf of this type falls within the heading of “other textile floor coverings” given that heading appears primarily to be intended to cover “floor coverings” of a type used in an internal context. However, as noted above, on its natural meaning (as set out in the dictionary definitions as regards both the French and English terms), “floor” does cover external surfaces and the Fringe Turf is plainly capable of being used as a covering of such a surface whether for walking on or some other purpose (and we would not regard such use as highly theoretical). In cases of doubt such as this we are required to consider carefully before departing from the categorisation given to the same type of products in any relevant BTIs. The BTIs produced to the tribunal by HMRC, which classify artificial turf under the heading “carpets and other textile floor coverings” indicate that, in the absence of any special characteristic of the turf in question which may indicate it has a particular intended use, generally artificial turf is to be regarded as falling under that heading. The Fringe Turf does not have objective characteristics which distinguish it from the type of products covered by those BTIs. In our view, therefore, this tips the balance towards the Fringe Turf being classified in that way.

Conclusion

134. For all the reasons given above we consider that the Products, other than the Fringe Turf, were correctly declared by the appellant as subject to duty at 2.5% under heading 95063990 00. The appeal is allowed as regards the Products, other than the Fringe Turf, and HMRC’s decision to the contrary is quashed to that extent.

135. 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.

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HARRIET MORGAN
TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2016

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ANNEX

BINDING TARIFF INFORMATIONS CITED BY HMRC

5 BTI GB123791276 with “national keywords”: “carpet tufted for floors artificial grass.” The description of the goods is: “Artificial grass. Made from 66% polyethylene for the straight yarns and 34% polypropylene for the curly yarns. Monofilament strands, each of which in cross section is less than 5mm wide and less than 1mm in thickness. These strands are tufted into a base of woven textile and rubber. Used outdoors to cover floors of concrete and wood surfaces”.

10 BTI ES-2012-000471-0224/12 with “national keywords”: “for floor, strips, textiles or plastic polyethylene.” The description of the goods is: “Floor covering whose textile (polyethylene strips with an apparent width of less than 5 millimetres that simulate grass) is placed outside once. It also comprises a base made of polypropylene, on which another layer of latex is applied only by its external face, in which the textile strands are inserted through stitches. Once these processes the remaining part of the
15 textile is cut. It comes in rolls that can be 1 meter wide and 5 meters long and 2 meters wide by 10 meters long.”

BTI DE23493/11-1 with “national keywords”: “carpets tufted of pile construction of polyester of synthetic fibre with rubber of polypropylene of synthetic textile material.” The description of the goods is: “Floor covering, so-called Synthetic artificial turf, for photos see attachment, as metered goods on rolls (therefore not tiled), according to the application has: - a width of 140cm, 225cm, 240cm or 425cm - is tufted, - has a base, according to the application, - of strips of synthetic textile material, the [carpet] pile is constructed of polypropylene and polyester strips
25 (synthetic textile pulp = synthetic textile fabric) with an apparent width of less than 5 mm, proportionately 66.7% is polyester and under 33.3% is polypropylene, - on the reverse side there is anti-slip rubber (SBR), - it is distinguished by its strength, thickness and stiffness as floor covering. “Floor covering, of textile materials, tufted (tuft), of synthetic fibers (polyester), no tile.”

30 BTI FR-PRO-2011-002512 with “national keywords”: “floor coverings grasses artificial or synthetic of polyethylene with backing, carpets of woven fabric”. The description of the goods is: “Synthetic turf consists of plastic material blades with a width of approximately one millimetre.”

BTI FI340/301/10 with “national keywords”: “floor coverings grasses of man-made textile material of man-made fibre tufted”. The description of the goods is: “Floor coverings, artificial turf. Product tread is tekstilianinetta. The product consists of three different layers of strips and yarn “ruohotupsuista”. Polyteenikaistalelankaa the “ruohotupsut” is sewn through the two polypropeenikaistalekankaan. Beneath the carpet is thick styreenibutadieenikerros. Polyteenikaistalelangan a width of about
40 1.4 mm. Customer supplied the technical data presented is Notified roll width of 400cm and a length of 65m or according to plan. Customs Laboratory examined the basis of a sample of the product supplied by the customer.”