



[2019] UKFTT 707 (TC)

TC07479

Appeal number: TC/2012/10607

CUSTOMS DUTY – classification “accessories” comprising clothing and other items for use with toys and dolls – appeal allowed in part

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BUILD-A-BEAR UK HOLDINGS WORKSHOP LIMITED Appellant

- and -

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

TRIBUNAL: JUDGE HARRIET MORGAN

**Sitting in public at the Rolls Building, Fetter Lane, Holborn, London on 19 to 23
February 2018 and 18 and 19 April 2018**

**Mr Laurent Sykes QC, counsel, instructed by Addleshaw Goddard LLP, for the
Appellant (“BAB”)**

**Mr Owain Thomas QC, instructed by the General Counsel and Solicitor to HM
Revenue and Customs, for the Respondents (“HMRC”)**

DECISION

1. BAB appealed against HMRC's decisions made on review (a) on 18 October 2012 and 22 July 2013 upholding the issue of three C18 post clearance demands ("**C18s**") in respect of customs duty and import VAT on the basis that BAB had not correctly declared the import of certain goods for the purposes of the Combined Nomenclature ("**CN**") and (b) on 13 July 2015 upholding their decision to refuse to repay to BAB customs duties and import VAT in respect of such goods. The C18s were issued on 7 June 2012 (for imports from 3 to 10 June 2009), 27 June 2012 (for imports from 15 June to 31 December 2009) and 28 November 2012 (for imports from 1 January 2010 to 19 October 2012).
2. The Build-A-Bear group (the "**BAB group**"), of which BAB is the UK arm, is a global retailer of stuffed toys and "accessories" for toys. The dispute in this case is the correct classification for customs duty purposes of a number of the "accessories" which BAB imports into the UK for sale in its "workshops" comprising the following (together with the items listed in [3], referred to as the "**items**"):
- (1) Items of clothing with a slit in the back through which the tail of a toy can be pulled or with slits or loops through which the ears of a toy can be pulled comprising:
 - (a) trousers, shorts, underwear, skirts, dresses, girls' sports clothing including leotards, swimsuits and ice-skating costumes; and
 - (b) wigs, hats, hoodies and christmas tree and glitter tree costumes (together the "**clothing items**")
 - (2) Items made primarily from plastic comprising:
 - (a) sunglasses, headbands, medals;
 - (b) mobile phones and tablets;
 - (c) hairdryers, hairbrushes and mirrors sold as a set;
 - (d) silver wands with tiaras or crowns sold as a set
 - (e) a variety of sports equipment such as surf boards, skateboards and golf clubs and fishing rods;
 - (f) wheelchairs and strollers; and
 - (g) wardrobes, armoires and dressers (together the "**plastic items**")
 - (3) Footwear made from plastic and textiles (the "**footwear**").
 - (4) Items made primarily from textiles comprising handbags, purses, backpacks, suitcases, baby carriers (with slits in the back for the tail of a toy to be pulled through), medical kits, beauty kits and school kits (the "**textile items**").
 - (5) Small textile hearts, plastic beating hearts and plastic "sounds" (the "**hearts and sounds**").
 - (6) A range of clothes and other accessories for animal toys such as leashes and collars, plastic animal food bowls, toy accessories, dog houses, dog beds and pet carriers in a variety of materials ("**animal accessories**").

3. During the course of the hearing, it transpired that certain items listed individually (whether as single items or sets) in the schedule of items in dispute were in fact imported with other items. In outline, these items fall within the following categories:

- 5 (1) Dresses and themed costumes with slits (such as a mermaid, “flapper” and Princess Leia costumes) which were imported with items such as slippers, hats, headbands, wigs, belts and shoes.
- 10 (2) Trousers with slits forming part of a wide range of themed costumes which were imported with items such as hats, crowns, bracelets and other items appropriate to the costume such as goggles and flippers with a diver’s costume and a mask with a batman costume.
- (3) Shorts with slits forming part of a football kit outfit which were imported with socks and in some cases a textile rugby ball and/or shin-pads.
- (4) Girls’ sports clothing with slits which were imported with items such as ear-muffs, towels, pareos and miniature plastic inflatables.
- 15 (5) A range of hats with slits for ears which were imported together with scarves, hats, textile blankets and bottles and slippers.
- (6) A range of themed costumes with hoodies with ear slits which were imported with items such as textile headpieces with a Darth Vader or Iron Man costume.
- 20 (7) Beach bags and a picnic basket imported with towels and textile sun lotion bottles and/or food.

4. The goods were all imported under the sub-heading in the CN (a) 9503 00 49 “Toys representing animals or non-human creatures” “other” [than stuffed] or (b) 9503 00 99 90, a residual heading for other toys other than those made of plastics. The sub-headings which the parties now consider apply are set out below. The sub-headings which BAB consider apply attract customs duty at 0% whereas those which HMRC consider apply generally attract customs duty at 4.7%. I refer to the items as “accessories” but note that HMRC disputed that certain of them are in fact “accessories” for dolls or toys within the meaning of that term as used in the CN. References in this decision to “classification” are to classification under the CN for customs duty purposes.

Facts and evidence

Evidence

5. I have found the facts on the basis of the evidence of Mr Roger Parry, Ms Sheri Stout and Mr Christian Cook, the documents in the bundles and the many samples of the accessories produced at the hearing (as demonstrated by Ms Stout). I found the witnesses to be credible and knowledgeable as regards BAB’s products and its business and have accepted their evidence except where stated to the contrary. However, inclusion of evidence in this section does not mean that I have accepted its relevance to the issues in this case. I have commented on the relevance of particular aspects of the evidence in my conclusions.

6. Ms Stout has worked at BAB Workshop Inc (“**BAB Inc**”), the parent company of BAB, since 2000. She is currently the director of sourcing and quality assurance. She has extensive experience of the processes of the group’s product development and

product production at the factory level and in sampling and production. She has visited the group's stores hundreds of times to observe how children select and interact with the group's products. Mr Parry is BAB's managing director. He has worked at BAB since 2006 having previously worked at Hamleys between 2001 and 2006. Mr Cook has worked for BAB since 13 July 2015 as its finance director.

Facts

7. As set out by Mr Parry, the group has approximately 400 "workshop" stores worldwide, including stores it owns in the US, Puerto Rico, Canada, UK, Ireland, Denmark and China and stores operated under franchise in Europe, Asia, Australia, Africa, the Middle East and Mexico. The group has sold worldwide more than 160 million stuffed toys and many times that number of accessories.

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

9. Mr Parry explained that the BAB group used to sell dolls in a human form as part of a range called "Friends 2B Made" which were thinner than the BAB stuffed animals. A lot of the accessories the group sold did not fit well on these dolls. Mr Parry's understanding is that customers could only purchase from a range of "accessories" offered by BAB specifically for those dolls. To address this in 2009 the BAB group introduced a "Sweetheart" range of BAB stuffed dolls, branded as Honey and Daisy. These are rounded in size and shape in line with the other BAB stuffed toys. All BAB's core clothing and "accessories" can be used with and worn by these dolls.

10. The Sweetheart dolls were initially sold in the US. As Mr Cook confirmed, BAB first imported them into the UK in late 2011 and sold them in the UK from sometime in 2012 onwards. Mr Parry thought the import of the Friends 2B Made range probably ended before the period in question and that the only BAB stuffed dolls which BAB imported and sold during the period in question were seasonal Santa dolls. He noted that from sometime in 2015 onwards, BAB has sold (under license) a range of four Lalaloopsy stuffed dolls in a human form.

11. At the time in question BAB sold around 1,000 different accessories. Since 2012 it has developed and sold 3,500 new accessories. During the relevant period around 45% of sales were of "accessories" only (meaning sales of those items without the sale of another toy at the same time). Mr Parry produced a spreadsheet showing that of total sales in the UK in a particular period ending on 11 August 2013, those where a customer bought (a) a BAB stuffed toy and "accessories" at the same time represented 46.2%, (b) only a BAB stuffed toy represented 8.5% and (c) only "accessories", 45.2%. Mr Parry was not sure if the figures for sales of BAB stuffed toys included sales of BAB stuffed dolls or not.

12. Mr Parry said that sales of only “accessories” were higher in the earlier periods; in 2009 such sales comprised 51% of total sales and in 2010 to 2012, around 43% to 48%. He said that at the relevant time sales of BAB stuffed bears comprised around 30% of total sales of BAB stuffed toys. He could not provide figures for a split between sales
5 of BAB stuffed dolls or fantasy figures. However, BAB’s strategy has changed since 2012 and it now sells far more products the rights to which are obtained under license from a range of sources such as television programmes, other toy ranges or the latest blockbuster movies. From that time, sales of “accessories” only have dropped to around 29% of all sales.

10 13. Ms Stout explained that the range of toys which BAB sells includes many which do not have tails or ears. Those sold during the relevant period without tails comprise: Hello Kitty, BAB’s Octopus, Turtle, Koala, Frogs, Cookie Monster and other Sesame Street toys. Those sold during the relevant period without ears comprise: Octopus, Turtle, Boo-rific Ghost, Penguin (in various versions), Frogs (in various versions) and
15 T-Rex (and other dinosaur toys).

14. Ms Stout asserted that across the industry dolls range in size from around 35 to 46 centimeters (“cms”) or 12 to 18 inches. She based this on information in the US Consumer Product Safety Commissions’ Age Determination Guidelines entitled “Relating Children’s Ages to Toy Characteristics and Play Behaviour” (the
20 “Guidelines”) and the websites of other doll/toy retailers, American Girl, Sophia’s and My London Girl and a Baby Annabel Doll advert on ebay.

15. She confirmed that in taking this view she relied on comments in the Guidelines on the type of toys likely to appeal to and be suitable for children at particular ages. These include comments that (a) 2 year old children have a low to moderate degree of
25 fine motor dexterity and control and can handle slightly larger and heavier dolls and stuffed toys (than younger children) of around 12 to 18 inches and 8 to 16 ounces and that “soft, rounded, pliable and cuddly dolls and stuffed toys are most attractive” to that age group and (b) toys of the same weight and size ratios are likely to appeal to children aged 3. The Guidelines refer to different (less specific) sizes and types of toys as
30 desirable to and suitable for children of other ages over 3. Ms Stout noted that in the Guidelines both dolls and stuffed toys are categorised in the play behaviour category of “pretend and role play”.

16. Ms Stout said that BAB’s stuffed toys are sized at 15 to 18 inches to fall within these parameters. She thought that doll and dolls clothing brands, such as DanDee and
35 American Girl, also consider the guidance in the Guidelines in sizing their products. She considered that, in any event, the size of the BAB stuffed toys reflects the size appropriate for the target market of children of the relevant age.

17. At the hearing Ms Stout accepted that she could not confirm that BAB’s clothes or other accessories would fit all dolls but emphasised that she had found evidence that
40 they fit a number of dolls. However, she thought that dolls aimed at children aged 3 and above (being the target market for the items) are similar in size to the BAB stuffed toys (as based on the Guidelines although they refer to the appropriate size of toys for children aged 2 and above). She thought BAB’s sizing of its stuffed toys is appropriate under these Guidelines.

45 18. I accept that, as supported by the evidence taken from the websites of other doll retailers and photographic evidence in the bundles of the “accessories” in use with non-

BAB toys and dolls, that BAB's "accessories" fit a range of dolls or toys other than those sold by BAB. There was no evidence, however, to support a conclusion that BAB's competitors all produce dolls or toys of the same size as BAB's stuffed toys. Nor was evidence produced on the proportion of toys and dolls of a similar size to BAB's stuffed toys for sale in the marketplace.

19. Ms Stout said that the BAB group adopted this sizing when it started out as it made it easier to source clothing. Between 1997 and 2007 its outfits were inspired by those sold by DanDee which made and sold collectable human form porcelain dolls and a range of outfits which fitted them. She produced an email from DanDee dated 31 August 2017, in which that company confirmed that materials and sewing on items for dolls or stuffed animals are the same and that "BAB factories are now use[d] to make doll's clothing too". Ms Stout explained that at that time BAB Inc also stocked and sold clothing manufactured by another US doll and dolls clothing retailer, Sophia's. In 2007 when Dan Dee stopped making dolls BAB still used them but set out their own detailed specifications for the items BAB wanted. She confirmed that BAB wanted accessories suitable for the size of its BAB stuffed bears.

20. In the early days BAB Inc also approached Century Merchandising Co Ltd ("CMC"), a manufacturer based in China which produces a variety of dolls' "accessories" for various toy brands. BAB Inc requested that the dolls' glasses, strollers and cribs which CMC manufactured for another retailer were slightly amended to feature the BAB logo for sale to the BAB group. The BAB group still purchases some items from CMC.

21. Ms Stout said that she is aware that CMC also produces clothing for dolls in a human form and other accessories for other businesses some of which market dolls in a human form. She produced a letter from CMC in which they confirmed that their factory in China produces doll's clothing and/or accessories for the following brands: BAB, Simba, Sanrio, Disney, Amanda & Family, Its Magical and Hoffman Spielwarren GmbH & Co KG.

22. From her experience she understood that CMC and other manufacturers do not look to fit the requirements of every customer; that is impractical and not cost effective. For all customers they use essentially the same manufacturing process, the same materials and the same sewing machines to produce the same or similar products but with different branding for different customers. Their products, therefore, have the same patterns, size, materials, stitching and threads. In the letter from CMC referred to above, CMC confirmed that the brands listed "use similar or same material, same cutting, sewing and construction method for production". Ms Stout did not know precisely what items CMC produces for the brands it listed. In her view the point is that, as she knows from her own experience in the factories, doll manufacturers can easily adapt the products they make for human dolls for BAB stuffed toys. She said that that is why the BAB group is often approached by such manufacturers who ask if they can manufacture such items for them. She thought that the manufacturers realise how quickly and cheaply they can alter their current manufacturing lines to produce the BAB group's accessories.

23. Ms Stout noted that the size, shape and design of the group's main range of BAB stuffed toys has not changed since the business was started in the late 1990s or since

BAB set up business in the UK in 2003. The accessories it designs, manufactures and sells are still the same size and shape as the original ones it sold.

24. She considered that all of the above illustrates how the items are fundamentally the same as “accessories” sold by other retailers, such as Simba Toys, which predominantly
5 sells human dolls. She exhibited photos of dolls sold by that business as well as by a number of other businesses which sell human dolls.

25. Ms Stout and Mr Parry both said that the items are designed to fit the majority of the “skins” BAB sells including “human skins” such as Honey, Daisy and Lalaloopsy. They both emphasised the “interchangeability” of the items in the sense that they can
10 be used with many other dolls and toys sold by other brands given that BAB stuffed toys match the height of other dolls and toys.

26. Mr Parry said that BAB stuffed toys and other products are intended to support and facilitate role playing. He described BAB’s “central retail concept” as reflecting the reality of children playing dressing up games. Both he and Ms Stout referred to the
15 Guidelines as illustrating the role of toys, such as the BAB stuffed toys, in that play pattern. They both said that BAB and other brands recognise that children are “brand blind” when playing with toys and accessories. In other words, in their view, when playing with toys, children do not discriminate between particular types of toy and accessories by reference to whether they are human like or animal like or by reference
20 to a brand. Therefore, BAB and other brands actively encourage and promote the use of their accessories with other brands to encourage “cross play”.

27. In support of this, Mr Parry and Ms Stout referred to snapshots from the website of other doll and clothes retailers namely (a) Sophia’s, whose website states that its clothes and accessories fit its own dolls and those of other retailers, American Girl, Lissi, Goetz
25 and Corelle and (b) My London Girl, a UK brand, whose website states that all its clothes and accessories fit American Girl and other 18in/46cm dolls. Ms Stout also exhibited photographs which she considered illustrate the interchangeability of BAB and non-BAB items on BAB stuffed toys and non-BAB dolls and toys.

28. Ms Stout said that her own daughter and her friends often utilised the same clothing and accessories when playing with toys and dolls such as BAB stuffed toys and
30 American Girl plastic toys. She had seen them create their own “store” where they pretended the dolls and bears went shopping for new wardrobes. From her observations, she considered that in dressing the toys and dolls the children were not concerned with whether an item had a slit or not or with regard to brand. They threw
35 all the clothing and other items of different brands in the same toy box. They dressed up BAB stuffed toys, non-BAB stuffed and unstuffed animal toys and human dolls in a range of BAB items and non-BAB items indiscriminately. She agreed that children may often keep together lots of different toys and games not just dolls and stuffed toys (and related items). She said that BAB have a policy that children can bring their BAB
40 toys back to the store for re-stuffing and they also bring toys with them when they want to buy more items. She had therefore seen how toys and dolls are dressed by children on many occasions.

29. Mr Parry noted that the items are largely miniature versions of products which one typically associates with people. He could not realistically think of anything that could
45 be described as a bear accessory other than perhaps a muzzle. In his view there is nothing in the inherent characteristics and qualities of the items which give them a

uniquely bear, animal or stuffed toy like quality. If anything, when used with a BAB stuffed bear or other animal toys the “accessories” humanise the bear or animal toy.

30. In his view it would be wrong to suggest that a BAB branded wardrobe, for example, could only be used to house items for use with BAB stuffed animals and/or BAB accessories. It was put to him that a child could keep anything in a wardrobe. He said that it was most likely to be used for toy clothes given its sizing.

31. He continued that his three daughters, who at that time were aged from 7 to 10, enjoy dressing up their toys and have collections of toy clothing and “accessories” from a range of retailers including BAB. His daughters do not separate out their toy accessories by brand or retailer; they throw them all together in one toy box. They dress up their dolls and toys of different kinds in a range of BAB “accessories” and non-BAB “accessories” indiscriminately. He had also observed children behaving in this way when he worked at Hamleys and in BAB’s stores when children visit to buy clothes for their dolls/toys or for toy repairs. He did not believe for a moment that in dressing up dolls and toys and engaging in role play with them a child differentiates between items with a slit in them and those without or between brands.

32. He was asked if he was suggesting that children do not use the slits in the clothing. He said that the slits give children an option to use the relevant item with a stuffed bear. He said that when buying items in store the customers are directed first to selecting a “skin”, then perhaps to the area for selection of a sound to put in it, then to the stuffing area and then to the dressing area where they can select “accessories”. All the accessories are displayed in the “dress me” area together; there is no separate section for stuffed bear “accessories”. He thought that children do use the slits but not all the time as it depends on what toy they are dressing. He said that the key area in the store is that where the heart is inserted in the heart ceremony where a textile heart (and in some cases, also a plastic beating heart) is inserted in the BAB stuffed toy before it is stitched up. This creates a bond between the child and the toy; BAB get pleas for lost toys every day.

33. Ms Stout confirmed that BAB wants its “accessories” to be suitable for the size of BAB stuffed bears. There is essentially a single standard sizing specification for each item of BAB’s clothing. Many clothing items are designed to allow for a small adjustment in size, for example, trousers may have an elasticated waist or a Velcro fastening. The materials, designs, trims and bindings may be different. There is a narrow base of manufacturers who are very familiar with BAB’s requirements. BAB may provide a model of a bear that can be used to check the fit. BAB owns the intellectual property in most of the specifications; most of the designs have BAB branding. Ms Stout agreed that the specifications ensure that the clothes and footwear fit BAB’s stuffed bears although she noted that they fit other toys and dolls as well. She did not know of any other manufacturer who makes clothing/accessories with slits for tails or ears.

34. Mr Parry said in his witness statement that BAB’s “accessories” fit the majority of BAB stuffed toys. At the hearing he could not say which “accessories” did not fit which of the BAB stuffed toys. He confirmed that BAB had not produced examples of cases where BAB’s “accessories” do not fit non-BAB dolls or toys but only those where they do fit. He confirmed that BAB does not import “accessories” designed to fit non-BAB dolls and does not supply BAB “accessories” to other retailers.

35. Mr Parry noted that BAB often sells BAB stuffed toys and outfit accessory sets together under special promotions. During such promotions, more often than not, the same outfit is offered with several different BAB stuffed toys. He gave an example of a promotional offer for the sale of a “tulip” dress with shoes and a handbag and one of Honey, Hello Kitty, a stuffed cat, and Bearamy, a stuffed bear. He referred to this as a “bundle promotion” where a customer could pick and mix between a selection of “furry friends” and accessories often at a discounted price.

36. Mr Parry produced statistics taken from the group’s sales data intended to demonstrate the “interchangeability” of BAB’s range of items. Mr Cook confirmed that he had requested the finance team in the US to pull the figures together. One set of figures related to sales of Honey and Daisy in the US and UK from 28 August 2011 to 31 December 2016 (the “data period”). Mr Cook thought that most of the sales would have taken place in the UK. He explained that these dolls were sold in the US before they were introduced for sale in the UK and at the relevant time sales in the US were tapering off. He thought there were around 5,300 sales of those dolls in the data period, of which around 5,000 related to sales in the UK. I note that Honey and Daisy were not sold in the UK until sometime in 2012 as set out at [10] above.

37. Mr Parry said that around 51% of the total value of other items sold with Honey or Daisy constituted sales of other plush human dolls. Of that 51%, 91.6% were sales of another Honey or Daisy (probably due to promotional offers for customers such as “buy one Honey or Daisy and get one half price”).

38. Mr Parry and Ms Stout said that the data produced for the data period related to sales transactions where a Honey or Daisy doll was sold alone (meaning with no other toy) but with BAB’s “accessories”. The data did not expressly set out how many Daisy or Honey dolls were sold individually in the UK in the data period. It showed for the data period (a) the number of items of a particular kind of “accessory” sold with an individual Honey or Daisy doll, (b) the number of transactions in which that item was sold, (c) the percentage of the overall sales value attributable to that item, and (d) the percentage of the overall individual sales in which that item was sold. Ms Stout said that it was apparent, however, that the data related to around 3,000 individual sales of Honey and Daisy. She took this from the fact that the data set out that a Honey or Daisy was sold with a tiered tulle dresses on 153 occasions and that such sales represented 5% of all individual sales of those dolls.

39. From the data, Mr Parry concluded that the proportion of the total value of “accessory” items sold with a Honey or Daisy in the data period is as follows: (a) items of clothing which feature a slit in the seat or head of the clothing, 21.56 %, (b) items of footwear that fit on BAB stuffed bears, 20.03%, (c) dresses or skirts which do not have slits, 33.23%, (d) tee shirts and sweaters with no slits, 5.44%, (e) hearts or sounds, 7.41% and (f) a variety of other “accessories” such as mobile phones, backpacks, handbags, sunglasses, doll beds, 12.33%.

40. In Mr Parry’s view this data shows that the presence of slits in the clothing or the shape of footwear is not a significant factor in the use of those items. He said that the fact that consumers buy “accessories” with slits when buying BAB stuffed dolls shows that consumers do not attribute any weight to these features when buying such items. He confirmed that he was assuming that if an item was bought at the same time as Honey or Daisy it was for use with that doll. It was put to him that, in particular, in

light of the fact that BAB has a customer loyalty scheme, in fact the customer may already have a BAB stuffed bear or other BAB stuffed toy at home. He agreed that it is reasonable to suppose that a proportion of such “accessories” may not be for Honey or Daisy but could be for a bear or other toy.

5 41. Mr Parry also produced data relating to sales of Lalaloopsy in the period from 1 August 2015 to 29 July 2017. The main items purchased along with this doll were other plush toys (mostly unstuffed “skins” but also some pre-stuffed toys) the vast majority of which were other Lalaloopsy dolls; sales of these dolls represented 98.69% of the total value of plush toys sold with that doll. Of the clothing, footwear and other
10 “accessories” sold with this doll in the specified period, items from BAB’s general range of “accessories” (rather than from the specific Lalaloopsy accessory range) comprise 33%, 35% and 24% respectively of the total value. 91% of the sales of these dolls in the relevant period were sold with some form of “accessories”.

15 42. Mr Parry said that BAB’s strategy ensures that BAB creates a larger market base for its “accessories” than if it simply sold “accessories” that only fit the finished BAB stuffed toys a child creates in the workshop. He thought that there is considerable benefit in BAB customers knowing that their children can build up an “accessories” collection which can be used not only with BAB’s stuffed toys but also to dress up and accessorise the rest of the child’s “toy family”. He considered that BAB is the “go to”
20 retailer for toy clothing and related “accessories”. In support of this he produced the results of a search on e-bay for dolls clothes which showed cases where people were re-selling BAB clothes/accessories with titles containing “dolls clothes” and “dolls accessories”. Some of the vendors expressly referred to the slits but still labelled the items for sale as “dolls clothes”. He believes these vendors understand, as BAB do,
25 how children play with “accessories”.

43. It was put to him that he had not produced any objective evidence on this. He said that he did not have evidence on BAB’s share of the toy “accessories” market. However, he could say that BAB is the only high street retailer offering such a range of
30 “accessories” and which dedicates half the store and such a substantial part of the retail experience to them. He noted that BAB has a much bigger range of “accessories” than, for example, that available at Tesco. In his view BAB is the only high street retailer to go to for “accessories” of this kind.

44. Ms Stout set out that BAB has three logos: (a) the pawprint which is the most notable and widely used, (b) the bear face which is not used widely on the items
35 themselves but appears on the website and in stores and (c) the heart which is widely used but is not as recognisable as being associated with BAB as the pawprint. BAB uses these to distinguish itself in the market as it prides itself on being a retailer not only of quality but also of safe products. She said that:

40 (1) The paw print is on most items BAB sells including Daisy and Honey (on a small tag on the side of the doll which also has the heart logo) and Lalaloopsy (a large paw print on the sole of the doll’s foot). The paw print is to BAB what the Mickey Mouse head logo is to Disney.

45 (2) The bear face is on a much smaller range of items such as (a) as an image on a polo tee shirt, the paw pad, the red and pink suitcases and the fabric seat of wheelchairs and (b) as part of the structure as the bed head on one of the beds, certain furniture items which feature plastic moulds of the bear face and plastic

moulds of the paw print logo for the hinges, some wheelchairs as an image on the pockets and fabric backs and also as a cut out in the plastic of the wheels.

Mr Cook's evidence

5 45. Mr Cook explained that BAB's former senior finance manager analysed the unique reference number allocated to each of its imports ("EPU codes") on the C18 demands by reference to its internal "stock keeping units" ("SKU"). The SKU is a unique product identification code allocated to each separate item or set of items imported. Mr Cook and Ms Stout later allocated all the items identified to the descriptive categories agreed with HMRC or additional categories where necessary. Mr Cook said that, during the
10 course of that exercise, it became apparent to him that the cumulative value of the accessories he could identify did not wholly reconcile with the total value which HMRC had used to calculate the duty shown as due in the C18s. He said that it was only when he was provided with soft/electronic copies of HMRC's C18 schedules in November 2016 that he was able to analyse the position in more detail and cross refer it against
15 BAB's own data.

46. The C18s list items imported under each specified EPU code by reference to a general description (such as "toy accessories", "toy shoes" or "toys") with an assigned value. The third C18 included descriptions of the manufacturers/suppliers in respect of the items listed under some of the EPU codes. Mr Cook said that he tried to find the
20 original import entry declaration BAB made for the EPU codes in the C18s and requested copies from the import agents. Given the lapse of time this did not yield much new information (compared to that already collated by his predecessor at BAB). He compared all foreign currency exchange rates in BAB's data with the rates set by HMRC for the relevant dates of import and the soft copy C18 data with BAB's internal
25 records. He then identified the items in particular EPU codes where there was a "balancing figure" meaning, broadly, a difference between the value of the items according to BAB's records and the value on which HMRC had charged duty.

47. Mr Cook categorised the cases where he thought he had found such differences as follows:

30 (1) Cases where BAB had no record for the items listed under an EPU code and was not able to locate the original underlying entry declaration forms. Whilst in some instances BAB was able to locate references to the overall amount of duty paid under the relevant code (in its duty deferment records), it did not have the detail of how that amount was broken down by reference to BAB's SKUs.
35 He calculated the total value of duty attributable to the missing items/value as £56,181.51. He noted that there is one instance in this category where BAB's records show it paid duty of £9,632.29 in respect of EPU code (18392J) but the C18 demand showed only £2,088.60 of duty was due under that code.

40 (2) Cases where he was able to match up the item price in HMRC's data with the item price in BAB's records on an EPU code level but on top of the item price BAB paid other costs on which duty is due, such as freight and insurance cost ("F&I costs"). He noted that BAB does not typically include such costs in the item price in its merchandising system. He calculated this figure to be £32,800.72.

45 (3) Cases where BAB has a record of the EPU code but does not have the records to break down the items listed under that code by reference to the

individual SKUs or, if the SKU could be ascertained, BAB did not have a detailed description of the accessory. The total value of the missing items is £5,143.96.

5 (4) Cases where the item price listed by HMRC in the C18s differs from the item price in BAB's records. In this case BAB's records show which individual "accessories" were imported under the EPU codes listed in the C18s but the total item price in its records differs to the total price in the C18s. He identified a figure of £940.23 in this category.

10 (5) A case which relates to two EPU codes in the C18s where the item price listed by HMRC does not match the item price BAB has in its records for the items imported under those codes. This could be due to a single missing product from BAB's data or a small amount of F&I costs. He identified the discrepancy as £164.32

15 48. Mr Cook explained that he had allocated these "balancing" amounts of duty (or repayments) to the categories of items agreed with HMRC in a way which he thought was the fairest approximation and on the balance of probabilities was likely to give a broadly accurate result.

49. As regards (1) above:

20 (1) Mr Cook looked at which suppliers had provided the items falling under each EPU code as set out in the third C18. He used the third C18 only as this was the only one in which this information was included. He identified 15 suppliers including Dan Dee Global Sourcing Inc and Betafac Industries Ltd.

(2) He worked out the proportion of the balancing figure relating to items in that C18 which was attributable to all items supplied by each relevant supplier.

25 (3) He considered what type of "accessories" BAB purchased from each relevant supplier and allocated the proportion of the balancing figure identified at step 2 to the relevant category in which that type of "accessory" falls. For example, Dan Dee supplied "accessories" which fall within four relevant categories so he allocated the balancing figure attributable to that supplier to each of those categories on a pro rata basis. In another case he knew that Betafac only
30 sold shoes to BAB so he allocated the full amount of the relevant proportion of the balancing figure to that category.

35 (4) It was somewhat unclear how Mr Cook allocated any balancing figure he identified in respect of the first and second C18s given those C18s did not contain a list of suppliers. He seemed to have applied the same proportions for allocating the amount to the various categories as though the same suppliers listed in the third C18 were in point.

50. Mr Cook did the same exercise as regards the F&I costs identified in (3) above. He allocated the remaining amounts he identified, which he said mostly relate to the first and second C18s, across all the categories on a pro rata basis.

40 51. Mr Cook noted in his witness statement that HMRC said that they could not provide the list of products included within each EPU code in the C18s. He had no way, therefore, of identifying any missing items from BAB's data. He could not confirm if HMRC had assigned the correct commodity code to each accessory to enable them correctly to calculate duty. He assumed that HMRC knew what all the items were when

they issued their C18s as otherwise he could not see how HMRC could issue those demands but HMRC have not provided their data.

52. At the hearing Mr Cook accepted that when a SKU was missing he otherwise had no way of identifying with any accuracy the precise underlying items comprised within the SKU. He also did not have a list of missing EPU codes. He did not produce the underlying records or his workings from which he had made the above calculations. It was put to him that some items appeared to be listed separately but were in fact part of sets as Ms Stout had indicated. He said BAB had tried to identify all the sets. He said the SKU descriptions are taken from products files which always state if an item is part of a set. He did not prepare the schedule which had been used (his predecessor did that).

Items

53. Ms Stout conducted a comprehensive display of the items or of products representative of the relevant items where, for example, she could not locate an example of the actual item sold in the relevant period. She displayed the item itself and demonstrated its use with a number of dolls and toys including (a) BAB's Bearamy, Honey and Daisy, (b) Lalaloopsy (which BAB sells under licence) and (c) dolls and toys sold by others such as Rosie, Charlotte, a Cabbage Patch kid and Toddler Sam, a hard bodied fantasy figure, Disney's Simba, and a hard bodied dog, Chatty Charlie. In addition, she produced a number of photos of items (or representative items) in use on a variety of dolls and toys.

54. I have listed below each category of item with a description of the items.

Items with slits for a tail or ears

55. All individual items of clothing in this category feature slits which allow the tail or ears of a toy to be pulled through them. This category also includes items which are imported and sold in sets, one or both parts of which may have a slit (such as football kits and rugby kits and trouser and hoodie sets).

56. Ms Stout thought that all items in this category fit BAB's stuffed bears given they are made to a standard specification. She emphasised, however, that they also fit other toys including those without tails or ears (as set out above). By way of further example of the "interchangeability" of these products, she noted the case where on BAB's website and on a printed advertising mailer which was sent to customers, a one-piece swim suit is shown as worn by BAB's Hello Kitty toy and its pink Octopus toy neither of which have tails.

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

Clothing with tail slits

58. All of the slits for tails are 4.5 cms long and are usually located in the seam of the clothing item. Ms Stout confirmed that, whilst the material of trousers and shorts may vary, the size and shape of these items is predominantly the same. They are all based

on the same design specification (with the same waist size and leg width) although they may be held up or fastened in different ways. The shorts are made to the same basic specification as the trousers save for the length of the legs.

5 59. Ms Stout explained that BAB sells a range of skirts and dresses the majority of which have no tailored slit and, in the case of skirts, are constructed with a black Velcro closure. It is only a minority of items which have a 4.5 cm slit at the rear of the item through which a tail can be pulled. Some dresses may have a longer skirt, a varying sleeve length or a different material but they are all designed to fit 13 to 18 inch dolls or toys. In knitted dresses or knitted skirts the slit is created by a dropped stitch
10 technique.

60. I agree with Ms Stout's description of the slits in the seams of these items as discreet in the sense that, when the relevant item is worn by a doll or toy with no tail, they are not obvious or not easily seen. In terms of appearance of the garment, the slit is relatively insignificant in proportion to the overall size of the garment and its overall
15 appearance. As Ms Stout accepted the dropped stitch technique used in knitted dresses/skirts results in the slit appearing more visible than when tailored into the seams of a garment. As Ms Stout also agreed the slit in underwear is also more visible than in the other relevant items with a slit.

Wigs with loops

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

62. The loops are covered in hair to help conceal them. I agree with Ms Stout's
30 description of the loops as discreet in that they are not very visible from outside the wig.

Hats and hoodies with slits for ears

63. Ms Stout noted that BAB sells a range of hats which do not have slits. However, those in dispute, which are predominantly baseball style hats, have two small 6 cms
35 tailored slits along the seams of the segment of the hat to allow the ears of an animal toy to protrude. The hoodies which BAB sell comprise a range of hooded pull over jumpers or zip up tops. Many of these do not have slits but those in dispute feature two small slits of 7 cms in the hood. The baseball style hats are almost all exactly the same size and shape with different colours or materials. Other hats have a similar
40 circumference and similar slits. From Ms Stout's experience all the hoodies with slits are the same size and shape but with different colours, materials and sometimes an opening at the front.

64. The slits in the hats do not have a functional purpose other than to accommodate ears of an animal toy. Ms Stout demonstrated that the slits allow a child to pull a human
45 doll's hair through in a pig tails fashion. The Charlotte dolls produced by Dolls World, the Cabbage Patch Kids Playground doll and Daisy and Lalaloopsy all have pigtails as

part of their design. She commented that this is not dissimilar to how people pull long hair worn in a pony tail through the hole at the back of an equivalent human sized baseball cap. She said that the main two designs for dolls' hair are pigtails and a high pony tail. If the hair is pulled back and into a pony tail at the back of the doll's head, the doll can appear bald or hairless from the front. By having hair on the sides or on top of the doll's head it is more visible when looking at the doll from the front. She said that this is common across the industry and is not specific to BAB.

65. The slits in the hoodies are slightly larger than those present in other items because there are no seams in the sides of a hood. Ms Stout said that the addition of a slit in the manufacturing process is, therefore, slightly harder as it is not just a case of leaving part of the seam open. BAB has moved away from adding slits into hoods due to (a) the additional cost of inserting slits in hoodies (around US\$ 0.08 to 0.10 per unit to manufacture) and (b) a view that children do not put the hoods up on the dolls or toys so much. Although the slits are wider, as Ms Stout demonstrated, they allow for a doll's hair to be pulled through in a pig tail style. She agreed, however, that the slits in the hoodies really have no function with a human doll; they are not positioned for human ears and you would not usually pull a doll's hair through them.

66. When the hoods are down the slits are not visible but they can be seen when the hood is up. As Ms Stout accepted these slits and those in the hats are more noticeable than the slits for tails.

67. It was put to Ms Stout that real baseball caps and hoodies do not have slits so there is no human equivalent concept in this regard. She noted that ladies put their hair through the back of hats, such as baseball hats. In her view, the slits give an equivalent option and enhance the play value of the items given, in particular, that a high pony tail and pigtails are the top selling dolls' hair styles.

68. Ms Stout emphasised that the slits in the clothing and loops on the wigs are added by BAB to give a child an aesthetic choice as regards (a) whether to pull through the tail or ears when utilising the item with an animal toy or (b) whether to pull a doll's hair through. BAB does not use more obvious round holes as slits are less visible and intrusive to the overall appearance of the item and they can be concealed where possible. For slits which are unsealed sections of a seam, they are naturally closed when nothing is protruding through them. She noted that hair is sewn on to the loops on the wig accessories to conceal them. She considered it clear that consumers were not put off by the slits when buying clothing for their Honey or Daisy dolls by reference to the sales data referred to above.

69. In her view, overall the slits or loops are a small feature both in the context of the items as a whole and in absolute terms and do not detract from the use of the items with human dolls. She did not consider that there is anything which makes the items more inherently suitable for use with bears or other animal toys rather than human dolls. The fabric is not more furry to make the toy look more bear like and none of the fastenings rely on the toy having fur. The items are made from fabric associated with human clothing such as polyester, cotton/poly blends and cottons.

Sunglasses, headbands, bracelets and medals

70. Ms Stout said that all these items are small by design specially to be used by a child with a toy in the dimensions of the BAB toys and dolls. In her view, they are simply too small to be used or worn by a child:

5 (1) The sunglasses are all of around the same frame size, length and shape. They have arms of only around 10 cms as they are designed to be proportional for a doll/toy. They have a warning that they have no UV protection. Ms Stout said that these items have no “play value” other than when being used with a toy or other doll.

10 (2) The headbands are around 15 cms in diameter. Some of them feature antennae or bunny ears to allow the child to dress the doll/toy as the child might when dressing up. They are all the same size and shape so that they can fit on dolls and other toys with similar sized heads. Ms Stout noted that they are very small compared with those used by humans as they are sized to fit dolls and toys. She produced a headband sold in Claire’s Accessories for wear by a child which was larger than the headbands in dispute. It was put to her that this headband fits Toddler Sam as was demonstrated. She agreed but said that it is still too big for most toys/dolls. It was put to her that she had only produced one headband from Claire’s Accessories and that there could be smaller ones intended for a child. She said that the point is that there is a clear size differential. She said that the length of the sides is the important thing. The BAB headbands would pop off a child’s head.

20 (3) The medals are small shiny medallions with the markings #1 on one side and “YOU ARE A STAR” on the other on a loop of material of around 30 cms in circumference which fastens with Velcro.

25 (4) The bracelets are around 16 cms in circumference and designed to go around the wrists of dolls, toys and small children. The product packaging is marked “4U and Your Bear” to reflect this. In Ms Stout’s view the inclusion of this wording here and not elsewhere indicates that other items are not suitable or intended for use with children. She said that the average wrist measurement is 5 inches for a child of 18 months to 3 years old and 5 and a quarter inches for a child of 3 to 7 years and 5 and a half inches for a child of 7 to 10 years old. She had taken this information from a jeweller’s website. She said that whilst she had not verified this information personally, it corresponds to sizing numbers she has seen before. During the course of the hearing, BAB decided not to pursue its appeal as regards the bracelets. The evidence as regards sizing of children’s wrists remains of relevance, however, as regards other items which have elastic bands attached to enable the item to be attached to a doll or toy (see [72] below).

35 71. In Ms Stout’s view these items have no play value other than when being used with a toy or other doll. There are no features which make them objectively more suitable for use with animal toys than human toys and objectively sunglasses and headbands are clearly a human accessory. She accepted that they all required a child to use them but did not think that a child would want to play with them other than with a doll or toy.

40 *Mobile phones and tablets and other plastic toys*

72. Items in this category include a number of items which have small elasticated bands attached to them to enable a child to attach the item to the wrist or foot of a toy:

45 (1) Mobile phones and tablets in a range of designs to mimic phones and tablets for humans (such as, as regards phones, cuboid, side and flip). They make noises when certain buttons are pressed. They have small elasticated bands of 6.5 cms on the back.

5 (2) Plastic hairdryers, brushes and mirrors sold as a set. The hair dryer is battery powered with a small fan that blows air when switched on. The air is not heated. The dryer has a small elasticated band on the back of around 6.6 cms. The brush is around 12 cms in length. The mirror is shaped like a flower with a small elasticated band of around 8cms.

(3) Silver plastic wands with tiaras or crowns sold as a set. The wands are 15 cms long and have a small elasticated loop of material of 8 cms. The tiaras and crowns have a diameter of around 15cm. On the packaging these are marketed as “bear stuff”.

10 (4) A variety of sports equipment such as surf boards, boogie boards, skateboards, snowballs, vinyl bag and plastic golf clubs and fishing rods of about 14 cms in size. These have small elasticated bands for the item to be attached to the foot or hand of a toy.

15 (5) Plastic wheelchairs which are 27.5 cms in height with a plastic frame and wheels and small fabric strips for the back, seat and armrest sections. Some of these have branding such as a bear on the back, a heart on the front and bear heads in the wheels and paw prints on the treads of the wheels.

20 (6) Small strollers which are manufactured by CMC and are the same as the strollers it makes for doll brands (BAB just requested that the colour was changed). These also have small plastic frames with wheels and small fabric strips for the back/seat.

25 (7) Wardrobes, armoires and dressers usually in dimensions of around 40 cms wide, 30-40 cms high and 27.5 cms long. They usually have a plastic frame with plastic doors on the front with shelves made from cardboard. Some of these also have branding such as a bear in the middle or a paw print on the hinges. In the examples in the bundle there was (a) a dresser with a paw print on the drawers, a bear head on the side panel and a mirror in the shape of a heart and (b) a wardrobe with a sticker stating “Bear Boutique fashion case” and paw prints on the drawer, a side panel with a bear head and a mirror in the shape of a heart. Ms Stout said that some of the cupboards and wardrobes were sold with the sticker in the packaging for the child to stick on the item if the child chose to do so. She said that the cupboard could be used to house anything of an appropriate size although it was marketed as being for dolls/toys accessories.

35 73. Ms Stout emphasised that all of these items are specifically made small by design for use with dolls/toys to help with the role play/dressing up play which children engage in when playing with their toys. Ms Stout worked with the manufacturer of mobile phone toys for use by children to design scaled down versions for use with toys. She noted that the toy mobile phones in dispute are much smaller than a real phone or tablet or toy phones designed to be played with by children as toys in their own rights. She considered that the other items are plainly too small for a child to use for himself/herself as set out below.

45 74. She said that the presence of the elastic bands or elasticated loops on the relevant items indicates they are intended to be attached to the hand or wrist or foot of a doll or toy. They would not fit comfortably around the wrist, hand or foot of a child. Moreover, a child would not need such bands or loops as he/she would simply grip the item. The holes in the plastic mouldings were specified by BAB and intentionally designed into

the plastic injection moulds which BAB purchased so that elastic bands could be fitted at the assembly stage. In her view there are no features which make these items objectively more suitable for use with animal toys than human toys and objectively they are clearly a human accessory.

5 75. It was put to Ms Stout that for the phones to make a noise or to perform its function the child would have to press it. She said it was too small to be used by a child; it is scaled specifically for toys to be used with a doll or toy as part of the role play. Whilst the child may have to take the actions to make the phone make a noise, the child does so in playing with the doll or toy, namely, by attaching the item to the doll or toy with
10 the elasticated loops and making the toy take the necessary actions. She produced a Disney phone which she said was for use by a child and noted it is about 1 to 1.5 inches bigger than the phones in dispute. She emphasised that the child can use the toy's hand to activate the phone or to punch the buttons on the tablet.

15 76. As regards the crowns Ms Stout said that (a) BAB specify the size of loops for crowns (b) the loops go around any doll with hair and are designed for use with ears or a high pony-tail or piglets (c) the crowns are designed to be as versatile as possible for use with as many toys as possible and, hence, the elastic stretches to accommodate different hair styles and (d) the specification is a general one and not tailored for specific dolls.

20 77. She noted that tiaras sold for children are far too big for the head of a doll or child and protrude beyond the back of the head. A child's tiara or crown is much larger and has teeth rather than loops. She produced an example of a crown from Claire's Accessories which was larger than BAB's crown and had no loops and a Dazzle Wand from Toys R Us which was larger than those in dispute. It was put to her that this crown
25 and wand fitted on Toddler Sam and on Honey although the crown protruded a little at the back. She said that from the size, branding and marketing these items were clearly for a child and anyway just to look at the items there are clear differences. She had not considered using accessories for Barbie as a comparator as Barbie is made on an entirely different scale to the type of dolls and toys which BAB sell. I note that when
30 the crown from Claire's Accessories was put on Honey and Toddler Sam, the teeth and ends of the crown protruded.

78. Ms Stout made the point that given their size the wheelchairs and strollers are clearly designed for a child to sit a doll or toy in them. She thought it highly unlikely a child would wish to play with these items without a doll or toy. She noted that these
35 items and the sporting equipment would be unsafe for a child to use. She considered that it would be absurd to suggest a child would play with the items of furniture on their own without using a toy or doll. In her view the wardrobe is plainly designed to hold clothing items for a doll or toy.

40 79. It was pointed out to Ms Stout that not all of the sporting equipment have elastic bands; for example, the golf clubs do not have them. It was put to her that the toys do not stay up independently when attached to an item such as a skateboard. She said the shoes worn by the toy may help. She agreed that the loops are for attachment and may not necessarily enable standing as the toys are quite floppy but, as she demonstrated, the child could hold the toy's hand to enable it to skate.

80. She emphasised that BAB's business is based on bringing the toy alive for role play. She confirmed that her comments on size were just made from her own experience and visual observations of products and children using the products.

Footwear

5 81. The general sizes and shapes of the footwear range are very similar with the main variants being the material used and the type of shoe (football boots, walking shoes, slippers, sandals). In production all BAB footwear is moulded over the same cast. The shoes all have a rounded appearance and generally feature BAB's paw print on the tread on the sole. Ms Stout said that the round design is to facilitate the shoes fitting on dolls
10 which typically do not have moving joints. She asserted that the wider shape makes it easier to fit the shoes onto the dolls' feet and that, in practice, they often fit onto the plastic moulded feet of dolls with greater ease than on the feet of a BAB stuffed toy where the stuffed foot has to be stuffed into the shoe. She noted that the boots for Cabbage Patch Kids dolls also have a rounded foot, the shoes for American Girl are
15 wider and shorter than the real-world equivalent as is the footwear sold by Sophia's. In her view, the round shape simply allows the shoes to be worn by a wider range of dolls.

82. Ms Stout noted that the paw print is simply BAB's logo and that it also appears on the soles of the shoes of Lalaloopsy and is featured on the majority of other accessories BAB sells and/or on the packaging. She had identified some brands of shoes for
20 humans which feature paw print treads which she thought indicates that such a logo is simply about branding and not an indication of whom the shoe is intended for. She referred to the sales data for Honey and Daisy as demonstrating that around 20.3% of the value of all accessories "cross sold" with Honey and Daisy are items of footwear.

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

Handbags, purses, backpacks, suitcases and baby carriers

84. The handbags and purses are made from textiles in the dimensions of around 7.5
40 cms by 11 cms. They have small zips, velcro strips or poppers for fastenings and a strap of around 16.5 cms. They are very similar with the main variant being material and design.

85. The backpacks are made from textiles usually with small zips to seal them shut. The general style and shape is the same but they have different designs. They have two
45 shoulder straps of 21 cms. They do not have contents apart from the "back to school model" which includes textile pencils and notebook (each with elastic bands), a calculator and an apple and report card.

86. Suitcases are 10 cm high, 14 cm wide and 3.6 cm deep with a small handle which includes an elastic band and a small clasp to undo the case.

87. The baby carriers mimic real world baby carriers and are made from polyurethane and a soft exterior fabric with two adjustable straps which can be worn front or back.
5 There is a small slit of 5cms in the back of the carrier to allow an animal's tail to protrude if used with an animal toy. It is marketed as a bear carrier.

88. Ms Stout emphasised that that (a) these items are small by design for use with dolls/toys, to help with the role play/dressing up play in which children engage, (b) the straps or handles are too small for a child to use (other than the baby carrier), (c) the
10 suitcase features an elastic band to enable the case to be attached to a doll or toy, and (d) the baby carrier would not carry a baby and it would not be safe as there are not enough fastening features to hold a baby safely in place.

89. There were certain miscellaneous textile items such as (a) medical kits (b) beauty kits and a happy birthday set with a cup cake and a card or a present (c) Christmas
15 stockings for children which they received when more than a certain amount was spent and a similar holiday stocking and (d) a safari set, plush footballs and foam/rubber footballs all of which feature an elastic band to attach the balls to the feet of dolls or other toys

Textile and plastic hearts and plastic sounds

20 90. The textile hearts are heart shaped and around 3 to 4 cms in size (although sometimes other shapes are used such as shamrocks for St Patrick's day). A textile heart is inserted into a stuffed toy in store during the heart ceremony (at the end of the stuffing process). They are imported in bulk with no packaging identifying them as for use with BAB products.

25 91. The plastic beating hearts are around 4 to 5 cms in size and are inserted into the bear in the stuffing process to recreate a beating heart sensation when hugged or pressed by a child. They are imported as single items.

92. The plastic sounds are small square or circular boxes of 3 to 5 cms in size which are inserted into a stuffed toy during the stuffing process. They are also imported as
30 single items. When the toy is hugged or pressed by the child the plastic sound repeats a pre-recorded message, a message recorded by the customer or a musical piece or other noise not associated with animals (such as music or kissing) or a pre-recorded animal noise (such as a bark or a roar).

93. Ms Stout noted that it is part of BAB's philosophy that no toy created in store should
35 leave the workshop without a textile heart. These accessories are not sold separately and cannot be used with non-BAB toys. They are put inside all BAB's stuffed toys regardless of what that toy is.

94. She also noted that there are no separate designs for hearts and sounds according to
40 whether they are intended for use with human dolls or stuffed bears or other animal toys. The sales data shows that 7% of the value of the cross sold items with Honey and Daisy were beating hearts or sounds and around 30% of the sales of those dolls involved these items. All sales of Honey and Daisy included a textile heart as these are not sold separately and are included in all toys.

Accessories for animal toys

45 95. This category comprises:

5 (1) Clothes which are specifically tailored for use with a four-legged animal; the arms or front leg sleeves are tailored to come out of the front of the garment as opposed to the sides for arms of human type garments or often have short or no sleeves. The items are made to a size and shape to allow use with stuffed and hard bodied animal toys.

(2) Leashes and collars varying in colour and patterns of around 54 cm long with a detachable collar of 27 cms circumference. Ms Stout said that these are more practical for use with hard bodied toys as those toys often actually move.

10 (3) Plastic animal food bowls and toy accessories of a size designed to be used with animal toys such as a mat and bowl set, dog houses in the dimensions 40 cm x 35 cms x25 cms made out of polyester material around a cardboard structure, animal beds and mats made from similar materials and in a similar shape although with different designs. Ms Stout said that there is nothing about these items which makes them more suitable for use with stuffed toys rather than hard bodied animal toys.

15 (4) Pet carriers in a variety of materials (usually textile or vinyl) with a variety of features such as zips, velcro and wheels on the bottom. Some are similar in size at 13 x 8 x 10. There is a bigger one of around 26 x36 x 26 but Ms Stout considered it is still too small to carry a real pet. Some had paw prints on them. They are not manufactured to support the weight of a real pet as opposed to an animal pet. One of the carriers had no top which Ms Stout remarked would enable a real animal to jump out. Ms Stout asserted that there is nothing about these items which makes them more suitable for use with stuffed toys rather than with hard bodied animal toys.

25 **Law**

Customs code - procedure

96. Article 40 of Council Regulation 2913/92/EEC setting up the Community Customs Code (the “Code”) imposes an obligation on a person bringing goods into the Community to present the goods to the national customs authority of the Member State. Whether or not the goods are examined, there is an obligation to make a summary declaration in respect of the imports under article 43 (subject to certain exceptions set down) in the manner stipulated in article 44. The Code contains provisions starting at article 59 which deal with placement of goods under a customs procedure which, in accordance with article 4(16), includes entry of the goods for free circulation.

35 97. Articles 73 and 74 provide that the goods shall be released once the customs declaration has been accepted and any customs debt paid. Once the goods have been released for free circulation, they are accorded the status of Community goods in accordance with article 79 of the Code, which entails the charging of any duties legally due. Article 78(3) requires national customs authorities to take steps to regularise an incorrect situation if it is discovered post-clearance of the goods.

40 98. Article 201 of the Code provides that a customs debt on importation shall be incurred through the release for free circulation of goods liable to import duties. Import duties are defined in article 4(10) as being “customs duties and charges having an effect equivalent to customs duties payable on the importation of goods.”

99. Articles 217 to 221 impose obligations on Member States to ensure that customs debts are accounted for and paid within certain time periods and that the amount of the customs debt is communicated to the debtor. Article 220 provides, with limited exceptions, that where a customs debt has been entered in the accounts at a lower level than the amount legally owed, the amount of the duty which remains to be recovered must also be entered in the accounts. Article 221(3) lays down a three-year time limit for communication to a debtor of a customs debt.

100. Commission Regulation (EEC) No. 2454/93 of 2 July 1993 lays down provisions for the implementation and application of the Code. These include a provision in article 199 that the lodging of a declaration signed by the declarant renders him responsible for the accuracy of the information provided in the declaration.

101. Article 201 of the Code determines when the liability to customs duty arises:

“(1) A customs debt on importation shall be incurred at the time of acceptance of the customs declaration in question.

- (a) the release for free circulation of goods liable to import duties, or
- (b) the placing of such goods under the temporary importation procedure with partial relief from import duties.

A customs debt shall be incurred at the time of acceptance of the customs declaration in question.”

102. HMRC gave the following outline of the effect of these provisions which BAB did not appear to dispute:

(1) It is for the importer to ensure that he enters the correct customs classification on any customs declaration at the time of importing a consignment of goods. From the time of publication in the Official Journal, no person is deemed to be unaware of the nature and extent of charges to customs duty (see Case 161/88 *Binder v Hauptzollamt Bad Reichenhall* [1989] E.C.R. 2415, at [19]). The importer is responsible both for payment of the import duties and for the regularity of the documents presented by him to the customs authorities. It is the responsibility of traders to make the necessary arrangements in their contractual relationships to guard against the risks of an action for post-clearance payments (see Joined Cases C-153/94 and C-204/94 *Faroe Seafood and Others* [1996] E.C.R. I-2465, at [114]).

(2) By virtue of the provisions of the Code and the regulation set out above, HMRC are obliged, as a matter of EU law, to enter the correct CN classification for goods imported into the United Kingdom (see Case C-413/96 *Skatteministeriet v Sportsgoods A/S* [1998] E.C.R. I-5285 at [23] to [25] and [36] to [37]). It follows that, in principle, when the customs authorities discover an error in the tariff classification of goods indicated in a declaration of release for free circulation, they must recalculate, in the light of the new information at their disposal, the amount of customs duties legally due at the date when that declaration was accepted (see Case C-413/96 *Sportsgoods* at [25]).

(3) The recovery of post-clearance payment of import duties complies with the principle of legitimate expectations recognised as a general principle of Community law by virtue of the mechanism for waiver and/or remission of the duty if certain conditions are met (see Case C-250/91 *Hewlett Packard France v*

Directeur Général des Douanes [1993] E.C.R. I-1819 at [12], [13] and [44] to [46]).

Code

103. Article 20 of the Code provides that “duties legally owed where a customs debt is incurred shall be based on the Customs Tariff of the European Communities”.

104. The European Union is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System known as the Harmonised System (“**HS**”). The Convention requires that contracting states’ tariffs and statistical nomenclatures conform to the HS. The HS is administered by the Customs Co-operation Council informally known as the World Customs Organisation (“**WCO**”). All contracting states use the headings and sub-headings of the HS. The official interpretation of the HS is given in four volumes of explanatory notes published by the WCO known as “**HSEs**”.

105. The EU’s tariff and statistical nomenclature (the “**Tariff**”) is defined in article 20.3 of the Code. Customs duties which are legally due on the importation of goods are determined by reference to the Tariff. The Tariff comprises, among other things, the CN (see article 20.3(a)). The CN is composed of three elements (i) the nomenclature of the HS, (ii) the Community Subdivisions to the HS and (iii) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

106. The CN is produced at Annex 1 of the Council Regulation 2658/87/EEC (“**Tariff Regulation**”). It is updated annually by the European Commission. Part 1 contains at Section 1A the General Rules for the Interpretation of the CN (“**GRIs**”). Part 2 contains the headings themselves which amount to a comprehensive goods nomenclature designed to classify all goods imported into the EU in the appropriate heading. The European Commission publishes explanatory notes to the CN known as “**CNENs**”.

107. The CN is structured by reference to sections, then chapter numbers with chapter titles, then headings and subheadings. The first two numbers constitute the chapter number, the next two numbers (together with 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 the application of each section and chapter respectively.

108. The relevant provisions in the CN are at chapter 95 which applies to “Toys, Games and Sports Requisites; Parts and accessories thereof”:

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

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

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

9503 00 21 - - Dolls

9503 00 29 - - Parts and accessories

.....

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

9503 00 41 - - Stuffed

	9503	00 49	-- Other.....
		
	9503	00 70	- <i>Other toys, put up in sets or outfits....</i>
	9503	00 75	-- Of plastics
5	9503	00 79	-- Of other materials.....
			- <i>Other.....</i>
		
			-- Other
	9503	00 95	- - - Of plastics
10	9503	00 99	- - - Other” (emphasis added)

109. I refer to the sub-headings in italics above as the dolls heading, the toys heading, the sets heading and the other toys heading respectively. I refer to dolls referred to in the dolls heading as “human dolls” and toys referred to in the toys heading as “animal toys”. For the avoidance of doubt, I note that these are sub-headings and they are referred to in a shorthand form as headings for convenience only; all relevant references should be interpreted on that basis. I also note that all references to note 3 in this decision are to note 3 to chapter 95 as set out below unless there is an express statement to the contrary.

110. Note 3 to chapter 95 (“**note 3**”) provides as follows:

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

111. Note 4 to chapter 95 (“**note 4**”) provides as follows:

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

30 **HSENs**

112. The HSENs for chapter 95 state:

“This Chapter covers toys of all kinds whether designed for the amusement of children or adults....

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

113. The HSENs for heading 95.03 states:

“This heading covers...

40 (C) Dolls.

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

45 Dolls are usually made of rubber, plastic, textile materials, wax, ceramics, wood, paperboard, papier mache or combinations of these materials. They may

be jointed and contain mechanisms which permit limb, head or eye movements as well as reproductions of the human voice, etc. They may also be dressed.

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

(D) Other toys.

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

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

These include:

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

(xiii) Dolls' houses and furniture, including bedding.

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

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

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

(a) the combined items are put up together for retail sale, but the combination cannot be considered as a set under the terms of [GIR 3(b)]; and

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

CNENs

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

“9503 00 21 Dolls

See the HS Explanatory Note to heading 9503, (C), first two paragraphs.

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

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

9503 00 29 Parts and accessories

See the [HSEN] to heading 9503, (C), third paragraph. [This refers to the passage set out above.]

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

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

115. The CNENs contain the following explanation of note 4:

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

10 Such combinations derive the essential character of toys not only from the packaging but also from the importance, value and use of their components, The classification of such combinations in the relevant subheading is determined by the items of heading 9503 contained in the combination; the other components are not taken into account.

For example:

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

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

20 116. The guidance on the sets heading states the following:

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

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

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

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

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

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

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

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

HMRC guidance

117. BAB pointed to HMRC's guidance issued in 2012 (which at the time of the hearing was still available on their website) which includes the following statements:

5 (1) Parts and accessories covered under 9503 00 29 include the items listed in the HSEs and "feeding bottles, rattles, handbags *and any other articles of limited functionality and sized to be used in play scenarios alongside dolls*" (emphasis added).

10 (2) "When two different types of articles used for amusement are packaged for retail sale, they should be classified as sets or outfits using chapter 95 heading code 0300. Collections of items that would otherwise be classified in a variety of heading codes such as chemistry sets or sewing kits are to be classified to 9503 00 70 using chapter note 4 to chapter 95. Sets and outfits are two or more articles packaged together to achieve the same play function, for example, a toy dog packaged with a kennel and small bone. Sets and outfits that comprise goods that
15 would be classified individually under different headings can be classified under the one heading that gives the set its essential characteristics. For example, a plastic doll dressed in a skirt, top and shoes would be classified under 9503 00 21. A plastic chair for a doll to sit in would be classified under 9503 00 95. Using note 3 to chapter 95, a chair would be classified as an accessory to the doll.
20 However, if they are packaged together, the essential characteristic of the set would be the doll, so the set can be classified under the doll's heading."

GIRs

118. The GIRs provide a set of rules for interpretation of the CN in order to ensure that all products are classified under the correct code. Unlike the HSEs, the GIRs have
25 legal force.

119. Rule 1 provides:

30 "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."

120. Rule 2(a) is not relevant in this instance but provides guidance on the determination of the objective characteristics of products in a specific state. Rule 2(b) applies to a restricted group of classification headings, namely, those restricted to
35 products of an identical material or substance.

121. Rule 3 provides:

40 "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
45 goods, even if one of them gives a more complete or precise description of the goods;

5 (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.”

10 122. Under rule 4: “Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.”

123. Under rule 6:

15 “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.”

BTIs

20 124. Binding Tariff Information notices are issued by the customs authorities of the Member States pursuant to Article 12 of the Common Customs Code (Council Regulation 2913/92/EEC) on request from a trader. They are called “BTIs”, and such information is binding on the relevant authorities in respect of the tariff classification of goods. The tribunal must exercise care before departing from a settled approach set
25 out in BTIs (see Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financien* at [34]). The parties produced a number of BTIs issued by the authorities in other Member States. I found these of limited assistance given there is often no explanation of the reason for the classification, in some instances the precise nature of the goods is not clear and overall they do not demonstrate a clearly consistent approach.

Approach to classification set out in the case law

30 125. As set out in the decision of the CJEU in Case C-486/06 *Van Landeghem (Common Customs Tariff)* [2007], to which BAB referred, it is settled case-law, as set out at [23] to [25] of that case that:

35 (1) “in the interests of legal certainty and ease of verification, 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 notes....”

40 (2) “the intended use of a product may constitute an objective criterion for classification 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....”

45 (3) “.the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (*BAS Trucks*, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the

classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *Kawasaki Motors Europe*, paragraph 36)".

126. The parties referred to cases where the CJEU has classified products for customs duty purposes according to their main intended use. In Case C-480/13 *Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafenfor*, for example, the question was whether a product intended for the analysis of white blood cells was to be classified either as a diagnostic or laboratory reagent (under heading 3822) or as a dye or other colouring matter for retail sale (under heading 3212). An expert's report concluded that the product could dye a textile with a blue colour, but that that colouring was nevertheless very light and could not be classified as "permanent".

127. In considering the "intended use" principle the court noted, at [32], that there is authority that where a product has two possible uses but one of those uses was "no more than a purely theoretical possibility", that product was, "on the basis of its objective characteristics and properties, naturally intended for the other use and therefore came under the tariff heading relating to that use" (referring to Case C-459/93 *Thyssen Haniel Logistic* (at [17] and [18])). They continued that likewise, according to the case-law:

"in order to be classified under the tariff heading relating to a use, the product to be classified need not be solely or exclusively intended for that use. It suffices that that use is the main use for which the product is intended (see, to that effect, *Neckermann Versand*, C-395/93, EU:C:1994:318, paragraphs 8 and 9, and *Anagram International*, C-14/05, EU:C:2006:465, paragraph 26)."

128. The court said, at [42], that it followed that the use of the product as a laboratory reagent "constitutes, in the light of its objective characteristics and properties, its exclusive use" and, at [45], that it came under heading 3822 noting that it "may have a weak and non-permanent dyeing effect on textiles, is not in practice used for its dyeing properties and is intended for the analysis of white blood cells..".

129. BAB referred to *HMRC v Huxley (UK) Ltd* [2017] UKUT 393 (TCC) where the Upper Tribunal ("UT") noted, at [60], that the CJEU made reference in its reasoning to Case C-14/05 *Anagram International Inc v Inspecteur van de Belastingdienst Douanedistrict Rotterdam*. That case involved the classification of gas-filled balloons described as "plastic festive balloon" on which different motifs could be printed depending on the occasion for which they were to be used. The question was whether they could be correctly classified as festive articles or as toys. The court held, at [26]:

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

130. The UT concluded, at [61], that it is therefore clear that (a) "use in practice" as that term is used in *Sysmex* "is a synonym for "main use" and (b) the main use of a product is, therefore, capable of constituting an objective characteristic if it can be established at the time of customs clearance. They noted that both *Thyssen Haniel* and *Sysmex* establish that "the main use of a product can be ascertained by adducing

evidence, notwithstanding that such evidence is not available to the customs officer at the point of entry”.

131. The parties also referred to decisions where the courts have emphasised that the classification test is a purely objective one such that subjective matters should not be taken into account. In Case C-228/89 *Farfalla Fleming v Hauptzollamt München-West* [1990] ECR I-3387 the CJEU rejected the argument that 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 stated, at [20], that since the customs authorities can rely only on objective criteria relating to the external characteristics of goods, even where such 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:

“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.”

132. In Case C-376/07 *Kamino International Logistics BV v Staatssecretaris van Financiën* the CJEU considered the correct classification of a colour LCD monitor which, although marketed for use with automatic data processing machines, also had other uses, such as for playing games. In his opinion, which appears not to have been disapproved by the CJEU, 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. The relevant parts of the opinion are as follows:

“72. In my view, there is no doubt that the technical characteristics of the product constitute the fundamental criterion to be taken into account in that connection. In the case of the monitors at issue, it will plainly be characteristics like the resolution, the 40 screen aspect ratio (the width of the screen in relation to its height), the available connectors, the possibility of adjusting the height and screen tilt angle, the presence of certain specific ergonomic features designed to facilitate close ‘desktop’ use and so forth, which the national court will have to analyse in order to determine whether or not the product is normally used in connection with an automatic data-processing system.

73. The possibility of taking account of the product’s intended commercial use, in other words its ‘target’ use, in order to determine its normal use, seems to me to be more problematical. In my view, that option should be excluded.

74. It is in fact clear that if significance is attached to elements such as the product’s declared use, as indicated on its packaging or in advertising material,

5 there is an increased risk of abuse. In a variety of fields, instances of products which are surreptitiously presented as being intended for uses other than their real use, in order, for example, to circumvent sales bans or rule out producer liability, are in fact anything but infrequent, even though the relevant public is actually perfectly well aware of the real intended use of the products in question.

10 75. The position set out above seems to me, moreover, to be consistent with the case-law of the Court 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."

15 133. This approach was followed in the UT in *E.P. Barrus Ltd and another v Revenue and Customs Commissioners* [2013] UKUT 0449. In that case the UT held that the tribunal had erred in assessing the correct classification of the vehicles in question by reference to the actual use that the vehicles were put by particular importers and the possible use to which they could be put on the basis of witness evidence as to such use and the marketing material that suggested possible uses. Essentially, the UT viewed this as evidence as to "targeted use" within the meaning of *Kamino*.

20 134. In the *Huxley* case referred to above, the UT accepted, at [64], that there is a distinction between the main use of a product, ascertained by reference to its objective characteristics, and other possible uses of the product, which can be ascertained, for example, from marketing material:

25 "Where the marketing material includes the subjective views of those who are promoting the product in question it is not relevant to classification. There is the risk, identified in *Kamino*, that purported uses set out in the marketing material are in fact shams in order to obtain a reduced rate of duty or circumvent some restriction applicable to the import of the goods in question."

30 135. At [66], the UT rejected the submission that the tribunal erred in taking into account certain external evidence as to the main use to which the relevant products were put. They said that there is nothing in the relevant authorities that "rules out the importer seeking to adduce evidence to the customs officer as to the main use or use in practice to which the goods in question will be put which may not otherwise be readily apparent from a physical inspection". They accepted, therefore, at [70], that "evidence can properly be presented with the goods to demonstrate the significance of their particular objective features".

40 136. It seems that the Advocate General in *Kamino* and the UT in *Barrus* and *Huxley* were making the point that, in classifying articles for CN purposes, courts should not take account of the subjective views of those promoting the product in question as to the possible uses for the product, whether set out in marketing materials or otherwise. That does not rule out, however, that such material may contain statements of relevance where, for example, it contains an explanation of how a particular product is intended to operate by reference to its objective characteristics and properties.

45 137. The extent to which "targeted use" can be taken into account and the role of the main intended use test has been considered more recently by the Court of Appeal in *HMRC v Honeywell Analytics Ltd* [2018] EWCA Civ 579. The issue in that case was the correct classification of an item described as "a gas monitoring device which is carried on the person (portable) and used by people who work in confined spaces and

may have reason to come into contact with potentially dangerous toxic gases” and which contained “both an audible, visible and a vibration alert mechanism” (the “**Device**”). The issue was whether the UT was correct to hold that the Device falls within a heading of the CN relating to measuring devices (9026) thereby overturning the tribunal’s decision that it falls within a heading relating to alarms (8531).

138. The majority upheld the tribunal’s decision. Sir Terence Etherton MR dissented but the majority agreed to some extent with his analysis of the relevant case law.

139. As Sir Etherton recorded, at [26], the tribunal held that heading 8531 (relating to alarms) described accurately and clearly the essential characteristics and properties and the use (the only intended use) of the Device. The tribunal stated the following (at [80]) as regards the meaning of the wording in heading 9206 “Instruments and apparatus for measuring the ... level of ... gases”:

“In our view while the device is an instrument that *does* measure “the... level ... of gases”, it is not a instrument *for* doing that...[N]o employer would send an operator into a confined space with this device to measure the level of dangerous gases without the alerting functions being operative. We consider that the items listed in Heading 9026 are ones whose only function and use is to measure the level etc of gas etc.”

140. As noted at [20], in forming this conclusion the tribunal had regard to the technical literature available online in relation to the Device, which stated under the heading “Protect yourself” that the Device could simultaneously monitor and display up to five atmospheric hazards.

141. As recorded by Sir Terence Etherton MR, at [39] to [42], amongst other findings, the UT found that:

(1) The tribunal may have been unduly influenced by this heading due to the technical literature.

(2) Nothing in the wording of heading 9026 suggests it is to be restricted to measuring apparatus whose principal purpose is to measure for the sake of measurement alone. The tribunal was wrong to conclude that the Device did not have measurement as one of its uses and that heading 9026 was restricted to those devices whose only function was to measure the level of gas (see [63] and [64] of the UT decision).

(3) The Device “prima facie falls within the scope of” both headings, and inevitably, by virtue of note 1(m), the Device must be classified under heading 9026 (as that note excludes from heading 8531 items which fall within chapter 90 of which heading 9026 forms part) (see [68]).

142. Sir Terence Etherton MR said, at [65] and [66], that he could see no basis for the tribunal’s restrictive interpretation of heading 9026 as regards the word “for”. He rejected the argument “that there is a general principle that, where an item is capable of falling within the wording of more than one heading, the heading which is most consistent with the principal purpose of the item in question should be applied”. However:

(1) At [67], he accepted that a main or principal function test has a role where:

“a heading specifies a product’s function according to a descriptive term which is undefined, an item will fall within that heading if that

specified function is its principal or main function even though the item might also be used for some other purpose”.

He said that was the situation in cases concerning the “undefined functions” of “pyjamas”, “nightdresses” and “video games” respectively (C-395/93 *Neckermann Versand AG v Hauptzollamt Frankfurt am Main-Os*, C-338/95 *Wiener S.I. GmbH v Hauptzollamt Emmerich* [1997] ECR I -6495 and T-243/01 *Sony Computer Entertainment Europe Ltd v Commission of the European Communities* [2003] ECR II-4089).

(2) At [68], he acknowledged that there is also a principle that, where the objective characteristics and properties of an article are capable of falling within more than one heading, a use which is “theoretically conceivable but highly improbable” is to be ignored (as in *Thyssen Haniel* and *Sysmex*).

143. He continued, at [69], that there are many cases which are plainly incompatible with the proposition that a principal or main function test applies as a general rule. Whilst the CJEU has held that an item may fall within more than one heading the court “never suggested that the conflict might be resolved by applying any such principle”; rather it was resolved by reference to tie-break provisions in the notes or the GIRs. He gave some examples including, at [70], the decision in the *Sony Computer* case where it was held (a) that Sony’s PlayStation®2 falls within both heading 8471 (in section XVI) as an automatic data-processing machine and heading 9504 (in chapter 95) which includes video games of a kind used with a television receiver, on the basis that it was intended mainly to be used to run video games, and (b) that note 1(p) in section XVI sufficed to classify it under that video games heading. That note states that section XVI does not cover articles within chapter 95. He concluded, at [71], that on that approach:

“There was no hint of any general principle that where an item falls, on the face of it, within more than one heading, it is allocated only to that heading which is consistent with the item’s principal purpose, function or intended use.”

144. He noted, at [73], that HMRC referred to and relied on a number of cases where the CJEU used a “principal function” test as a tie-breaker between different applicable headings and took into account what consumers would consider to be the ancillary or principal functions (C-119/99 *Hewlett BV v Directeur Général des Douanes et Droits Indirects* [2001] ECR I-3981, C-288/09 and C-289/09 *British Sky Broadcasting Group plc v Revenue and Customs Commissioners* [2011] STC 1519 and C-58/14 *Hauptzollamt Hanover v Amazon EU Sarl*). He observed that the court did so, however, pursuant to the express provisions of the principal function test in note 3 in Section XVI which, in his view, “undermines, rather than supports, HMRC’s argument...”; if a general principal use test existed, there would be no need for note 3. He noted, at [75] that:

“It might equally be said that GIR 3(b) would also be unnecessary if there was a generally applicable tie-break test of “principal function”.”

145. He did not express a firm view on whether the word “for” in the measurement heading means that it applies only to items whose main or principal purpose is to measure (at [77] and [78]). He commented, however, at [78], that “the *Sony* case illustrates why caution must be exercised on this point” given that the word “for” appeared in both applicable headings but the CJEU held that the only legitimate tie

break was note 1(p) in section XVI. He said that, therefore, if that word “imports a principal function test, it would not have been possible for Sony’s product to fall under both headings”.

146. He concluded at [83], that having regard to the principles he had set out, the UT were wrong to classify the Device under heading 9026 only if the UT were bound by findings of fact of the tribunal to conclude that the Device’s measuring function was “theoretically conceivable but highly improbable”. He said that it was obvious that was not the case.

147. At [89] he agreed with HMRC that the UT were wrong to say that, for the purposes of classification, marketing materials and a product’s “targeted” use are always irrelevant. He also said that the UT were not entitled to interfere with the tribunal’s decision insofar as it found as a fact that a person would only acquire the Device because it had an alarm function, and in that sense the measuring was subordinate to the alarm function. However, at [90], for the reasons he had given, he considered that these errors were “irrelevant to the analysis” since the only question of fact was as set out above.

148. Lord Justice Sales took the contrary view, at [115], that the UT had made a material error in its reasoning and that the tribunal’s classification was lawful and should be upheld. He said at [116], that he agreed with the observations of the Master of the Rolls at [67] to [69] albeit that he reached a different conclusion on the facts.

149. Lord Justice Sales set out further details of the marketing and other materials the tribunal had regard to in making its decision. At [121] he noted that HMRC relied on the published manuals for use of the Device and the appellant’s product description, available on its website:

25 “The Quick Reference Guide stated that the device was "designed to warn of hazardous gas levels above user-defined alarm setpoints". The Manual included a Safety Information notice, which stated "Use the detector only as specified in this user manual, otherwise the protection provided by the detector may be impaired." It also included a recommendation that the sensors should be bump tested before each day's use, "to confirm their ability to respond to gas by exposing the detector to a gas concentration that exceeds the alarm setpoints. Manually verify that the audible and visual alarms are activated."”

150. He noted, at [122], that, as emphasised by the tribunal at [28], there was a prominent warning that extreme caution should be used when disabling a sensor, as then it “cannot detect and alarm against the applicable gas”. He thought that on “a fair reading of the Manual as a whole, it is directed to ensuring that the device is maintained so that the alarm function is effective. Although it appears the alarm function can be switched off and the device also has a visual display, there is no section of the Manual addressed to use of the device other than as an alarm. The product description appeared under the heading, “Protect yourself”.

151. He said, at [127], that the tribunal had not erred in taking account of the above information and the Device’s “targeted use”. He considered that it is clear from relevant EU case-law that the marketing literature and manuals issued by a producer of an item are themselves part of the objective materials to which it is legitimate and appropriate to have regard in classifying goods for customs duty purposes. He said that this point emerges clearly in the *Sony* case. He noted, at [129], that it was held that there was no

definition of “video games” and following *Neckermann Verstand* and *Wiener SI GmbH*, that:

5 “it was appropriate to look for the objective characteristic of those goods which tended to distinguish them from others in the use for which those goods were intended” and to assess in that regard whether the goods were used mainly for the purpose given by a tariff heading, even though it might also be possible to envisage another use for them: see [110]. It was appropriate to consider as video games “any products which are intended to be used, exclusively or mainly, for playing video games, even though they might be used for other purposes”: [111]. In making that assessment, the CFI had regard to “the manner in which the PlayStation®2 is imported, sold and presented to the public” and to promotional material which indicated how it was marketed and sold to consumers, namely as a video game console: [112]-[113]. These materials and the way in which the device was configured showed that it was intended for use mainly for playing video games, even though it might be used for other purposes: [112]-[113].”

152. I note that in *Sony*, in forming the conclusions referred to above, the CJEU had regard to (a) “the brochures and other promotional information relating to the PlayStationR2” which showed that it was marketed and sold to consumers mainly as a video game console, even though it may also be put to other uses, (b) evidence that consumers perceive the PlayStationR2 mainly as a game console and (c) the fact that it was packaged for retail sale as a video game console, since it is presented with a controller module [with] several control buttons, which are mainly used for playing video games, as well as connector cables whereas other units, such as standard keyboard, mouse and ADP monitor to which it can be connected are sold separately (see [112]).

153. In the *Honeywell* case, Sales LJ concluded on this point, at [130], as follows:

30 “Such material forms part of the objective characteristics and properties of the goods in question for the purposes of applying the classification headings in the tariff Regulation. The relevance to tariff clarification of the objective manner in which an item is presented to consumers or users is also confirmed by the judgment of the CJEU in Joined Cases C-288/09 and C-289/09 *British Sky Broadcasting Group* [2011] STC 1519, at [77]-[79]. Indeed, given the importance for tariff classification under various headings of the use to which an item is intended to be put, *it seems to me that it would be most odd and contrary to principle to leave out of account the way in which consumers are encouraged to use the item in question by materials placed into the public domain and objectively verifiable for the purposes of tariff classification.*” (emphasis added)

40 154. He continued, at [132], that as the Master of the Rolls explained at [68], there is a principle of EU law in assessing the application of tariff headings that one should ignore uses of an item which are conceivable but are in reality “no more than a theoretical possibility” (referring to *Systemex* at [32] and [42]). He said that to “use a domestic law analogy, this is a *de minimis* type principle”. He concluded, at [133] and 45 [134], that on the findings properly made by the tribunal, at the most use of the Device for measuring the level of gas could only be regarded as a theoretical possibility.

155. Further, at [136], he considered that in the context of the circumstances where the tribunal had to make a binary choice between the two headings in question, the tribunal

was entitled to apply a main or principal purpose test to heading 9026 on the basis that that is the force of the use of the word “for” as supported by the general approach to application of the tariff headings set out in the *Sony* case. He thought, however, at [138], that the tribunal went too far in interpreting heading 9026 to mean that the items covered by it were ones “whose only function and use is to measure the level etc of gas etc”:

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“it would have been sufficient if that was the main function of the [Device]. Just as in the *Neckermann* case items of clothing were properly to be classified as pyjamas because that was their main intended use, even though they could also be used in other ways, I consider that a device could be said to be an instrument for measuring the level of gases if that was its main use, even if it might be used for other things. But plainly, on the findings made by the FTT, that was not the main use or function of the [Device]. Faced with the arguments before it about how to characterise the use or function of the Device, the FTT was entitled to have regard to the main or principal object for which it was to be used, namely as an alarm rather than for measuring the level of gas.”

156. Lord Justice Davis essentially agreed with Sales LJ. He said, at [102], that the correct question was what the Device was “for” and that overall the tribunal found that the measurement or checking of gases was not what the Device was “for”. The tribunal found that the measuring function was entirely subordinate to the alarm function; the measuring function was simply a means to an end: the end being the alerting function. He said, at [104], the tribunal’s conclusion amply accords with the caselaw that uses of a particular device which are found to be but a theoretical possibility are on any view to be disregarded; that is what the tribunal had in terms found to be the case.

157. He said, at [109], that, on any view, HMRC’s argument that checking or measuring the level of gases was the principal function of the device had failed conclusively on the facts before the tribunal. Nor (even on its mistaken legal approach) did the UT make such a finding. It simply “proceeded on the footing that measuring was at least *one* purpose and *one* of the intended uses”.

158. In view of that he thought, at [110], there still are real doubts as to whether the device could fall within heading 9026. He said that he “entirely understands the point that, where there are competing functions or uses, the Notes and GIRs are potentially available and the need to resort to a “principal function” approach becomes less obvious; and I agree also that a number of the authorities in the European jurisprudence, as cited to us, are decisions where the Explanatory Notes feature”. However, at [111], as he read them:

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

159. At [112] he gave as an example the case of *Hauptzollamt Hannover v Amazon* case where the CJEU accepted that:

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“while Amazon’s Kindle device had a dictionary function, that did not make the device an electronic dictionary for classification purposes: since that was not the “principal function” of a Kindle. It is true that Note 3 to Section XVI featured in that case; but the statements of principle there set out seem to go wider than that. The cases of *Neckerman*, *Sysmex* and *Sony Corporation* (cited

above), among others, also all contain statements of principle to like effect: again, statements of principle not based on Notes or GIRs. For example, in *Systemex* (at paragraph 32) this was said, in unqualified terms [citing [32] of *Systemex*].....

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

Decision on clothing and footwear

10 Submissions on clothing items

160. It was common ground that the clothing items are accessories within the meaning of chapter 95. There was also no dispute that under GIRs 1 and 6, as applied in combination with note 3, they fall, at any rate on a “prima facie” basis within the toys heading and the sub-heading “stuffed” (9503 00 41) on the basis that they are
15 accessories which are principally suitable for use with those articles. The dispute is:

(1) Whether, as BAB argued, the clothing items also fall within the dolls heading and the sub-heading for “accessories and parts” (9503 00 29) on a prima facie basis such that the correct classification is to be determined under the “tie breaker” provisions in GIR 3.

20 (2) Whether as HMRC argued, classification under the toys heading and the sub-heading “stuffed” is definitive without the need to have recourse to GIR 3. That is on the basis that under note 3 items cannot be *principally* (in the sense of first or foremost for use) suitable for use with articles falling within more than one heading or sub-heading of chapter 95.

25 (3) If, contrary to HMRC’s view, the tie-breaker in GIR 3 applies, whether classification is to be made (a) as BAB argued, under GIR 3(a) by reference to the dolls heading (and the sub-heading for “parts and accessories”) on the basis that this provides the more specific description of the clothing items or (b) as HMRC argued, under GIR 3(c) by reference to the toys heading (and the sub-
30 heading “stuffed”) as the last in numerical order on the basis that neither heading is more specific than the other.

161. HMRC submitted that the application of GIR 1 and 6 is key in this case noting, in particular, the following:

35 (1) In the reference in the chapter heading to “dolls, other toys”, the words “other toys” plainly mean all toys other than those already mentioned, such as dolls. This heading is, therefore, the appropriate heading for *all* toys.

(2) Note 3 must be applied to the construction of headings and sub-headings in chapter 95 so that it is read as including parts or accessories to the items listed in the headings/sub-headings.

40 (3) Articles which do not represent human beings do not fall within the dolls heading given it refers to “dolls representing only human beings”. It follows that the subsequent reference to “and parts and accessories thereof” means parts and accessories of dolls representing only human beings.

45 (4) The sub-heading for toys complements the dolls heading by classifying separately other articles, which represent animals or non-human creatures. “Parts

and accessories” which are, within the meaning of note 3, “suitable for use solely or principally with” such toys are classified with those articles.

162. In HMRC’s view, in assessing whether the clothing items are suitable for use principally with any articles in heading 9503, the tribunal must follow the approach set out in the cases as regards “intended use”. In their view, it is readily apparent from the clothing items’ objective characteristics, that the items are inherently suitable for use principally as “accessories” with animal toys of a stuffed kind. The slits in the clothing or loops on the wigs clearly demonstrate that they are specifically designed to fit BAB’s stuffed bears. The slits are positioned for the tail or ears of a stuffed bear and are of the size to accommodate those features. As with an armhole in a garment, it is evident from their positioning and sizing what they are designed to do.

163. Clothing items suitable for use solely or principally with human dolls would not have such features; they are included in the items, as is clearly apparent from the design, to accommodate the ears and tail of a stuffed bear as features which have no human equivalent. Moreover, they are not equally suitable for use with both human dolls and animal toys given the features simply cannot be explained as being of any use for a human doll. The fact that, for example, hair can be pulled through the loops on wigs or the slits in hats where a doll has pig tails is an example of theoretical use which is to be disregarded.

164. HMRC consider that it is inherent in the words “solely” or “principally”, that if accessories are found to be suitable for use solely or principally with a category of articles in a particular heading of chapter 95, they cannot also be held to be suitable for such use with articles in another category. The natural meaning of the term “principally” is first or foremost; an item cannot be suitable first or foremost for use with more than one set of articles. It is simply irrelevant, therefore, whether the clothing items can be used with human dolls. Moreover, under the hierarchical approach to classification the test in note 3 is specifically intended to allocate an item to a particular category at the first level of the classification test.

165. BAB’s stance is that, on the contrary, the clothing items fall on a prima facie basis in each of the dolls and toys headings on the basis that (a) they are suitable for use in practice as accessories for human dolls or that use can reasonably be envisaged and is more than entirely theoretical and (b) note 3 brings them also within the toys heading as their principal function is to serve as accessories for human shaped toys, whether or not having tails or ears and, therefore, as accessories to dolls or toys falling within both headings. In support of this BAB made the following main points:

(1) It is not permissible, as is the effect of HMRC’s argument, to apply a principal purpose test as regards whether the clothing items fall within the dolls heading.

(a) Whilst it is arguable that there is a main intended use test inherent within the wording of the dolls heading, there is no “principal” use test as such.

(b) It may be that certain items carry within them an implied principal use. A nightdress or pyjamas for example may be intended for use principally at night rather than at other times (as in the *Neckerman* and *Weiner* cases referred to in *Honeywell Analytics*). However, the clothing items can plainly be used as accessories for more than one set of articles

especially given that the articles in question (human dolls and animal toys) are very similar. This slim line is demonstrated by the fact that the HSEs state that the toys heading applies even where the toy possesses “predominantly human physical characteristics”; the inclusion of alien ears would suffice for an item to fall under that heading. On that basis, the clothing items are essentially an accessory for a wider class comprising articles falling within both headings.

(c) Note 3 cannot be intended to introduce a principal use test into the dolls heading given the express inclusion in that heading of the words “and accessories and part thereof”. It would not be necessary to include these words if note 3 were intended to apply. Note 3 cannot simply rub out or qualify that express wording. If note 3 were intended to do so, it could have been differently worded as in note 3 to section XVII which states: “References in Chapters 86 to 88 to “parts” or “accessories”, do not apply to parts and accessories which are not suitable for use solely or principally with the articles of those chapters”. Moreover, note 3 does not operate as a form of tie-breaker provision, to determine which of two headings apply, as that would render GIR 3 redundant.

(d) The fact that note 3 refers to classifying accessories with “articles” falling within chapter 95 further supports this analysis. The purpose of note 3 is in part to make it clear that, subject to certain exceptions, items which may otherwise fall within other chapters fall within chapter 95 where they are suitable for use solely or principally with “articles” meaning any one or more of the categories of articles falling within the headings in chapter 95.

(2) In the first instance, therefore, the tribunal must assess whether the clothing items fall within the dolls heading separately from considering whether they fall within any other heading. Under the general principles set out by the CJEU, such classification may be made according to “use in practice” or “main intended use” as distinct from a wholly theoretical use as held in the *Sysmex* case (as interpreted in *Huxley*) or on the basis that the use can be reasonably envisaged looking at all the characteristics of the items as a whole (see *Van Landeghem (Common Customs Tariff)* [2007] C-486/06 at [27], [29], [34] and [42]).

(3) If, contrary to BAB’s view, note 3 is held to import a principal use test into the dolls heading or there is a principal or main intended use test inherent in the heading itself, it is entirely conceptually possible for an accessory to have more than one principal or main intended use (see *Kip Europe SA and Others (C-362/07)*, *Hewlett Packard International SARL (C-363/07) v Administration des douanes – Direction générale des douanes et droits indirects* and *Xerox Ltd v Revenue & Customs* [2010] UKFTT 527).

(4) The inclusion of the slits does not somehow change the nature of the clothing items as suitable for use with human dolls. The circumstances of this case are not akin to those in *HMRC v Invamed Group Limited and Others (Tax)* [2018] UKUT 305 or *Paderborner Brauerei Haus Cramer (Customs Union)* [2011] EUECJ C-196. The inclusion of the slits in the relevant items (a) is not so invasive as to render use as an accessory to a human doll as theoretical and (b) does not result in the items of clothing ceasing to have the objective

characteristics which make them suitable for use with human dolls. BAB also referred to *Xerox Ltd v Revenue and Customs* [2015] UKUT 631 (TCC) in this context.

166. BAB concluded that on the evidence, including, in particular, the witnesses' evidence on the interchangeability of the clothing items for use with dolls and toys, (see [8] to [43]) the use of the clothing items as "accessories" for dolls is not theoretical and can reasonably be envisaged and indeed is a main or principal use. BAB emphasised the following main points as regards the evidence:

(1) There is a standard size for dolls and toys of this kind such that the items fit both human dolls, including those sold by BAB, and stuffed bears and other stuffed animal toys.

(2) The slits in the clothes and the loops for wigs are not "intrusive"; they are not noticeable when the item is on a doll. The loops are there simply to compensate for the fact that animal ears get in the way. Whilst the slits in the hats, hoodies and specific items, such as knitted dresses, are slightly more visible than those in other items, in the overall context of the item they are not intrusive. In all cases the presence of the slits or loops does not detract from the item's suitability for use with a human doll. The slits in hats and hoodies have a function in the context of human dolls in that hair can be pulled through them as set out above.

(3) The sales data evidence demonstrates that, in practice, the items are sold and used with both BAB stuffed animals and BAB stuffed dolls as Mr Parry and Ms Stout stressed. 21% of the accessories sold with Honey and Daisy are items of clothing with slits. Under the principles set out in the caselaw, the tribunal can take this evidence into account in classifying these items; it relates to an objective characteristic in demonstrating the lack of significance of the slits such that use of the clothing items with human dolls is a principal use.

(4) On the other hand, under the principles in these cases, the fact that BAB sells more stuffed bears than human dolls is not relevant. That is not a function of the objective characteristics of the clothing items; it is merely a function of BAB's business model.

(5) Similarly, the use of the bear logo on certain of the items does not affect the position. This merely reflects BAB's branding and does not limit the items to being suitable for use only with stuffed bears.

167. BAB concluded that a customs officer inspecting the items would naturally view them as being suitable for use principally with human shaped dolls whether or not having tails or ears. Only on closer inspection would the customs officer note that the slits permit use with human like dolls or toys with tails or protruding ears. The conclusion, as based on objective characteristics, that the principal use of the clothing items is as accessories for human and quasi human dolls can be corroborated by the sales data evidence.

168. HMRC responded that:

(1) The cases which BAB referred to provide no support for its case but rather in many instances support HMRC's position. In particular, there is no suggestion in any of the cases that where a main intended use or principal purpose test is relevant, an item can have more than one such main use or principal purpose.

(2) The lack of intrusiveness of the slits is not relevant. This is not an objective concept and its use as a test is nowhere supported in the terms of the headings or subheadings.

(3) Much of the evidence on “interchangeability” of the clothing items for use with human dolls and animal toys is not relevant to classification as it does not relate to objective criteria:

(a) On the basis of the decision in *Honeywell Analytics*, information in marketing materials or manuals or on packaging which is in the public domain and objectively verifiable can be taken into account. That does not include material such as the sales data produced by BAB or information on the commercial history of BAB or the subjective experience of the witnesses as to the behaviour of children. Whilst some of this may indicate consumer behaviour, it is not objectively verifiable and does not otherwise shed light on the objective characteristics of the items.

(b) In any event the data produced by BAB is not wholly reliable and relates to a large extent to sales of BAB dolls which were only sold towards the end of the period in question or to sales taking place wholly outside the relevant period.

(c) The Guidelines and the fact that the relevant items may fit some other dolls or toys is irrelevant to the objective assessment required. Clearly the items would fit any figure of comparable size with appropriate limbs and shape. For all the reasons set out above, the items are clearly designed for use with BAB’s own stuffed bears. Moreover the fact that there is no evidence that other manufacturers make clothing with slits underlines the significance of the design of these items.

(4) The fact that parts and/or accessories are mentioned in some sub-headings, such as the dolls heading, is irrelevant. The point is that recourse must be had to note 3 for parts and accessories to be included in the main heading in the first place.

169. If it is found that, contrary to HMRC’s view, the relevant items fall within both relevant headings:

(1) BAB’s view is that, applying the test in GIR 3(a) as set out in the case law (see below), GIR 3(a) allocates the clothing items to the dolls heading (and the sub-heading for “parts and accessories”, 9503 00 29) as that is the more specific heading.

(2) BAB noted that the dolls heading specifically refers to “accessories and parts thereof” whereas the toys heading has no such reference absent note 3; that note is to be disregarded for this purpose.

(3) In any event, the toys heading must encompass a much broader range of items on the basis of the following main points:

(a) It is not a question of surveying the market to see how many individual goods are sold in a year within each category but of applying common sense.

(b) According to the dictionary definition a “doll” is a model of a human form which is small in size. This implies that the term “dolls” in the dolls

heading covers a specific range of sizes smaller than that of “toys” under the toys heading. The related “parts and accessories” for a “doll” can be assumed to be correspondingly limited.

5 (c) There is a vast variety of animal and other non-human forms compared with a single human form. That means that correspondingly there must be a much wider range of “parts and accessories” for animal toys.

(d) The specification of size and human characteristics to which an “accessory” for a “doll” must conform makes the definition in the dolls heading a more complete description of the clothing items.

10 (4) HMRC’s stance is that neither heading is more specific than the other. They each merely capture one of the principal uses of “accessories” with human dolls and with animal toys. The proposition that the toys heading covers a greater range of items is based on nothing more than assertion. In any event the question of
15 which heading is more specific is not determined by reference to how many goods fall within that heading but on the specificity or generality of the heading. The decision of the UT in *Xerox* entirely supports this view.

Conclusion on clothing items

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

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

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

30 (3) if, contrary to my view, the clothing items fall within each of the dolls and toys headings on a prima facie basis (and thereby the relevant sub-headings), under GIR 3, in any event, the items are to be classified under the sub-heading for animal toys of a stuffed kind as the last applicable heading in numerical order.

Application of GIR 1 and 6 and note 3

171. On the basis of the caselaw, in deciding which heading in chapter 95 applies to the clothing items, the correct starting point under GIR 1 and 6 must be to assess
35 whether the items, which are accepted to be “accessories”, are suitable for use solely or principally with articles falling within chapter 95 within the meaning of article 3 according to the items’ objective characteristics. On their natural meaning I interpret the term “suitable” to mean right or appropriate and the term “principally” to mean for the most part or chiefly. On that basis, in my view, the clothing items are “accessories”
40 which are suitable, in the sense of right or appropriate, for use for the most part or chiefly with animal toys of a stuffed kind:

(1) The critical factor is that the items are specifically designed, according to BAB’s specifications, to fit stuffed bears of the size and proportions of the BAB stuffed bears with slits in the clothing or loops on the wigs which are evidently

positioned and sized to enable the tail or ears of the stuffed bear to be pulled through.

(2) Whilst the clothing items may fit some human dolls, these design features have no function as regards such dolls (except in the limited circumstance that a child could choose to use the slits in the hats to pull through the hair of dolls which have appropriate hair styles to enable the child to do so).

(3) Much of the evidence presented by BAB on the lack of visibility of the slits, the “interchangeability” of the products for use with human dolls and animal toys, the commercial history of the group and the sales data, is aimed at demonstrating that (a) absent the loops or slits, the clothing items are similar to clothes for dolls, (b) the clothing items fit some human dolls and other toys and (c) consumers purchase and use the clothing items with human dolls notwithstanding the presence of the slits. However, much of this evidence is not objectively verifiable evidence of the type which can be taken into account in the classification analysis and/or does not establish the proposition asserted and/or in any event does not detract in any way from the significance of the objective characteristics of the clothing items, including the slits or loops, as features which make the clothing items suitable for use chiefly with stuffed bears (see [172], [173] and [181] to [187]).

172. As set out in full above, in *Honeywell Analytics* it was held that materials such as marketing information and manuals which demonstrate an item’s “targeted use” or intended use may form part of and may be taken into account in assessing its objective characteristics for classification purposes. The court noted that it is apparent from the *BskyB* case that the objective manner in which an item is presented to consumers or users is relevant. In that case, in applying the intended use test the CJEU considered it relevant to consider which functions of a multi-functioning device a consumer would regard as principal and ancillary, which they discerned from the features of the device itself (see [76] to [81] of the decision). In *Honeywell Analytics* the court also noted that, given the importance to classification of the use to which an item is intended to be put, it would be wrong to leave out of account the way in which consumers are encouraged to use the item in question by “materials placed into the public domain and objectively verifiable”.

173. On that basis, objectively verifiable materials and evidence showing how the clothing items are marketed to customers and how customers view the items according to their objective characteristics may be of relevance to the analysis. In that context BAB point, in particular, to the following evidence, as demonstrating that, in its view, the presence of the slits in the clothing items does not affect a consumer’s view of the items as suitable for use with human dolls:

(1) Evidence on the commercial history of the BAB group as regards the production, import and sale of the clothing items, the marketing strategies of other dolls and dolls “accessories” retailers and the size of dolls they sell and the witnesses’ subjective views based on their observations of children’s behaviour (see [8] to [43]).

However, this is not objectively verifiable material of a type which evidences how consumers are encouraged to use these particular clothing items or how they view the clothing items’ objective characteristics as regards their suitability for

use chiefly with human dolls or animal toys. At most this evidence demonstrates that, aside from the presence of the slits, the clothing items are similar to clothing produced for human dolls, that there are human dolls on sale in the market place of an appropriate size for the clothing items to be used on them and that, in practice, the clothing items are sometimes used for that purpose. This does not suffice to detract from the analysis set out above.

(2) The sales data, in particular, that relating to Daisy and Honey. However, even if it is permissible to take account of such sales data as evidencing consumer behaviour (and that seems doubtful on the basis of the caselaw), the materials produced in this case are not sufficient to evidence how consumers view the clothing items, in terms of their suitability for use with human dolls or animal toys, with any degree of reliability or certainty:

(a) As regards the data in respect of sales of Honey and Daisy and related evidence (see [36] to [40]): (i) Honey and Daisy were only sold in the UK from near the end of the relevant period, from 2012 onwards, (ii) it is not possible with accuracy to establish how many of the sales referred to were made in the UK, (iii) whilst the data shows that around 21% of sales of accessories made with a Honey or Daisy doll when sold alone were of clothing items, it is not necessarily the case that all of these items were purchased for use with these dolls (see [40]), (iv) BAB produced no comparable statistics for sales of clothing items with its stuffed bears or other toys during the whole of the relevant period and (v) the evidence was that during the relevant period around 45% of sales were of accessories alone (with no toy); there is no way of knowing what doll or toy those items were purchased for use with.

(b) The data regarding sales of Lalaloopsy relates to periods after that in question and there is no breakdown of sales of clothing items with these dolls between those with slits and those without them (see [41]).

(3) BAB also noted that there were occasions when the clothing items were marketed for sale with toys with no ears or tails but only limited specific occasions were identified (see [35] and [56]). In the example given by Mr Parry of “bundle promotions”, the toys with which the relevant clothing items were marketed for sale included stuffed bears.

174. Equally I do not consider that the fact that the items may have the BAB pawprint logo on them or on the packaging is a matter to be taken into account in the analysis. In my view the fact that items are branded with an image associated with a bear is not a feature which of itself indicates that the items are suitable for use principally with stuffed bears. The logo simply indicates that this is a BAB product. It is reasonable to assume that a bear related logo is used as the sales of stuffed bears are a central part of BAB’s business model. However, it does not follow and there is no objectively verifiable evidence that this branding affects or influences the view which a consumer can be expected otherwise to have of the relevant items, according to their objective characteristics.

175. In my view, as applied under GIR 1 and 6, note 3, in effect, provides a definitive classification for an accessory where it can be identified as being suitable solely or principally use with articles within a particular heading:

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

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

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

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

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

30 176. BAB said that, in effect, this interpretation involves reading the dolls heading as though it is subject to note 3 thereby importing a principal use test into that heading. BAB argued that if note 3 is to be read in that way different wording could have been used (as in section XVII) (see [165]). Moreover, in its view, there is no suggestion in the wording of the dolls heading itself that a principal purpose test is to be applied; if anything, a main intended use test may be implied.

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

45 178. On that basis, it follows that if an item cannot be identified as an “accessory” suitable for use solely or principally, in the sense of chiefly or for the most part, with articles within a particular heading or sub-heading of chapter 95, it is to be classified as

an item in its own right under the heading or sub-heading within which it otherwise falls under the usual approach to classification. That would be the case, therefore, if, for example, the item is equally suitable for use with human dolls and animal toys such that, under note 3, it cannot be specifically identified as an “accessory” or “part” of either set of articles. The overall effect of note 3, therefore, as applied in conjunction

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179. In my view, the case law to which BAB referred does not support a different approach to that set out above in a case where, as here, the CN specifically requires a sole or principal suitability for use test to be applied in determining which heading or sub-heading applies:

(1) The decisions in *Sysmex*, *Huxley* and *Honeywell Analytics* address when and how a principal or main intended use is to be applied when such a test is not expressly provided for in the CN or related GIRs. I note that in *Honeywell Analytics* there was a difference of opinion as to when such a test may be used when not specifically provided for in the headings/notes. However, there is nothing in that case or the other cases referred to which casts doubt on the application of such a test when specifically provided for in the CN or GIRs or to suggest that “principally” should be interpreted otherwise than in accordance with its natural meaning.

(2) In *Kip*, *Hewlett Packard* and *Xerox* the courts considered the effect of note 3 to section XVI which sets out a principal function test as follows:

“Unless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines designed for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function”.

(3) An issue in these cases was whether machines carrying out a number of different functions (such as printer, copier, fax and scanner) could be classified under the above note by reference to an identifiable principal function. BAB emphasised that in *Xerox* it was found, at [101], that the machines were, by reference to their objective characteristics, “genuinely multifunctional and that it is not possible to conclude that the copying function is subsidiary to the data processing function or vice versa”.

(4) BAB submitted that, similarly the relevant items are genuinely multifunctional in that they are for use both with human dolls and stuffed bears; no one function is subsidiary to the other. I note, however, that the assumption in those cases was that if it was possible to identify a principal use or function, classification would be determined accordingly at the GIR 1 stage. It was only if the different functions were of equal importance, that it was necessary to have recourse to GIR 3(a). The general approach was, therefore, consistent with the approach taken here and, for the reasons set out, I do not consider that the clothing items are equally suitable for use with human dolls and animal toys.

180. In the *Van Landeghem* case the issue was whether certain “pick-up” vehicles were to be classified as (a) “vehicles principally designed for the transport of persons” or (b) “vehicles for the transport of goods”. BAB noted the following:

5 (1) The CJEU said that under the wording of the heading in (a), “the principal intended use of those vehicles is decisive for their classification. It follows from the use of the term 'designed', as supported by the settled case-law....that the principal intended use of the vehicle is decisive, provided that it is inherent to the product” (see [27]). The CJEU emphasised that “intended use is determined by the general appearance of the vehicles.... and on the basis of the entirety of the characteristics of those vehicles which give them their essential character” (see 10 [27], [29] and [34]).

It is uncontroversial that, as BAB said, this demonstrates the importance of looking at all the characteristics of the relevant items in assessing which heading they fall within.

15 (2) At [42] the CJEU concluded that, on that test, the principal intended use of the vehicles was for the transport of persons. They added that “[c]ontrary to the Commission's argument, the classification of the vehicles [under the heading for vehicles for the transport of goods] cannot reasonably be envisaged and therefore the application of General Rule 3(c)...is excluded on the basis of its very 20 wording.”

BAB said that this demonstrates that the CJEU considered that, notwithstanding the “principal use” test applicable under the heading for vehicles designed principally for the transport of persons, the vehicles could also have fallen within the heading for vehicles for the transport of goods on a prima face basis if that use could “reasonably be envisaged”. However, I note that earlier in the decision, 25 at [27], the CJEU said in terms that under the first heading “the principal intended use of those vehicles is decisive for their classification”. It seems that in the comment at [42] the CJEU was simply noting that the Commission’s argument that the tie-breaker in GIR 3 was in point had no basis at all (given the view that 30 use for the transport of goods could not reasonably be envisaged).

181. BAB pointed to *Invamed*, *Paderborner* and *Xerox* as supporting its view that the analysis is to be approached by assessing whether the presence of the slits or loops in the clothing items detracts from the suitability of the items for use as accessories with human dolls. In that context, BAB noted that in the majority of the items the slits and 35 loops are not very visible, apparent or “intrusive” which, in its view, together with the evidence set out at [8] to [43] (as to which see [171] to [174]), demonstrates that the items are intended for and are suitable for use with human dolls notwithstanding these features.

182. In *Invamed*, the tribunal held that mobility scooters should be classified as 40 “carriages for disabled persons..” (8713) rather than “other motor vehicles, principally designed for the transport of persons...” (8703) on the basis that the addition of certain features compromised their use by persons other than disabled persons. Following the hearing of this appeal, however, the UT has overturned that decision in *HMRC v Invamed Group Ltd & Ors* [2018] UKUT 305 (TCC) but the reasoning in the UT 45 decision is of relevance. In outline, the UT held the following:

5 (1) The UT said that the vehicles would fall within “carriages for disabled persons” only if they were designed solely for persons with a non-marginal limitation on their ability to walk (“**disabled persons**”) (based on the decision of the CJEU on a referral the tribunal made to it (see *Invamed Group and Others* [2016] EUECJ C-198/15)). They said, at [66], that where such vehicles are equally capable of being used by persons other than disabled persons “the real question is whether the vehicles are also, by reference to their objective characteristics, designed for the use of such persons” as well as for those who are disabled.

10 (2) The UT said, at [68] and [69], that the approach of looking for additional objective features of the vehicle which tend towards a design for use by disabled persons is not applicable given the objective characteristics are simply those of a motorised vehicle providing transport, at walking pace, which is capable of being used for that purpose by an able-bodied person, and there is evidence of actual
15 (and not merely theoretical) use by such persons. In that case the court must analyse whether the vehicle is designed for transport generally or solely for use by persons with a relevant disability.

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

25 (4) The UT held, at [72], that the tribunal was wrong (a) to conclude that, because the design of the vehicle and those features which benefitted disabled persons did not benefit able-bodied persons when compared to walking, the scooters could not be said to have been designed for such able-bodied persons and (b) to seek to identify whether particular features of the scooter afforded an
30 extra ability or facility to able-bodied persons:

35 “...where the core structure of the vehicle affords to an able-bodied person the same facility for mechanised travel as a disabled person, that fact without more would result in classification under heading 8703, because there could be no design distinction ascertainable from those objective characteristics between intended use by disabled persons as against able-bodied persons who may choose to use a scooter in preference to walking. It is not necessary to find something in addition to the ability to use the scooter instead of walking which aids or is an advantage to an able-bodied person in order to conclude that the scooter is designed for able-bodied persons as well as for disabled persons and
40 so is not designed solely for disabled persons. In seeking to identify such additional advantages, we consider that the FTT adopted the wrong approach.”

45 (5) They held, at [74] to [76] that analysing “the true question” (as set out at (3) above that:

“there are no material countervailing disadvantages in the use by an able-bodied person of a mobility scooter, and that since the basic

5 objective characteristics of such a scooter provide the same facility of mechanised movement to disabled and able-bodied persons alike, it must follow that viewed by reference to their objective characteristics the scooters are not designed solely for use by disabled persons and are not classifiable under heading 8713. They are motor vehicles principally designed for the transport of persons and fall as such to be classified under heading 8703.”

10 183. The UT took the view, therefore, essentially that the vehicles were to be classified for customs duty purposes as vehicles principally designed for the transport of persons on the basis that the vehicles were designed to provide both able-bodied and disabled persons with the same mechanised transport function; the design did not give rise to any material disadvantage for an able-bodied person in using the vehicle for that function. On that basis, the UT considered that the scooters could not be said to be designed solely for use by disabled persons.

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

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

25 186. In *Paderborner*, the CJEU held that a “malt beer base” produced from brewed beer could not be classified as such as it lost the objective properties and characteristics particular to beer when it was clarified and subjected to ultrafiltration; the resulting malt beer base did not look like beer and did not have the bitter taste specific to beer (see [37]). In *Xerox*, the UT upheld the tribunal’s decision that items known as “ink sticks”, which were imported for use exclusively with Xerox solid ink printers, should be classified as “printing ink” or “other inks” rather than as “parts” of printers. The UT rejected the criticism that it followed from the tribunal’s statement, at [91] of its decision, that the goods retained “at least some of the objective properties and characteristics of “ink”...”, that the goods had not retained *all* the characteristics of ink and so were not prima facie classifiable under the heading for inks. The UT noted that

40 45 in the relevant passage the tribunal were dealing with a submission based on

Paderborner that the goods had lost the objective characteristics and properties of ink. The tribunal made this comment in that context, “that is in order to show that it had not lost them” and evidently regarded *Paderborner*:

5 “as a case where the processes that the product had undergone so denatured it that it was no longer capable of answering the description of ‘beer’, whereas in the present case the processes the Goods had undergone did not mean that they were no longer capable of answering the description ‘ink’....”

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

Application of GIR 3

15 188. To recap, for the reasons set out above, my view is that:

(1) It is inherent in the wording of note 3, as interpreted in the light of the GIRs, that an “accessory” cannot be regarded as suitable for use solely or principally with articles falling in more than one heading or sub-heading in chapter 95. It follows that if an item does not meet the test in note 3 as regards any of the articles in the relevant headings, it is to be classified as an item in its own right according to the usual classification principles.

(2) On that basis, if, contrary to my view, the clothing items are equally suitable for use with human dolls and animal toys, they would not fall to be classified as “accessories” under either the dolls heading or the toys heading. Rather they would fall to be classified under the other toys heading and the relevant sub-heading for “other” (9503 00 99).

(3) If I am wrong on how the test in note 3 applies and the clothing items can be classified within both the dolls and the toys heading on a prima facie basis, for the reasons set out below, my view is that, under GIR 3, they are to be classified under the toys heading and the sub-heading “stuffed” (9503 00 41).

189. As regards applying GIR 3(a) in this context, the parties referred to a number of cases, including in particular the UT decision in *Xerox*. At [50], the UT took the view that when deciding between competing headings on the basis of which is more specific, the comparison should be made “between the relevant part of each heading rather than the heading as a whole” on the basis that:

35 “The language of GIR 3(a) refers to the heading which “provides the most specific description”, and a heading which is itself a broad category of goods but contains within it a specific description which fits the goods in question does, it seems to me, “provide” that description. It also I think accords more with the apparent intent of GIR 3(a) that if goods are specifically described in a heading they should be classified under that heading. I will therefore proceed on the basis that the question is whether the relevant part of heading 3215 which describes the Goods (‘printing ink’ or ‘other inks’) is a more specific description than the relevant part of heading 8443 (‘parts’ of ‘other 15 printers’).”

190. The UT went on, at [61], to accept the argument that the tribunal had made an error in their approach to GIR 3(a) on the basis that, as set out at [54], the exercise does not require any further comparison of the objective characteristics and properties of the goods. Once an article has been *prima facie* classified under particular headings by reference to its objective characteristics and properties “the result is a binary determination: either a tariff heading describes the article or it does not”. Whilst GIR 3(a) “requires an examination of the competing tariff provisions” that exercise “does not call for any further comparison of the objective characteristics and properties of the goods” rather it is “a textual exercise requiring a comparison of the language of the competing headings, to see which, if any, more specifically describes the goods.” The UT continued at [55] that to put it another way:

“the GIR 3(a) exercise is not concerned with examining the goods again to see how closely or obviously they fit under a particular heading, or with which of two or more competing headings the goods have more affinity. It does not matter for this purpose whether the conclusion that the goods are *prima facie* classifiable under a particular heading was an obvious and straightforward one, or was a narrow decision under which the goods only just scraped in. Either they are in the heading or they are not. What is of relevance at this stage is how specific the description in the heading is.”

191. The UT noted, at [65], that there is guidance on how to apply this rule at para (IV) of the Explanatory Note to GIR 3 as follows:

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

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

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

192. The UT went on to refer to a number of examples falling in (b) as follows:

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

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

193. The UT accepted that the examples given above were relevant and helpful particularly the second which the UT considered was “closely similar to the present case” and concluded that:

“Here too the Goods have been specially manufactured to fit into a more complex object, and are “shaped and identifiable for use in” printers. I will assume that they are *prima facie* classifiable as parts of printers. But they are also *prima facie* classifiable as inks, which as explained above is in my judgment both a description of the material of which they are made, and also a

reference to their intended function. The example tends to support the view that I have already expressed that the Goods are to be classified not as parts of printers but as inks, the latter being a more specific description than parts of printers, which covers a wide range of different items. Similar considerations
5 apply to the other example where a carpet designed for use in a car is more specifically described as a carpet than as an accessory for a car.”

194. In *Hasbro European Trading BV v Revenue & Customs* [2018] EWCA Civ 1221, the Court of Appeal agreed that, as was said in *Xerox*, that textual analysis must be “of prime importance” in a GIR 3(a) case (see [41]). Newey LJ added, however, that the
10 fact that the HSEs in respect of the GIRs direct attention to which description “more completely identifies” the goods indicates that the “objective characteristics and properties of the goods” can also be significant:

“GIR 3(a) seems to me to call for an evaluation of which heading provides the most specific description of the relevant goods. Often, it may not in practice
15 be necessary to look beyond the wording of the rival headings to determine this. The particular characteristics of the goods can potentially be material, however.”

195. Lord Justice Newey also thought that a certain amount of guidance as to how GIR 3(a) should be applied can be gleaned from Case C-183/06 *RUMA GmbH v Oberfinanzdirektion Nürnberg* [2007] ECR I-1561. In that case the issue was whether
20 keypad membranes for insertion on the keypad of a mobile phone was to be classified (a) under heading 8529 of the CN as “[p]arts suitable for use solely or principally with the apparatus of headings 8525 to 8528”, which includes mobile telephones or (b) under heading 8538, as “[p]arts suitable for use solely or principally with” certain
25 apparatus which include “[b]oards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity”.

196. Lord Justice Newey cited, at [42], the following passage at [35] of the CJEU’s decision in *Ruma* where they comment on the application of GIR 3(a):

“According to the wording of [GIR 3(a)]....which specifically covers the situation where goods are prima facie classifiable under two or more headings, 'the heading which provides the most specific description shall be preferred to headings providing a more general description'. In the present case, it must be
30 pointed out that, as regards the objective characteristics and properties of the keypad membrane at issue in the main proceedings, and in particular given the fact that it refers expressly to '[p]arts of apparatus of subheadings ... 8525 20 91', namely to parts of mobile telephones, subheading 8529 90 40 provides a more specific description than subheading 8538 90 99 which covers a much
35 wider and more varied range of goods, as shown by its title read in conjunction with that of heading 8537" (emphasis added).”

197. He continued to note, also at [42], that in that case, the heading covering “a much wider and more varied range of goods” was thus rejected. He said, at [43], that:

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

198. BAB also referred to the UT decision in *HMRC v TomTom International BV* [2013] UKUT 498 where the UT took a similar approach to applying GIR 3 as set out in *Ruma*.

199. Having regard to the approach set out in the caselaw, I have concluded that, for the purposes of GIR 3(a) neither of the dolls and toys headings provides a more specific description of the clothing items than the other:

(1) I can see no reason why, in comparing the two relevant headings, the toys heading should not be read as including reference to “parts and accessories” suitable for use solely or principally with toys falling within that heading. Plainly the toys heading is only in point if read subject to note 3. It makes no sense, therefore, to read it, as BAB argued, without reference to note 3; BAB provided no convincing reason why that should be the case.

(2) On that basis, the comparison is between, to paraphrase, descriptions of the clothing items (a) as accessories of human dolls and (b) as accessories of animal toys (of a stuffed kind). On a textual analysis these descriptions are simply of accessories for two different ranges of items, namely, human dolls and animal toys. I cannot see how one of these descriptions can be said to more specifically describe or more completely identify the clothing items than the other. Each description identifies the clothing items as accessories but for use with different articles, namely (a) human dolls or (b) animal toys.

(3) On the authority of *Ruma* (as cited with approval in *Hasbro*), BAB asserted that the dolls heading is more specific primarily because the toys heading covers a wider and more varied range of “accessories” than the dolls heading. That assertion was made on the basis that (a) there is a wide variety of animal and other non-human forms compared with a single human form and that the term “dolls” implies articles of more limited sizes than “toys” and (b) it follows that there must be a wider and more varied range of animal toys than human dolls and, correspondingly, of “accessories” for those animal toys. However:

(a) As set out in *Hasbro*, whilst in general terms the fact that a heading covers a less broad and varied range of goods may indicate greater specificity, the essential question is which heading provides *the most specific description of the relevant goods* or which heading *most completely identifies those goods*.

(b) In *Ruma*, it is readily apparent that a description of a keyboard membrane as, to paraphrase, a part of a mobile phone is clearly more specific and more completely identifies the membrane than a description as a part of “boards, panels, consoles, desks, cabinets and other bases....for electric control or the distribution of electricity”.

(c) However, in my view the assumption that there is a more limited range of items which may fall to be classified as accessories of a human doll compared with the range that may be classified as accessories of an animal toy, does not mean that the dolls heading provides a more specific description of or, more completely identifies, the clothing items. The fact remains that the clothing items are captured by each heading essentially on the same basis, namely, that they are “accessories” but suitable for use with,

in one case, human dolls and, in the other, animal toys. Each heading simply captures one of the potential uses of these items as “accessories”.

5 (4) In any event, it seems doubtful that it can simply be assumed that more items may be classified as “accessories” of human dolls than of animal toys on the basis that animal toys may take a number of different forms and be of a greater variety of sizes than human dolls. It is a matter of common experience that human dolls come in all different shapes and sizes, with different appearances and may be made of different materials; a vast array of accessories for use with such dolls can be envisaged.

10 200. On that basis the clothing items fall to be classified under GIR 3(c) by reference to the heading which is the last in numerical order, namely, the animal toys heading (and the sub-heading stuffed) (9503 00 41).

Submissions on footwear

15 201. The parties essentially took the same stance as set out above as regards all items of footwear. They made the following main points on the evidence:

20 (1) HMRC said that the shoes are specifically designed in terms of their distinctive round shape and size to fit BAB’s bears. They are not of the size and shape which indicates that they are for use with human dolls as they do not correspond to a human shaped foot. The fact that these shoes fit onto some specific types of doll is irrelevant.

25 (2) BAB said that the shoes are plainly equally suitable for use as accessories for human dolls and animal toys. The evidence demonstrates that the fact that they are round is not to do with the bears; bears do not have round feet. The evidence is that they are designed with that shape due to the difficulty of inserting feet attached to non-moving joints into a shoe with a foot shape. In BAB’s view the paw print logo appearing on some of the shoes is irrelevant for the reasons set out above.

30 (3) HMRC responded that there is no real evidence that a rounded shoe of this kind fits more easily on a doll with fixed joints (which many dolls have). The examples in the bundles do not show human dolls with rounded feet of the type for which these shoes are suitable. The fact that BAB’s shoes fit some dolls with more rounded feet is irrelevant to classification; that does not of itself make them identifiable as shoes suitable for use for human dolls.

Conclusion on footwear

35 202. Applying the same analysis as set out in relation to the clothing items, I have concluded that (a) the footwear is also to be classified under the toys heading and the sub-heading “stuffed” (9503 00 41) and (b) if, contrary to my view, the footwear can be classified on a prima facie basis under both the dolls and the toys headings, for the same reasons as set out in relation to the clothing items, it is to be classified under GIR
40 3(c) under heading 9503 00 41 as the last applicable heading in numerical order.

203. I note the following as regards the evidence:

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

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

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

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

Sets comprising clothing items

204. In my view, for the reasons set out below, (a) two or more clothing items put up for retail sale in a set, each of which contain slits (such as a trouser and hoodie set) or one of which includes a slit or slits and (b) the sets of items set out at [3], one of which is an item of clothing with a slit, are to be classified under the toys heading and the sub-heading "stuffed" (9503 00 41).

205. Where each item in the set includes a slit or slits, note 4 is not in point as that applies only where one of the items in a set put up for retail sale falls in a different heading to 9503. The sets heading (9503 00 70) is also not in point as according to the HSEs, it does not apply where the items in a set both fall within the same heading/sub-heading as is the case here.

206. Where only one item of clothing of a set of two items contains a slit, the items fall within different headings (namely (a) the dolls heading (and the sub-heading for "parts and accessories") as regards the item without a slit and (b) the toys heading (and the sub-heading "stuffed") as regards the item with a slit or slits).

(1) HMRC appeared to consider that, in this scenario, the sets heading takes priority over the application of GIR 3(b) which determines the classification of items put up for retail sale in sets according to "the material or component which gives them their essential character in so far as this criterion is applicable".

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

(3) On that basis, in my view GIR 3(b) applies to classify the relevant clothing items under the animal toys heading on the basis that the presence of the slits in one of the clothing items in the set gives the overall set the essential character of accessories suitable for use principally with animal toys of a stuffed kind.

5 207. The sets described in [3] above also contain items which viewed individually may be classified in different headings (on my analysis, as regards the items with slits under the heading for animal toys of a stuffed kind and, as regards the other items as “accessories” for human dolls (as set out below)). In my view the same analysis applies as set out at [206]. Under GIR 3(b) the slits in one of the clothing items in the set gives
10 the overall set the essential character of accessories suitable for use principally with toys of a stuffed kind. It is clear from the slits in the main clothing item that the overall outfit is suitable for use principally with a stuffed toy and the remaining items are designed to complement that outfit.

15 208. Finally, I note that in any event the same rate of duty would apply if the items are instead viewed as falling within the sets heading on the basis that GIR 3(b) does not apply or that the essential character of the items cannot be determined under that provision.

BAB’s fall back argument

20 209. BAB argued that if, contrary to its view, it is found that the clothing items and footwear fall within the animal toys heading, they should be classified under the sub-heading for “other” (meaning other than “stuffed”) (9503 00 49). In its view, (a) the items are equally suitable for use with hard-bodied toys as for with stuffed toys (b) neither of these sub-headings provides a more specific description of the goods than the other and (c) therefore, they are to be classified under the last sub-heading in numerical
25 order for “other”, 9503 00 49.

30 210. HMRC argued that (a) the items do not have characteristics which render them suitable for use chiefly with hard-bodied animals and (b) in any event, under GIR 3(a) the sub-heading “stuffed” is to be preferred on the basis that it provides a more specific description of the relevant items than that for “other” which covers a broader range of toys.

35 211. As set out in full above, it is plain that the clothing items and footwear are specifically designed to fit stuffed bears of a particular size and shape. Whilst theoretically the items could fit a hard-bodied animal of similar dimensions, no evidence was presented justifying a conclusion that the items are suitable for use chiefly or for the most part with such animals. If contrary to my view, the items can be classified on a prima facie basis under each sub-heading, I would accept BAB’s argument that neither of the applicable sub-headings provides a more specific description than the other such that the items are to be classified, under GIR 3(c) by reference to the sub-heading for “other” as the last in numerical order.

40 Decision on all other items

Submissions on plastic and textile items

45 212. HMRC submitted that the plastic and textile items are not correctly viewed as parts or accessories at all and either have an independent “play value” or a “utilitarian” function of their own. In their view, on that basis the classification of these items depends on what they are made of and whether they are imported in sets or individually.

For example, toys of plastic should be classified in heading 9503 00 95 and toys put up in sets in heading 9503 00 70.

213. HMRC made the following main points in support of their position that these items are not accessories:

5 (1) The case law establishes that an item is to be classified as an “accessory” to another item only if it performs a particular service relative to the main function of that other item. That test is not satisfied as regards these items merely because a child can use them in conjunction with a doll or toy. In fact, many of the items, such as sunglasses, mobile phones and i-pad, have “independent play value”
10 and/or are clearly suitable for playing with in association with a stuffed bear or a doll or on their own. Some of the items, such as backpacks, purses, handbags, suitcases and furniture, have a “utilitarian” function in that they can be used, for example, to carry or hold things.

15 (2) The HSEs contain several provisions indicating what constitute accessories in this context:

(a) In the notes, the reference to parts and accessories of a doll is exemplified by “heads, bodies, limbs, eyes...moving mechanisms for eyes, voice-producing or other mechanisms, wigs, dolls’ clothing, shoes or hats. It is probable that items listed up to voice producing and other mechanisms
20 are included as parts and the remaining items as accessories. The fact that the parts referred to are all parts of the body of the doll gives a clear indication of the scope of the “parts” which are intended to be included within this heading. The fact that the accessories refer only to clothing (namely, to items to be attached directly to the body of the doll) is an
25 equally clear indication of the scope of the “accessories” which are intended to be included.

(b) The HSEs emphasise that “other toys” includes all toys not included in (A) to (C) and includes a wide variety of toy items some of which are specifically intended to be used with dolls such as dolls houses and
30 furniture, including bedding, dolls’ tea sets, toy shops and farmyard sets.

(c) It is plain from the above that not everything which can be played with in association with dolls can or should be classified as an accessory for a doll. The HSEs clearly contemplate classification as “other toys” for items which are specifically designed to be used with dolls.

35 214. BAB submitted that all of these items are accessories of dolls and/or toys and, applying the same analysis as set out in relation to the clothing items, they are to be classified under the dolls heading and the sub-heading for parts and accessories (9503 00 29). BAB made the following main points:

40 (1) These items are plainly accessories for human dolls and animal toys both as a matter of ordinary English and common sense and under the principles in the caselaw. The function of dolls and toys is as an object of amusement for a child to play with. According to their objective characteristics and properties, such as the size of the items as specifically scaled for use with dolls and toys, these items are clearly designed to enhance this “play function” as an experience for the child.
45 The addition to certain items of the elastic bands, of a size to fit a doll’s arm or foot as appropriate, reinforces this assessment.

5 (2) The guidance published by HMRC supports the view that these items are accessories; they state that such accessories include “any other articles of limited functionality and sized to be used in play scenarios alongside dolls” (see [116(1)]). There is nothing in the HSEs to indicate these items are not to be viewed as accessories of dolls. In the French language version of the HSEs the reference is merely to tea sets and not to dolls’ tea sets. There is no indication that the toy shops and farmyard and similar items referred to specifically for use with dolls or toys.

10 (3) The HSEs specifically refer to wigs, dolls clothing, shoes and hats as accessories to dolls. BAB does not accept that this suggests that in this context accessories are confined to items which can be placed on a doll. However, this does make it entirely clear that there can be no material distinction between such items and other items which are to be worn by or directly attached to a doll or toy such as headbands, crowns, tiaras, wands and sunglasses.

15 (4) The items do not have “independent play value” or a utilitarian function. That they are not designed for use by a child as toys in their own right is apparent simply from the size and scale of the items (as demonstrated by comparison with items designed for children in some cases) and, in some cases, as reinforced by the presence of the elastic bands as set out above. A child would have no use for these items other than in conjunction with a doll or toy. The elastic bands are too small for a child to use and a child would not need to use them; the child could simply hold the relevant item.

20 215. HMRC responded that there is insufficient objectively verifiable evidence for the tribunal to conclude that the size of the items themselves and of the elasticated loops renders them suitable only for use as accessories with toys and dolls. In particular, HMRC noted that only very limited comparator items were produced and that the evidence on sizing of a child’s wrist was taken only from a jeweller’s website, no evidence was produced on the size of a child’s head and that dolls may plainly vary considerably in size. Accordingly drawing a distinction based on these factors is fraught with difficulty.

Caselaw on meaning of parts and accessories

216. The parties referred to the following cases as regards what constitutes a part or accessory for the purposes of the CN.

35 217. In *Turbon International GMBH v Oberfinanzdirektion Koblenz* (Case C-276/00) [2002] ECR I-1389 (“*Turbon I*”) the question was the correct classification of ink cartridges specifically designed for use in a particular type of ink jet printer. Three potential headings or sub-headings were in play: 3215 90 80 (printing ink - other), 8471 60 40 (printers), and 8473 30 90 (under “parts and accessories ... suitable for use solely or principally with (printers)”). The court said, at [29], that it was apparent that the cartridge was specifically designed for, and could only be used by, a particular type of printer and as “the cartridge includes a technically sophisticated mechanism ensuring a controlled flow of ink during the printing process, the national court wonders whether such a cartridge should not be regarded rather as part or accessory of a printer”.

45 218. The court rejected the argument that the cartridge was a part of the printer as follows, at [30] and [31]:

5 “... it should be observed that the word part, within the meaning of CN heading 8473, implies a whole for the operation of which the part is essential... and this is not so in the case of the cartridge....While it is true that, without an ink-cartridge, a printer is not able to carry out its intended functions, the fact remains that the mechanical and electronic functioning of the printer in itself is not in any way dependent on such a cartridge. The inability of the printer, in the absence of an ink-cartridge, to transcribe on to paper the work produced with the aid of a computer is caused by lack of ink rather than a malfunctioning of the printer.

10 For those reasons an ink-cartridge such as that at issue in the main proceedings, which, in view of its characteristics...plays no particular role in the actual mechanical functioning of the printer, cannot be regarded as part of a printer....”

15 219. The court continued, at [32], that equally, such a cartridge cannot be classified under heading 8473 as an accessory of the printers in question. At [12] the court had noted that “according to the [HSEN] relating to heading 8473, '[t]he accessories covered by this heading are interchangeable parts or devices designed to adapt a machine for a particular operation, or to perform a particular service relative to the main function of the machine, or to increase its range of operations’”. At [32] they concluded that applying that guidance:

20 “While the cartridges are interchangeable, they are not designed to adapt the printers for a particular operation, or to perform a particular service relative to their main function, or to increase their range of operations, within the meaning of the [HSEN] relating to heading 8473. Such cartridges merely enable ESC printers to fulfil their usual function, namely, the transcription on to paper of work produced with the aid of a computer.”

25 220. The court said that such classification is, moreover, corroborated by the HSEN relating to heading 3215 which includes mere ink-filled cartridges for ordinary fountain pens. As they considered the Advocate General rightly pointed out at [59] of his opinion:

30 “such cartridges are to fountain pens what the cartridges at issue....are to ESC printers, since their function is both to hold the ink and to release a regular flow of ink necessary for the use of an instrument designed to print on paper and they have a format, which varies according to brand, such as to allow them to fit inside the pen for which they are designed”.

35 221. In *Turbon International GMBH v Oberfinanzdirektion Koblenz* (Case C-250/05) [2006] ECR I-10531 (“*Turbon 2*”) the CJEU referred to further evidence in the national court which had shown that the cartridge itself played an essential role in the printer’s mechanism. They reached the same result as in *Turbon 1*, but by a different route. They now accepted that the cartridge itself was a part of the printer, but the ink was not. In consequence, the CJEU said, at [19], that the cartridge was to be treated as:

40 “made up of two elements which, when considered separately, may each be classified under one heading, namely subheadings 3215 90 80 or 8473 30 90 of the CN, but neither of those headings covers the goods as a whole.”

45 222. It was, therefore, necessary, under the general rules, to determine which element provided the “essential character”. On this point the court held, at [23], that the ink was determinant, with the result that the correct classification was 3215 90 80:

5 “Even if an ink cartridge ... is constructed in such a way that the Printer does not function in the absence of that cartridge, the fact remains that the ink contained in the Cartridge is the most important factor for the purpose of using the goods at issue. In fact, the ink cartridge is not inserted in the printer in order to make the printer itself function but specifically to supply it with ink. Therefore, the ink must be regarded as determining the essential character of an ink cartridge, such as that at issue in the main proceedings.”

10 223. The CJEU did not find it necessary to revisit its finding as to the meaning of “accessory” in its first judgment. However, in her opinion Advocate General Kokott made the following observations, at [56]:

15 “... as the court correctly held in its first judgment (para 32) it is not possible to classify the ink-cartridges under CN heading 8473 as an 'accessory'. As the explanatory note to HS heading 8473 makes clear, only something which enables the principal item to perform a function over and above its standard functions counts as an accessory. This is not the case with the ink-cartridges, which, though necessary to enable the printer's standard functions, do not enable anything beyond that.”

20 224. In the light of the new evidence, however, she held that the cartridge could be treated as a “part” of the printer because it had been shown to be essential to its mechanical operation. She compared it to the paper-tray, by which paper was delivered to the printer and which “no-one would doubt” was part of the printer (at [69]). By contrast “the ink in the cartridges”, though “suitable solely for use” with this type of printer, was not essential for its “mechanical and electronic functioning”, and was not therefore “part of” the printer (at [72]). She would have held (unlike the court) that 25 neither element could be regarded as giving the cartridge its essential character (at [99]), so that under the general rules the relevant classification would be the last in numerical order (that is 8473 30 90).

30 225. The same approach was taken to whether something was a “part” or “accessory” in Case C-152/10 *Unomedical A/S v Skatteministeriet* which concerned the classification of plastic drainage bags for catheters and dialysers. The relevant headings were 3926 (“other articles of plastic”) and 9018 (medical appliances including “catheters” and “dialysers”), taken with chapter 90 note 2(b) (“parts and accessories”). The court described the function of the catheter bags as follows, at [15]:

35 “The bags are manufactured from PVC foil and injection-moulded plastic components. The bags are designed to function together with a standard balloon catheter, but are imported and sold without the catheter. The function of the bags is to collect urine, at the same time ensuring a sterile environment around the catheter and facilitating observation, measurement and sampling of the drained urine.”

40 226. The court said that the dialyser bags performed a similar function (at [17]). The court observed, at [27], that catheters and dialysers were provided for by specific subheadings under 9018, and that the drainage bags could only be included in that classification on the basis that they were parts or accessories under note 2(b). The court also noted, at [28], that note 2(b) to Chapter 90 of the CN states that “[o]ther parts and 45 accessories, if suitable for use solely or principally with a particular kind of machine, instrument or apparatus, or with a number of machines, instruments or apparatus of the same heading ... are to be classified with the machines, instruments or apparatus of that kind”.

227. The court referred, at [29], to the comments in *Turbon 1* at [30] and [32] as set out above. They said, at [30], that there is “nothing which permits the conclusion that those notions cannot be defined identically” in respect of the relevant headings and that would ensure “a coherent and uniform application of” the CN. At [35] they held that neither
5 set of goods could be classified either as a “part” or as an “accessory” in respect of catheters or dialysers on the basis that, at [36]:

“Neither the urine drainage bag for catheters nor the drainage bag for dialysers is indispensable for the functioning of those instruments or apparatus. It is
10 apparent that catheters do not depend on the presence of a urine drainage bag in order to function and, similarly, that dialysers do not depend on the presence of a drainage bag in order to carry out dialysis, since the process of cleansing blood is complete at the time when the bag is used, that bag serving only to collect the liquid drained (see, by analogy, Case C-339/98 *Peacock* [2000] ECR I-8947, paragraph 21, and *Turbon International*, paragraph 30).”

228. They considered, at [37], that this finding was not affected by the “fact that dialysers work only when a bag is attached”. In that regard:

“suffice it to state, as the European Commission points out, that, were it not for the security mechanism with which that apparatus is fitted, the dialysis process could be carried out without a bag, that security mechanism being the sole link
20 between the apparatus and the bag (see, by analogy, Case C-250/05 *Turbon International* [2006] ECR I-10531, paragraph 23).”

229. They said, likewise, at [38]:

“those bags do not enable the instruments and apparatus to be adapted for a particular operation, nor do they increase their range of operations, or enable
25 them to perform a particular service connected with their main function. A drainage bag attached to a catheter has the sole purpose of collecting liquid drained after the catheter itself has fulfilled its own function, which is to drain the urine present in the bladder. For its part, a drainage bag for a dialyser does not enable that apparatus to perform operations other than that for which it is designed, namely that of cleansing blood.”

230. In *Amoena (UK) Ltd v Revenue and Customs Commissioners* [2016] STC 1884 the Supreme Court considered these cases in the context of deciding on the appropriate customs classification of a Carmen mastectomy bra designed to be worn with an artificial breast form, by women who have undergone surgical removal of one or both
35 breasts. The Supreme Court held that the item should be classified under chapter 90, as a part or accessory for an artificial part of the body.

231. At [38] Lord Carnwath, who gave judgement with which the other panel members agreed, commented that the two *Turbon* cases are of little direct help because the facts were so different. He said that as Arden LJ recognised in the Court of Appeal’s decision
40 in *Amoena*, the main significance of the *Turbon* cases was as regards the guidance given on the meaning of “parts and accessories”, as then applied in *Unomedical*. In Lord Carnwath’s view “that aspect of the court’s reasoning, relating to the interpretation of the CN, must be treated as authoritative, regardless of its application to the particular facts”.

232. However, he continued, at [39], that like McCombe LJ in the Court of Appeal he had “difficulty” with some of the reasoning in *Turbon 1*:

5 “If, as the court said, one test under the relevant explanatory note was whether the cartridge performed “a particular service relative to (the) main function”, the natural answer would be yes. The only reason given by the court for reaching the opposite view was that the service merely supports the printer's "usual function" of transcribing work onto paper. That seems to make little sense. The "usual" function of a printer is also its "main" function, and the ink cartridge performs the "particular service" of providing ink for that function.”

10 233. At [40] he said that in *Turbon 2* Advocate General Kokott tried to get round the problem in a different way. She interpreted the CJEU as holding in *Turbon 1* that what was required was something enabling the principal item to perform a function “over and above its standard functions”, which the ink-cartridges did not do. He thought that in the Court of Appeal decision, Arden LJ in effect interpreted that case in the same way. However, he noted that “that is not what the guidance says, nor what the court itself said in *Turbon 1*. Nor is it a natural meaning of the word “accessory”.” Referring to an example given by the UT, he said that “a bicycle bell can fairly be described as an "accessory" to the bicycle, even if does not add to its range of functions”.

15 234. In his view, at [41]:
20 “a better answer is one which distinguishes more clearly between the printer itself, and the materials used by it. Ink and paper are both necessary for the printer to do its work. But one would not naturally describe either as a "part or accessory" of the printer, any more than petrol would be regarded as a "part or accessory" of a car. The words "particular service relative to" its function need to be more narrowly construed as referring to services directly connected with the mechanisms or processes by which it performs that function. As Advocate-General Kokott said in *Turbon 2* (para 72), the ink though "suitable solely for use" with this type of printer, was not essential for its "mechanical and electronic functioning". This approach is also consistent with the ultimate conclusion of the court in *Turbon 2*. Although the cartridge (unlike the ink) played a part in the mechanical functioning of the printer, its dominant or "essential" function was to supply it with ink. This is not a distinction which arises in the present appeal.”

25 235. He said, at [42], that *Unomedical* is of more direct relevance. He thought that on one view, “it was a surprisingly narrow application of the guidance. The bags were designed specifically for use with the catheters or dialysers, and might be said to perform a particular service relative to them. In ordinary language, there would be nothing unnatural in describing them as "accessories"”. However:

30 “what seems to have mattered to the court was that the bags played no direct part in the actual processes of either appliance. As they said of the dialyser bag, "the process of cleansing blood is complete at the time when the bag is used, that bag serving only to collect the liquid drained ..." (para 36). Similarly, the catheter bag had the sole purpose of collecting liquid drained "after the catheter itself has fulfilled its own function, which is to drain the urine present in the bladder" (para 38).”

35 236. He continued that it is difficult to translate the reasoning of the *Turbon* cases or *Unomedical* to an artificial breast form, whose function does not depend on any mechanical or other active process (at [43]). In any event, he did not see them as showing any error in the approach of the UT, at least as regards their conclusion that the bra is an accessory. He noted that Arden LJ held that the bra was not a “part”,

applying the statement in *Turbon I* that the notion of parts implies “a whole for the operation of which the part is essential” and, at [44], that she held it was not an “accessory” because it did not “improve the performance of the breast form” or give it “any additional functionality”. He did not agree with this conclusion but rather agreed with McCombe LJ that the bra is an accessory:

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“If it were necessary to identify some "additional functionality" in that sense, the requirement would in my view at least arguably be met by the contribution of the bra to (as the FTT found) lessening the psychological impact of having had the mastectomy. However, for the reasons I have given I do not see that as an essential requirement under the second part of the relevant test. I agree with McCombe LJ that on a natural reading the bra is an "accessory". By holding the breast form in place, the bra enables it to perform its function. The bra thus "performs a particular service relative to the main function" of the breast form. Contrary to his view I do not find that conclusion inconsistent with the principles established by the CJEU in the cases cited.”

237. HMRC submitted that Lord Carnwarth was here effectively upholding the approach of the UT which had held (at [57]) that:

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

Conclusion on plastic and textile items

25 238. I have concluded that the plastic and textile items are to be classified for customs duty purposes as accessories of a human doll. I am assuming for this purpose that an item can be classified as an accessory of a human doll only if it is identifiable as suitable for use principally with such a doll.

30 239. Under the caselaw set out above an item is an accessory of or for another item for the purposes of the CN if it plays a particular service relative to the main function of that other item. It seems to me that the main function of a doll of the type with which these items are suitable to be used is to serve as an object of amusement and play. According to their objective characteristics and properties, the plastic and textile items perform a particular service in relation to that main function in adding to or enhancing the way in which such dolls can be used for amusement or play.

Items corresponding to those in the HSEs

40 240. I note that the HSEs list clothes, shoes, wigs and hats as examples of accessories of a human doll. The listed items all have in common that they can be used to dress or adorn the doll itself. In the terms used in the caselaw, they can be regarded as performing a particular service relative to a doll’s main function by adding to its amusement or “play value”, specifically by reference to adding to its character or appearance. These items enhance the scope for a child to imagine a particular role or character for a doll in playing with the doll.

45 241. I cannot see any basis in principle for drawing a distinction between the listed items and the items in this case, which can be used similarly to adorn or dress a doll, namely, sunglasses, headbands, medals, crowns and tiaras:

5 (1) These items are designed to be placed on or worn by a doll or toy by way of adornment in the same way as the items listed in the HSEs. Under the test set out in the caselaw, these items perform precisely the same service relative to the main function of a doll as those listed in the HSEs, namely, in enhancing the doll as an object of amusement by adding to its character and appearance.

(2) These items are specifically identifiable as accessories of a doll or toy due to the sizing and scaling of the items.

10 (3) Due to their size and nature these items have no function as an object of amusement otherwise than when used on a doll or toy. Whilst the items are sized for relatively large dolls (compared with, for example, Barbie), I consider it is plain from their size together with their composition and appearance that they are not suitable for children to use on themselves for “play value”, for example, in dressing up games.

15 (4) Whilst these items could be used on either a doll or a toy they are by design suitable, in the sense of right or appropriate, principally, in the sense of chiefly or for the most part, for use with human dolls given they are scaled down versions of corresponding items used by people.

Other items

20 242. In my view, the remaining plastic and textile items are also accessories of a doll or toy notwithstanding that they extend beyond the types of items of clothing and adornment listed in the HSEs (and I note that list is plainly not exhaustive).

25 243. Under the caselaw, I can see no basis for distinguishing between items according to whether they can be directly placed on a doll or by reference to the level of active involvement required from a child. In my view, the critical factor is that all the remaining plastic and textile items can be used to enhance the amusement or play value which can be derived from a doll, essentially in the same way as those listed in the HSEs, by adding to the character of the doll and/or the role-play scenarios in which a child can use the doll. I cannot see that it makes a material difference to the analysis that, in order to derive amusement from some of these items, the child would have to be involved actively in manipulating the doll and the relevant item to make them interact in a more extensive way than by simply placing the item on the doll. In each case these items enable a child to use the doll for role play in situations or, according to the character, suggested by the item in question. For example, a child may wish to enact a scenario where the doll dresses and undresses and stores its clothes using the furniture items or where the doll styles and dries its hair using the hairdryer set.

35 244. The fact that the HSEs cite items such as dolls’ tea sets, dolls’ houses, toy shops and farmyards as examples of “other toys” does not, in my view, suffice to indicate that items of this type are not accessories of dolls. I note that, as BAB pointed out, in the French language version of the CN, the reference is merely to tea sets with no reference to dolls; that indicates that in fact the intention is to refer to tea sets scaled for use as a toy by a child himself/herself. There is no indication that toy shops and farmyards are items which are suitable for use with dolls or toys; they may well be items suitable for the child to use in enacting his/her own role play in interacting with the item. The fact that it has been decided that dolls’ carriages and dolls’ houses should be classified as
45 items in their own right does not necessarily indicate that items such as furniture cannot

be regarded as an accessory of a doll or toy; if that were the intention, those items also could also have been dealt with specifically in the CN.

245. In my view, essentially for the same reasons as set out above, with the exception of the baby carriers, these items are accessories which are suitable principally for use with a human doll:

(1) These items are specifically identifiable as accessories of a doll or toy due to the sizing and scaling of the items and, as regards some items, given that they can be attached to a doll or toy with elastic loops. The evidence on the size of the elastic loops compared with the size of a child's wrist was insufficient to form a conclusion on whether the loops could be used on a child. However, in any event, a child would have no use for the loops. It is fanciful to suggest that a child would want or need to attach a toy surfboard, skateboard or suitcase to himself/herself with an elastic loop.

(2) Due to their size and nature these items have no function as objects of amusement otherwise than when used on or with a doll or toy. Again I consider it is plain from their size together with their composition and appearance that these items are not suitable for children to use as toys in their own right without a doll or toy or for use as functional items.

(3) Whilst these items could be used on either a doll or a toy they are by design suitable, in the sense of right or appropriate, principally, in the sense of chiefly or for the most part, for use with human dolls given they are scaled down versions of corresponding items used by people. There is nothing in their design or appearance to suggest they are chiefly for use with animal toys (whether of a stuffed kind or otherwise). For the same reasons as set out at [173] above, my view is that the presence of BAB's logos on some of the items (such as the furniture) is not a material factor. The presence of that branding does not render the items inherently suitable for use chiefly with stuffed animal toys.

246. In my view, the baby carriers are equally suitable for use with human dolls and stuffed bears. In the overall context of the design and composition of these items, presence of the slit on the baby carrier (and the description on the packaging as "bear stuff") indicates that these items are suitable for use with stuffed bears as well as with human dolls, but is not of itself sufficient to indicate that they are suitable for use chiefly or for the most part with stuffed bears or other animal toys. On that basis the baby carriers should be classified as set out at [249].

247. Some of the items dealt with in this section are put up for sale in retail sets (such as the crown and wand sets and the hair "accessories" set). As when viewed individually the items all fall within the same heading, as "accessories" for dolls, neither the sets heading nor note 4 is in point.

248. I note that at the hearing BAB accepted that wheelchairs and strollers may alternatively fall within the heading relating to dolls' carriages (9503 00 10) which also applies to give a duty rate of 0%.

Application of GIR 3

249. For the same reasons as set out above in relation to the clothing items, my view is that (a) due to the nature of the "principal purpose" test in note 3 as applied under GIR 1 and 6, the plastic and textile items cannot be regarded for classification purposes

as falling on a prima facie basis within both the dolls heading and the toys heading and (b) if, contrary to my view (except as regards the baby carriers), the items are accessories which are equally suitable for use with animal toys and human dolls, they would fall to be categorised under the final “other toys” category and the relevant sub-heading according to what they are made of.

250. If, contrary to my view, the items can be classified as “accessories” within both the dolls and the toys headings on a prima facie basis, for the same reasons as set out above in relation to the clothing items, for the purposes of GIR 3(a) neither heading describes the plastic and textile items more specifically than the other and the items would fall to be classified under GIR 3(c) by reference to the last heading in numerical order (namely, that for animal toys of a stuffed kind (9503 00 41)).

Conclusion on “accessories” for animal toys

251. HMRC argued that the animal accessories are not in fact “accessories” for animal toys within the meaning of note 3 for the same reasons as set out above in relation to the plastic and textile items. HMRC consider they should be classified under the heading for other toys and the appropriate sub-heading according to what they are made of.

252. BAB submitted that, essentially applying the same analysis as set out in relation to the plastic and textile items, the various items are “accessories” which are suitable for use solely or principally with animal toys and, therefore, are to be classified under the toys heading. In its view, however, they are classifiable on a prima facie basis within each of the sub-headings for “stuffed” and “other”, as they are equally suitable for use with stuffed animal toys and hard-bodied animal toys. On that basis, as neither of those sub-headings provides a more specific description of the items than the other, they are to be classified under rule 3(c) by reference to the last sub-heading in numerical order being that for “other” (9503 00 49).

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

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

Decision on hearts and sounds

255. BAB’s stance is that, according to their objective characteristics, (a) the textile and beating hearts and plastic sounds which make human noises are to be classified as

“accessories or parts” of human dolls under the sub-heading 9503 00 29 on the same basis as set out above and (b) the plastic sounds, which make animal noises, are to be classified as accessories or parts of animal toys under the sub-heading “stuffed” (9503 00 41).

5 256. HMRC submitted that:

(1) The textile hearts have no characteristics which enable them to be identified as for use inside dolls or toys as opposed to for use for other craft purposes and should be classified as “Other made up articles of textile” under heading 6307.

10 (2) There is nothing to identify the plastic beating hearts specifically as for use with animal toys or human dolls. They should be classified under the heading for other toys and the sub-leading for plastic (9503 00 95).

15 (3) Whilst the unfinished appearance of the plastic sounds indicate they are to be put inside something, there is nothing to indicate whether they are to be put inside a doll or toy or another item such as a pillow. These should be classified under heading 8543 as “Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter”. HMRC noted that the HSEs for this heading provide “For incorporation in a wide variety of utilitarian or other goods, e.g., wrist watches, cups and greeting cards. These modules usually consist of an electronic integrated circuit, a resistor, a
20 loudspeaker and a mercury cell. They contain fixed musical programmes”.

257. In my view, the textile hearts and plastic beating hearts are identifiable from their objective characteristics, notably their heart shape, sizing and, in the case of the beating hearts, their pulsation feature, as parts or accessories for use with stuffed dolls or toys (albeit that explanatory materials, such as marketing materials, may need to be provided
25 to the customs authorities to explain the significance of these features). However, there is nothing to identify them as suitable for use principally with stuffed human dolls or animal toys. They are equally suitable for use with both of these items. On that basis:

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

35 (2) If I am wrong and these items can be classified on a prima facie basis as accessories under both the dolls heading and the toys heading (and appropriate sub-headings), for the same reasons as set out in relation to the other items, they are to be classified under GIR 3(c) under the last applicable heading in numerical order (9503 00 41).

258. As regards the plastic sounds, my view is that (a) those which make a pre-recorded human sound or on which a sound can be recorded are to be classified as “accessories or parts” under the sub-heading to the dolls heading (9503 00 29) and (b) those which
40 make an animal sound, are to be classified under the sub-heading for animal toys of a stuffed kind (9503 00 41). The fact that these items make a sound when pressed and the nature of the sounds made plainly indicate that these items are to be placed into a human doll or animal toy (according to the nature of the sound made).

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Decision in principle

259. Finally, I note that I have made this decision on the correct classification of the items as a matter of principle. BAB asked the tribunal also to determine the quantum of its liability according to the figures it presented on the evidence of Mr Cook.
5 However, my view is that it is premature for the tribunal to make any such determination at this stage. If necessary the parties can apply to the tribunal for further consideration of this issue should there be any outstanding dispute between them once they have considered the impact of this decision and once it is clear whether either party will apply for and be granted permission to appeal and, if so, pending the outcome of
10 any further proceedings.

Conclusion

260. For all the reasons set out above, the appeal is allowed in part to the extent set out above.

261. This document contains full findings of fact and reasons for the decision. Any party
15 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
20 and forms part of this decision notice.

**HARRIET MORGAN
TRIBUNAL JUDGE**

RELEASE DATE: 27 NOVEMBER 2019

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