



Neutral Citation: [2022] UKFTT 359 (TC)

Case Number: TC08612

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2019/06093

*CUSTOMS DUTY – Commodity Codes for import of goods – Combined Nomenclature classification for import duty rates – cat trees and scratchers (mixed components) – metal panels (whether in final form) – approach in determination of duty rates – the General Rules for the Interpretation of the Combined Nomenclature ('GIRs') – Explanatory Notes (HSEs and CNENs) – Binding Implementing Regulation – Tribunal's jurisdiction – **appeal dismissed***

Heard on: 10-11 March 2022

Judgment date: 29 September 2022

Before

**TRIBUNAL JUDGE HEIDI POON
MEMBER MICHAEL BELL**

Between

COZY PET LIMITED

and

Appellant

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Harry Winter, of counsel instructed by the Appellant

For the Respondents: Ms Charlotte Brown, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

DECISION

INTRODUCTION

1. The appeal by Cozy Pet Limited ('the appellant' or 'Cozy Pet') is against the following decisions by the respondents ('HMRC') to issue C18 Post Clearance Demand Notices.

(a) The first decision letter was dated 5 December 2018, with the corresponding C18 Demand being issued on 27 March 2019 in the quantum of £33,824.29, (being the sum of £28,187.25 Customs Duty and £5,637.45 Import VAT), and was varied on review by letter dated 22 August 2019.

(b) A further decision was issued on 2 October 2019 to implement the variation after review conclusion, with the corresponding C18 Demand issued on 22 October 2019 in a further sum of £1,936.83.

2. The C18 Notices were issued because HMRC contend that there has been an underpayment of import duty, on the basis that certain products supplied by the appellant were misclassified to commodity codes that attracted a 0% rate of duty.

3. The scope of the appeal is set out in the parties' Agreed List of Issues dated 14 September 2021. The Tribunal is requested to provide a decision in principle by determining the correct commodity codes for the products in question, with the view that the parties can reach an agreement on the issue of quantum.

4. The products in question in this appeal fall into two categories:

(a) Cat Trees and Cat Scratchers (henceforth '**Cat Trees/Scratchers**')

(b) Heavy Duty Panels and Playpen Panels – the former is a reference to 'Heavy Duty Playpens', which have been treated under the same classification code as Playpen Panels by both parties, and in this Decision, HD Panels and Playpen Panels are collectively referred to as '**Metal Playpens/Panels**'.

5. With regard to the products in dispute, this appeal concerns imports post-dating 2 February 2016, with the competing commodity codes between the parties being:

(1) For Cat Trees/Scratchers:

(a) The appellant adopted the tariff codes 4421 99 99 99 and 4421 90 97 90 for '*Wood and articles of wood*' at 0% duty rate;

(b) HMRC contend that the tariff code 6307 90 10 00 for '*Textiles and textile articles*' at 12% duty rate.

(2) For Metal Playpens/Panels:

(a) The appellant adopted the tariff code 7314 49 00 00 for '*Base metals and articles of base metals*' at 0% duty rate;

(b) HMRC contend that the tariff code 7326 20 00 90 for '*Articles of iron or steel wire*' at 2.7% duty rate.

EVIDENCE – WITNESS AND DOCUMENTARY

6. For the appellant, Mr Colin Fraser appeared as its witness and has lodged three witness statements in relation to this appeal. Mr Fraser describes himself as 'a consultant advising Cozy Pet Limited in many areas of the business processes including purchasing and import of goods'; he gave evidence on behalf of the appellant, and was cross-examined. We accept Mr Fraser's evidence in relation to matters of fact, subject to the qualifications as set out in the parties' Statement of Agreed Facts.

7. Whilst not stated in his evidence, Mr Fraser requested Mr Winter to relate that the appellant is under the impression that no other retailers tendering Cat Trees/Scratchers same as, or similar to, those by Cozy Pet are being enquired into by HMRC. We understand that Mr Fraser wishes this to be noted in the record of these proceedings, and we do so here for the sake of completeness. However, the Tribunal can make no finding of fact in this respect, since no evidence has been adduced in relation thereto. In any event, whether the appellant is hitherto the only importer of Cat Trees/Scratchers being enquired into by HMRC is not relevant to the substantive appeal. To any extent that the appellant considers itself to have been singled out for adverse treatment by HMRC as concerns the tariff codes it has adopted for the importation of the said commodities, it is a public law issue over which the Tribunal has no jurisdiction.

8. In terms of documentary evidence, the parties lodged three joint bundles designated as Hearing Bundles 1, 2 and 3 ('HB1' and so on). Where relevant, the Decision includes the pagination reference of a document in the form of '(internal pagination/bundle number/PDF pagination within the bundle)'.

STATEMENT OF AGREED FACTS

9. The parties have lodged a Statement of Agreed Facts (SOAF), which states the following:

'(1) For the purposes of the hearing on 10-11 March 2022, Mr Fraser's three witness statements are accepted as factually correct in their entirety save for the single factual issue as regards the purpose of the coloured plush fabric used on the Cat Trees and Cat Scratchers. On that factual issue:

- (a) HMRC's position is that the coloured plush fabric has the purpose of attracting cats.
- (b) Cozy Pet's position (in accordance with Mr Fraser's witness statements) is that the coloured plush fabric is a minor feature for the aesthetic benefit of humans, typically to fit in with their home décor.

(2) For the purposes of the hearing on 10 to 11 March 2022:

(a) HMRC do not rely on the factual evidence of their two witnesses in relation to the enquiry that led to the present dispute. For the avoidance of doubt, Cozy Pet does not rely on any factual evidence in relation to the enquiry that led to the present dispute either.

(b) HMRC's two witnesses have no first-hand knowledge of the products in dispute and reached their conclusions by reference only to factual information provided by Cozy Pet (as reflected in the exhibits in HMRC's witness statements). Accordingly, HMRC place no reliance on their two witnesses with respect to the facts of the products in dispute (other than that they received factual information on those products from Cozy Pet).

(c) It is common ground that the plush fabric used on the Cat Trees and Cat Scratchers is knitted.'

FINDINGS OF FACTS

Background

10. The appellant is a retailer of pet products. Between 13 January 2016 and 8 May 2018, the appellant imported from China a variety of cat trees and metal playpens/panels, which are the subject matters of an enquiry opened by HMRC on 14 May 2018. The enquiry was concluded by the Review Conclusion decision of 22 August 2019. During the course of enquiry, the appellant provided specifications and explanations of the items in dispute. It was based on the provided information that HMRC made the decisions as regards the tariff codes applicable. We set out the factual matrix in relation to each category of the products in turn.

Cat Trees/Scratchers

Description from photographic exhibits

11. From the photographic exhibits, we describe the products in question as follows:

Single-column Scratcher

- (1) The single-column Scratcher consists of a circular post coiled in 'super heavy-duty sisal'; the post is of an 'extra wide' diameter of 22cm.
- (2) The sisal post is 74cm in height, and finishes with a slightly domed curvature; the cap of the post is covered in plush fabric.
- (3) The base of the post is a square measuring 49cm x 49cm, and covered in matching plush fabric as the post cap.

Twin-column Scratcher

- (4) A different version of Cat Scratcher consists of two sisal columns of 52cm high, and are anchored diagonally on two corners of a square base, which measures 56cm diagonally and is covered in plush fabric.
- (5) The sisal posts are of a smaller diameter than the 'extra width' single column, and appears to be circa 15cm.
- (6) The twin posts support a plush fabric pouch, with a dangling fabric pom-pom in matching colour as the fabric covering the base. The pouch is designed for a cat to snuggle into after climbing either post.

A Cat Tree

- (7) A Cat Tree is of different heights, ranging from 91cm to 158cm on the exhibits, and has platforms of different shapes and sizes, at different levels and combinations. The platforms are supported and connected by posts.
- (8) Various accessories can be attached to the tree structure, such as two fabric pouches in one exhibit, or a one pouch and one 'hammock' in another, or a round wooden tube suspended from the underside of a platform lined with fabric on the inside and outside of the cross-section which allows a cat to coil up inside, and contraptions such as dangling pom-poms can be affixed to the top.
- (9) A tree structure also comes with a built-in hatch in the shape of a cubic box (or curved slightly like an igloo). It can form the base of a tree structure, or be situated half way up the tree structure, to be accessed by a small ladder of two or three rungs.
- (10) The base can be square or rectangular in shape, and smaller than the overall footprint of a Tree (with its protruding pouches, for example). The footprint of the structure measures between 45cm x 91cm and 65cm x 93cm.
- (11) All visible surfaces of the Cat Tree (including the inside of the hatch) are covered, in a mixture of plush fabric and sisal coil.
- (12) Unlike the Cat Scratchers, the posts integrated into the tree structure can be largely covered in plush fabric with sisal coils interspersed at mid-sections of the posts. There is the option for choosing a different model of Cat Tree where the posts are mostly covered in sisal coils. The rungs to an integral ladder are covered in sisal coils.

12. The common feature to all Cat Trees/Scratchers is that the underlying structure is made of MDF wood, supplemented by metal such as a circular ring for a fabric pouch to be attached, or cardboard paper to form the tubing for the posts. All products are imported flat packed to be assembled, and a photograph shows that the underside of the platforms remains in bare wood.

Appellant's specifications of product components and explanations of tariff code applied

13. In relation to the product components, the appellant has stated in correspondence with HMRC the following ratios:

- (1) In an email dated 24 July 2018, the appellant stated what it considered to be the proportion of the component parts of the items:
 - (a) Wood, 60%
 - (b) Plush, 20%
 - (c) Sisal rope, 10%
 - (d) Paper tube 10%
- (2) In a later email dated 13 March 2019, the component percentages varied to:
 - (a) Wood, 50%
 - (b) Plush, 15%
 - (c) Sisal rope, 15%
 - (d) Paper tube 10%
 - (e) Plastic caps 5%
 - (f) Bolts 5%
- (3) On 11 October 2018, the appellant stated that: 'the value of the plush materials is less than 20% of the purchase price of the item'.
- (4) On 29 November 2018, the appellant confirmed to HMRC that the plush material was 'woven', as advised by its main Cat Tree supplier, noting that there was confusion from different suppliers' answers as the Chinese translation for 'Knitted' and 'Woven' appears to be identical.
- (5) From the photographs (HB1/163-166 – internal pagination absent), the fabric is stapled onto the wooden platforms, and the edges of the fabric are turned in on the underside before the staples are applied to hold them in place.

14. In the course of the enquiry, the appellant's explanations for the basis for classifying the products as 'wooden furniture' are as stated in the following communications.

- (1) By letter dated 20 August 2018, it is stated that:

'A cat tree is principally made from wood, this is because it is a climbing structure that needs to remain stable when 1 or multiple cats of varying weights are at the top of the tree which can reach a height of 2m ... there are also cardboard posts, bolts or fixings, plush and sisal, but these components are simply there cosmetically to make the item appear more attractive ... One of its uses is to attract a cat's attention away from other items of furniture in a home and encourage the cat to sharpen it's [sic] claws on this piece of furniture thus protecting other more valuable pieces of furniture.'
- (2) In correspondence dated 12 March 2019, it is stated that:

'A cat tree is essentially a wooden product. Wood is the main component because this is the component that dictates the weight, shape and size of the item, this is essential to give stability to the cat tree to ensure it does not fall over when used by a cat or cats, a basic but essential requirement.... Given the item is for interior use only, it is large, principally made from wood and a customer chooses the external colour to match their home décor ... I believe cat trees should go into a Furniture tariff which gives 2 possibilities they would be 9403609000 or 4420909990.'
- (3) When providing additional information in an email dated 19 July 2019 in support of the Review Request, the appellant stated that:

‘... first we need to understand it’s [sic] function, it is essentially a climbing frame for a cat/cats, many people with multiple cats only purchase a single cat tree so their combined weight must be taken into account. The item can be up to 2m in height it must be stable and strong enough to support cats often in excess of 5kg jumping from platform to platform therefore the size of the wooden base and the weight of the product are the two key elements that provide stability, without stability the item simply does not function because would fall over.

When a Chinese factory costs an item it is often done by knowing how many will fit inside a shipping container, the larger the box the less you can fit and generally the higher the price, since the size of the box is going to be determined by the largest component which of course is the wooden base ...

We have provided a sample of the plush material used on a typical Cozy Pet cat tree, if you hold it up to the light you will appreciate how thin it is, a cat could easily destroy this grade of material in a short time, the plush is not generally for the cat to claw at, this is the function of the cord that is wrapped round the cardboard tubes.

You will note from our ... added information on how a cats [sic] vision works this clearly dispels the notion that the colour of the plush is designed to attract a cat, it is not. The colour of the plush is chosen by a customer to match their home décor and this certainly would move a cat tree which is after all a large indoor item into a category of a Furniture Tariff ...’ (sub-paragraphing added)

15. The substance of Mr Fraser’s evidence reiterates the basis for the appellant’s choice of the tariff code, including what seems to us an opinion premised on the cat’s vision for asserting that cats are not attracted by the fabric, and therefore ‘fabric has very little effect on the cats’. Mr Fraser also stated that a Cat Tree can be near 2m in height, which would appear to take in the dangling fixtures affixed to the top of the structure.

HMRC’s original decision based on ‘woven’ material

16. By letter dated 5 December 2018, accompanied by ‘Customs International Trade Schedule’, the classification of the products reached by HMRC is summarised as follows:

- (1) The Cat Trees are proper to 6307 90 9899 at 6.30% duty rate based on the information provided that the plush material is ‘woven’, (and not 6307 90 1000 as discussed during the enquiry which applies to ‘knitted’ material).
- (2) The justification for this Commodity Code is stated to be:

‘... the textile material (the woven textile fabric and the sisal cord) is essential in enabling the product to be used as intended because it attracts cats which can e.g. scratch their claws, sit, sleep on it and play with it. It is therefore the textile material (not the wood or paperboard) that gives the article its essential character within the meaning of GIR 3(b).

As it cannot be determined whether the sisal or the woven textile material is more essential to attract cats, the bigger quantity of the woven textile fabric and the wider variety of activities it provides to the cat are considered to give the article its essential character within the meaning of GIR 3(b) (see also the HSEN to GIR 3(b), (VIII)).

Within the meaning of note 7(f) to Section XI, the woven textile fabric is assembled by sewing and is consequently a made-up textile article of textile fabric. The article is therefore to be classified under CN code 6307 90 98 as other made-up textile articles.’

Review conclusion varied to ‘knitted’ material

17. The statutory review was carried out in accordance with the provisions of ss 14 and 15 of the Finance Act 1994 (‘FA 1994’). The review conclusion was dated 22 August 2019 and was restricted to the legal basis for the tariff classification. It was noted that a formal complaint against the enquiry officer was lodged by Cozy Pet on 1 June 2019, but it was not a matter to be addressed by the statutory review officer.

18. Between the original decision of December 2018 and its corresponding C18 Demand issued in March 2019, the most significant further piece of information was derived from the sample material provided by the appellant on 19 July 2019. An analysis of the sample material by the Tariff Classification Service (‘TCS’) confirmed that the material was ‘knitted’ and not ‘woven’ (as advised by the appellant via its supplier).

19. The salient points from the review conclusion in respect of the Cat Trees/Scratchers are:

- (1) The plush material is tested to be ‘Knitted’ (not ‘Woven’ as advised by the appellant’s main supplier).
- (2) Cat Trees with knitted plush material are properly classified to commodity code 6307 90 10 00 which attracts 12% duty.
- (3) The C18 Demand issued on 27 March 2019 is to be varied, as the quantum was based on the code 6307 90 99 98 for ‘Woven’ material at the lower duty rate of 6.3%.

Further ‘Right to be heard’ letter

20. As the code relating to the woven plush (6307 90 99 98) that had been applied in the original decision attracted a lower duty rate of 6.3%, HMRC sent a further ‘Right to be heard’ letter on 2 September 2019 advising that additional duties in the sum of £1,936.83 were due, following the Review Decision.

21. On 27 September 2019, the appellant wrote to HMRC providing specification details of the Cat Trees (C187/HB2/129). The letter also set out the appellant’s view on the basis of HMRC’s review conclusion as follows:

‘... the decision taken by HMRC is based on a decision made by the commission [sic] in 2013 for a Cat Scratcher not a Cat Tree, [which are different products] ... Amazon the biggest online retailer understands this simple difference. The commission made many mistakes ... for over a decade prior to the 2013/14 decision, Cat Scratchers/Trees had always been classified as wooden products. Had the commission actually looked at ... a Cat Tree on the same day it considered a Cat Scratcher it would have seen the difference. We know the difference because we are experts, the commission is not, nor did they apparently have an expert there on the day. ... Cats are not attracted to the plush material and their sight can actually be described as colour blind, so the commission were actually incorrect with this assumption as well.’

22. On 2 October 2019, HMRC replied with a formal decision, stating that no new information had been provided to alter the Review Conclusion decision.

Metal Playpens/Panels

Description from photographic exhibits

23. The function of the products is to construct a barrier or making an enclosure in the form of a playpen. The two types of products in question differ in the density of the metal used to form the panel sections from which the barrier or enclosure is to be built. From the photographic exhibits, we describe the products in question as follows.

Heavy Duty Playpens/Panels

- (1) The panels are of metal throughout with the frames being cast in heavy duty metal and the inserts within the frames are of metal wires being welded to intersect vertically and horizontally at intervals to form a grill.
- (2) The panels are of a few standard dimensions with tubular ringlets extending from the frame edging to enable panels to be linked up by inserting a metal wire rod to form a barrier, such as a staircase barricade, or to be joined up into a defined shape like a square, a rectangle, hexagon, or octagon, so as to form an enclosure.
- (3) Whether into a barrier or an enclosure, an inserted panel can be incorporated as an entrance/exit panel with metal latches to open and close.
- (4) The design of panel enclosure can include a metal base to fit within the panel structure to form a playpen.
- (5) The height of a panel is 80.5cm, and the width comes in two dimensions, with the wider being 110cm and the narrower being circa 35cm. A playpen of one wide panel per side is a square enclosure of 110cm x 110cm, excepting the side with the entrance/exit, which is made up by three panel sections, with the latches on the centre panel, and narrower panels to either side to make up an overall measurement of 110cm.

Metal Playpens/Panels

- (6) The concept is similar to HD playpens/panels, and the material difference is the frames of the panel sections are not framed with heavy-duty metal tubing material as in the HD version. It is a cheaper product and is not as sturdy as the HD version.
- (7) The panels are of one standard dimension of 76cm (height) x 60cm (width), and there is the option of integrating a panel with an opening with latches into the structure.

Appellant's explanations of tariff code applied

24. From the correspondence with HMRC, the appellant's explanations for the choice of tariff code to be applied are summarised as follows.

- (1) On 12 March 2019, under the heading 'Metal Products', it is explained that:

'The raw material for these products is iron or steel wire delivered to the factory on large drums that weigh several tonnes; our metal products are made from an outer frame made of wire that has an inner section of wire rods that are welded together at the intersection to create a grill or fence of iron or steel wire, some are zinc coated for outdoor use, and some are painted.

These products are used to contain animals but they are not all cages because many have open roofs and or no floors, these items are enclosures, a type of fencing, the products that do have roofs and floors are made from exactly the same type of wire panels.'

- (2) In the Review Request dated 19 July 2019, it is stated that:

'Whether light weight or ... Heavy Duty these items are simply a series of panels ... A customer may connect 4,6,8,10 or more panels together to create a fenced area. Playpens can be used outside but as they are always powder coated (Painted) they should not be left out in rain or damp weather, these items do not have metal floors or roof panels and are therefore not cages, the Tariff 7314 39 00 00 perfectly describes these powder coated items.'

RELEVANT LAW

Customs Codes and Combined Nomenclature

25. Regulation 2913/92 ('the Community Customs Code), as supplemented by Regulation 2454/93, governs goods imported prior to 1 June 2016. From 1 June 2016, customs duty is governed by Regulation 952/2013 ('the Union Customs Code') as supplemented by Regulation 2446/2015. For the purposes of this appeal, nothing turns on the applicable regime.

26. It is common ground that the applicable rate of customs duty is determined by reference to the Combined Nomenclature ('CN'): Art 20.3(a) of the Union Customs Code; the CN is produced at Annex 1 to Regulation 2658/87. Part 2 of the CN contains the commodity headings as a comprehensive goods nomenclature.

GIRs have legal force

27. The Combined Nomenclature is to be interpreted in accordance with the General Interpretative Rules ('GIRs'), which are contained as Section 1A of Part 1 of Annex 1 to Council Regulation 2658/87. The GIRs have the force of law.

28. Section 1A of GIRs is entitled '*General rules for the interpretation of the Combined Nomenclature*', and states as follows:

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

1. The titles of sections, chapters and sub-chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the following provisions.
2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.
3. When, by application of rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
 - (a) the heading which provides the most specific description shall be preferred to heading providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods;
 - (b) mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which

cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, in so far as this criterion is applicable;

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

(4) Goods which cannot be classified in accordance with the above rules shall be classified under the heading appropriate to the goods to which they are most akin.’

29. Under rule 6 of the GIRs, it is provided that:

‘(6) For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheadings 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.’

Explanatory Notes (HSENs and CNENs) and BTIs

30. As an aid to the interpretation of the scope of the various headings, the World Customs Organisation publishes Explanatory Notes to the Harmonised System (‘HSENs’) and the EU publishes Explanatory Notes to the Combined Nomenclature (‘CNENs’). Of direct relevance to tariff classification is the Binding Tariff Information (‘BTIs’), which are rulings by the European Commission on specific products on referrals by Member States.

31. A succinct summary of the legal framework relating to tariff classification by Lawrence Collins J in *Vtech Electronics (UK) plc* [2003] EWHC 59 (Ch) (‘*Vtech*’), (as cited with approval by the Court of Appeal in *Invamed Group Limited v HMRC* [2020] EWCA Civ 243 per Patten LJ at [5]), is as follows:

(1) The CN is established based on the World Customs Organisation’s Harmonised System laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the Community is a party: at [7].

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

(3) A BTI is issued by the customs authorities of the Member States pursuant to art 12 of the Common Customs Code (Council reg 2913/92/EEC) on request from a trader, and is binding on the authorities in respect of the tariff classification of goods: at [12].

Case law principles on applying Tariff Headings

32. The principles derived in *Vtech* from the many decisions of the European Court on the interpretation of the tariff headings at [13] to [15] are summarised below:

(1) The decisive criterion for the tariff classification of goods must be sought generally, regard being had to the requirements of legal certainty, in their objective characteristics and properties, as defined in the headings of the Common Customs Tariff.¹

¹ Case C-177/91 *Bioforce GmbH v Oberfinanzdirektion München* [1993] ECR I-45, where the function of the products (hawthorn drops) was decisive; Case C-309/98 *Holz Geenen GmbH v Oberfinanzdirektion München* [2000] ECR I-1975, where the intended use of the product (wood blocks for window frames) was said to be such

(2) The headings and the Explanatory Notes do not have legally binding force and cannot prevail over the provisions of the Common Customs Tariff.²

(3) But the tariff headings are important means for ensuring the uniform application of the Common Customs tariff and are therefore useful aids to interpretation.³

(4) The tariff headings may show that a classification by Commission regulation is invalid, if the error made by the Commission is manifest.⁴

(5) It is for the national court (even in a case which has been referred to the European Court for guidance on the applicable principles) to determine the objective characteristics of a given product, having regard to a number of factors including their physical appearance, composition and presentations.⁵

33. The CJEU has consistently held that, 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 found in their objective characteristics and properties, as defined in the wording of the relevant Headings or Subheadings, and of the notes to Sections and Chapters. It is then for the national court to determine the relevant ‘objective characteristics and properties’.⁶

Interpretation of ‘essential character’

34. The following cases are instructive of the CJEU’s approach in interpreting the meaning of ‘essential character’ under GIR 2(a) and 3(b).

(1) The reference to ‘the use of the goods’ in the HSEN suggests that an intended purpose or function can determine the essential character of an article: Case C-205/80 *ELBA Elektroapparate* at [17].

(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: Case C-459/93 *Thyssen Haniel Logistic GmbH* at [13].

(3) It is apt to ask whether the essential character is retained when a particular component is removed; if it is not, then that element gives the article its essential character: Case C-253/87 *Sportex* at [8], Case C-243/01 *Sony Computer Entertainment Europe* at [126].

(4) Features that merely add comfort are unlikely to give the article its essential character: Case C-288/99 *VauDe Sport GmbH* at [25]-[28], Case C-123/09 *Roeckl Sporthandschuhe GmbH* at [43].

(5) Where the product comprised two components: the cartridge and the ink, the classification of ink cartridges whose function was to supply ink to ink-jet printers was held to be by reference to the purpose of the product, which was to supply ink to a printer. The essential character of the product was therefore given by the ink, even though the

an objective criterion if it was inherent in the product; Case C-338/95 *Wiener SI GmbH v Hauptzollamt Emmerich* [1997] ECR I-6495 (‘*Wiener SI*’), where the intended use of the product (pyjamas) was decisive, and the presentation of goods was regarded as relevant.

² Case C-35/93 *Develop Dr Eisbein GmbH v Hauptzollamt Stuttgart-West* [1994] ECR I-2655, para 21; Case C-338/95 *Wiener SI GmbH*, per Advocate General Jacobs, para 32; Case C-309/98 *Holz Geenen GmbH*, para 14.

³ *Wiener SI* at para 11, *Holz Geenen* at para 14.

⁴ Case C-463/98 *Cabletron Systems Ltd v Revenue Comrs* [2001] ECR I-3495, para 2.

⁵ *Wiener SI* at para 21.

⁶ Case C-362/07 *Kip Europe SA; Kubota (UK) Limited v HMRC* [2021] UKUT 276 (TCC).

ink was useless unless delivered in the cartridge: Case C-250/05 *Turbon International GmbH v Oberfinanzdirektion Koblenz* ('*Turbon*') at [20]-[23].

(6) Multifunctionality does not preclude one function from determining the essential character of an article if that function predominates: *Vtech Electronics Europe plc v HMRC* [2016] UKFTT 043 (TC) at [81].

(7) If a product's essential character is its stability, shape and structure, then any material that on its own provides that stability, shape and structure will give the article its essential character: *Bemis Ltd v HMRC* [2019] UKFTT 538 (TC) ('*Bemis*') at [38]-[42]; *HMRC v Tomtom International BV* [2013] UKUT 498 (TCC) ('*Tomtom*').

DISCUSSION

Burden of proof

35. It is common ground that pursuant to s 16(6) of Finance Act 1994, the appellant bears the burden of proof that the grounds on which its appeal has been brought are established.

Cat Trees/Scratchers

The competing commodity codes

36. During the course of the enquiry, the appellant's position as regards the commodity codes applicable to the products in question are those set out at §5. On appeal, however, alternative commodity codes are being put forward as candidates for the Cat Trees/Scratchers. As to HMRC, the commodity code applied in the original decision was varied on review in line with the plush material being 'knitted' and not 'woven'. The various candidates of commodity codes, and the respective duty rates, as put forward by the parties are tabulated below for ease of reference.

Cat Trees/Scratchers			
Appellant		HMRC	
9403 60 90	Wooden furniture (0%)	6307 90 10	Other knitted made-up textile articles (12%)
4420 90 99	Wooden furniture not in Ch 94 (0%)		
4421 99 99	Other articles of wood (0%)		
4421 90 97	Other articles of wood (0%)		
5609 00 00	Articles of rope (5.8%)		

Parties' positions

Appellant's submissions

37. The appellant's stated grounds of appeal are that: (a) the Cat Trees and Cat Scratchers are different products, with Cat Trees being 'larger and relying on its wood content to provide stability through base area and weight'; (b) that 'the commission ruling in 2013/2014 is not relevant, in addition it includes assumptions that were incorrect'.

GIR (1) application

38. Mr Winter's submissions focus on the application of GIR(1), whereby it is averred that 'HMRC's arguments can be proved to be wrong by the simple application of GIR(1)'. Mr Winter places special emphasis on GIR(1) where it is stated: '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*'.

39. For this reason, Mr Winter submits that GIR(1) is first and foremost, and there is no requirement to recourse to GIR(2) or (3) in relation to the consideration of 'essential character' if the titles of sections, chapters and sub-chapters are sufficient to arrive at the correct CN code.

With tenacity, Mr Winter took the Tribunal on a tour de force of the various options of commodity codes that are more ‘appropriate’ candidates in contrast to the one adopted by HMRC. By reference to case law, for example, on the meaning of ‘furniture’, Mr Winter seeks to persuade the Tribunal to embark afresh on an exercise of applying GIR(1) in determining the ‘correct’ code(s) for the Cat Trees/Scratchers.

The various options of commodity codes

40. The appellant had imported the goods under the two commodity codes respective of (a) Cat Trees: 4421 99 99 99 and (b) Cat Scratchers: 4421 90 97 90. The relevant CN headings that deliver the respective CN codes are as follows:

- (1) 4421 99 99 99 (relevant duty rate is 0%)
Section IX: Wood and articles of wood; wood charcoal; cork and articles of cork; manufactures of straw, of esparto or of other plaiting materials; basket-ware and wickerwork
Chapter 44: Wood and articles of wood: wood charcoal
4421: Other articles of wood
4421 99: Other
4421 99 99: Other
4421 99 99 99: Other
- (2) 4421 90 97 90 (relevant duty rate is 0%)
Section IX and Chapter 44: as detailed above.
4421: Other articles of wood
4421 90: Other
4421 90 97: Other
4421 90 97 90: Other

41. The appellant subsequently placed reliance on the commodity codes 4420 90 99 90 and 9403 60 90 00, which relate to:

- (1) 4420 90 99 90 (relevant duty rate is 0%)
Section IX: Wood and articles of wood; wood charcoal; cork and articles of cork; manufactures of straw, of esparto or of other plaiting materials; basket-ware and wickerwork
Chapter 44: Wood and articles of wood: wood charcoal
4420: Wood marquetry and inlaid wood; caskets and cases for jewellery or cutlery, and similar articles, of wood; statuettes and other ornaments, of wood; wooden articles of furniture not falling in Chapter 94
4420 90: Other
4420 90 99: Other
4420 90 99 90: Other
- (2) 9403 60 90 00 (relevant duty rate is 0%)
Section XX: Miscellaneous manufactured articles
Chapter 94: Furniture; bedding, mattress, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like; prefabricated buildings
9403: Other furniture and parts thereof
9403 60: Other wooden furniture
9403 60 90 00: Other wooden furniture

Relevance of the Commission Regulation and BTI

42. In respect of HMRC’s reliance on the Commission Implementing Regulation 350/2014, Mr Winter submits that the description of the articles relevant to that Regulation, and the reasons adopted therein, mean that the Regulation ‘neither applies directly nor by analogy’.

43. As to the relevance of BTIs, Mr Winter emphasises that they are issued by the customs authorities of the Member State on request from a trader; they are persuasive but not binding in relation to goods other than those in relation to which the BTI was issued: *Flir Systems AB* [2009] EWHC 82 at [37]. Furthermore, care should be taken in transposing the reasoning contained in a BTI to a similar article where the precise objective characteristics of the article considered by the BTI are unclear: *Vtech* at [64]-[65].

HMRC's submissions

44. The CN headings to arrive at HMRC's commodity code, and the relevant Explanatory Notes are set out as follows:

- (1) 6307 90 10 00 (applicable duty rate 12%)
Section XI: Textiles and textile articles
Chapter 63: Other made-up textile articles: sets, worn clothing and worn textile articles; rags
 6307: Other made-up textile articles, including dress patterns
 6307 90: Other
 6307 90 10: Knitted or crotched

- (2) Note 7 of the CNENs states:

For the purposes of this section, the expression 'made up' means:

- a. cut otherwise than into squares or rectangles;
- b. produced in the finished state, ready for use (or merely needing separation by cutting dividing threads) without sewing or other working (for example, certain dusters, towels, tablecloths, scarf squares, blankets);
- c. cut to size and with at least one heat-sealed edge with a visibly tapered or compressed border and the other edges treated as described in any other subparagraph of this note, but excluding fabrics, the cut edges of which, have been prevented from unravelling by hot cutting or by other simple means;
- d. hemmed or with rolled edges, or with a knotted fringe at any of the edges, but excluding fabrics, the cut edges of which have been prevented from unravelling by whipping or by other simple means;
- e. cut to size and having undergone a process of drawn thread work;
- f. assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);
- g. knitted or crocheted to shape, whether presented as separate items or in the form of a number of items in the length.

- (3) In reaching the decision to apply the commodity code under '6307', HMRC rely specifically on the Commission Regulation which applies to 'simple' and 'more sophisticated' Cat Scratchers. This is EU Commission Implementing Regulation 350/2014, and it states:

'In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation.

...

Pursuant to those general rules, the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table.'

Background to the Implementing Regulation 350/2014

The ‘simple cat scratcher’

45. Regulation 350/2014 was implemented following a Meeting on 19 June 2013 of The Customs Code Committee Tariff and Statistical Nomenclature Section Textiles Sector of the European Commission Directorate-General Taxation and Customs Union. Relevant extracts from the Minutes were set out in the Review Decision, as informing the basis for HMRC in reaching the conclusion that the commodity code applicable to the Cat Trees/Scratchers should fall in line with Regulation 350/2014. The extracts from the Minutes relevant to this appeal are:

After reception of the laboratory analyses the Commission drafted a regulation classifying the simple cat scratcher. A sample of this article was present at the meeting. The Committee discussed the preliminary draft regulation.

The Commission informed the MS [i.e. Member States] that it had informally consulted the WCO Secretariat as far as the question is concerned whether the Harmonised System (HS) articles used by animals (e.g. sleeping baskets for dogs etc.) could be considered as furniture within the meaning of heading 9403. The Secretariat indicated that this kind of question had never been treated in the HS Committee. However, the Secretariat referred to a decision issued by the US concerning a “weatherbed” for dogs, which states that *“furniture is specifically limited to such items used by humans”*. (italics added)

Some MS said that a general exclusion of articles made for the use of animals from Chapter 94 might limit the scope of the Chapter and, thus, should be avoided. In a round of the table a large majority of the MS agreed with the classification in heading 6307 (other made-up textile articles) suggested in the draft regulation.

Some MS were in doubt whether heading 5609 (articles of twine etc.) or heading 6307 (other made-up textile articles) were the more specific headings to classify the woven sisal fabric. The Commission pointed out that in the third paragraph of the HSEN to heading 5609(c), textile fabrics and articles made from such fabrics are excluded from heading 5609 and classified in their appropriate heading (e.g. heading 6307). According to this Explanatory Note *heading 6307 is considered to be a more specific heading for textile fabrics than heading 5609 which covers “articles of twine, cordage, rope or cables, not elsewhere specified or included”*. (italics added)

Two MS preferred classification in Chapters 44 or 48, depending on whether the wood or paperboard prevailed, referring to Commission Regulation (EC) No 1462/2006. The Commission pointed out that this Regulation classified an ornamental article that had no use or meaning other than decoration of the house and, therefore, the look, shape and form of the article were essential within the meaning of GIR 3(b). Unlike this Regulation, in the present case the “cat scratcher” has a specific use and meaning as an article to attract cats and to keep them away from furniture that they would otherwise scratch and occupy. Thus, *in the case the “cat scratcher”, the material that attracts cats is more essential than the material that gives the article its form*. (italics added)

A ‘more sophisticated cat scratcher’

46. The Minutes also record the Committee’s discussions on a ‘more sophisticated cat scratcher’, and excerpts of which relevant to our consideration are as follows.

‘In another round of the table the MS were considering classification of a more sophisticated cat scratcher; a photo of which is also attached to the document with the draft regulation classifying the simple cat scratcher. The wooden parts of the more sophisticated article (e.g. a sleeping-cave, a platform, a hollow

tube) are on the inside and outside covered with plush fabrics and the cardboard tube is covered with cords of sisal.

A majority of the MS followed the same logic as for the classification of the simple cat scratcher. Consequently they were of the opinion that the material that attracts the cat (i.e. the textile material) gives the essential character to the article within the meaning of GIR 3(b) and, therefore, the cat scratcher should be classified as textile article.

These MS favoured classification in heading 6307, with the exception of one, which favoured heading 5609. Some MS preferred classification in Chapter 44 as “articles of wood” following the classification of a similar article by experts of ten MS at the “Second Project Group for Chapter 44” held in Sweden in 2005.’

47. The Committee therefore noted that the classification heading 6307, while favoured by most Member States, should be considered against heading 5609, or chapter 44 headings as preferred by some other Member States. The Minutes recorded the following Action Points:

‘The Commission will submit a draft regulation classifying the simple cat scratcher according to the opinion of the majority of the MS in heading 6307 for vote at a forthcoming meeting.

It will also prepare another draft regulation classifying the sophisticated cat scratcher, for discussion. The Commission will apply the same logic for the classification of both articles considering the role of the materials in relation to *the use of the products as scratching, sleeping and playing facilities for cats.*’ (italics added)

Whether ‘articles of wood’ as considered by Committee in November 2013

48. The Customs Code Committee Tariff and Statistical Nomenclature Section Textiles Sector held a further meeting on 12 November 2013 where it confirmed the following:

‘Taking in consideration the arguments mentioned at the last Committee meeting the Commission had drafted a regulation classifying a cat scratcher built in a more sophisticated manner than the simple cat scratcher ... This sophisticated cat scratcher has more wooden parts than the simple one (e.g. it has a sleeping cave, a platform and a hollow tube of wood).

Nevertheless, all the wooden parts of this sophisticated cat scratcher are on the inside and outside covered with textile fabrics, which makes the article similar to the simple cat scratcher.’

49. In relation to the alternative CN code for the sophisticated cat scratcher under Chapter 44 as an ‘*other article of wood*’, the Committee observed:

‘Although during the “Second Project Group for Chapter 44” held in Sweden in 2005, an article similar to this more sophisticated cat scratcher had been classified under heading 4421 as an “other article of wood” by 10 Member States, the Commission pointed out that some of these prefer now classification as a textile article. Moreover, the Commission recommended following the same logic as for the classification of the simple cat scratcher and, consequently, to focus on the function and use of the article in order to identify the material that gives the article its essential character within the meaning of GIR 3(b). (underlining original)

One MS pointed out that the Commission Regulation (EC) No 1462/2006 classifying an ornamental article made of ceramics and textile according to the material that gives the article its form is not relevant in this case, since this ornamental article had no use or meaning other than decoration of the house

and, therefore, the look, shape and form of the article were essential within the meaning of GIR 3(b). However, the cat scratcher has no decorative function, but a specific function as an article to attract cats and to keep them away from furniture that they would otherwise scratch and occupy. Consequently, in this case *the material that attracts cats is more essential than the material that gives the article its form.*' (italics added)

50. The Committee's conclusion forms the basis of a draft regulation to classify the sophisticated cat scratcher in CN-code 6307 90 98 for the following reasons:

'... the majority of the MS were of the opinion that the material that attracts the cat (i.e. the textile material) gives the essential character to the article within the meaning of GIR 3(b) and, therefore, the cat scratcher should be classified as textile article. These MS favoured classification in heading 6307 as other made-up textile article. One MS questioned the text of the draft regulation where the sisal and the woven textile material are described as being equally essentially to attract cats.'

The EU Commission Implementing Regulation 350/2014

51. The EU Commission Implementing Regulation 350/2014 states that: 'In order to ensure uniform application of the Combined Nomenclature annexed to Regulation (EEC) No 2658/87, it is necessary to adopt measures concerning the classification of the goods referred to in the Annex to this Regulation'. It continues by stating that pursuant to the GIRs, 'the goods described in column (1) of the table set out in the Annex should be classified under the CN code indicated in column (2), by virtue of the reasons set out in column (3) of that table'.

(1) Column (1) gives the description of the goods in the attached photograph as:

'Article consisting of a wooden box covered on the inside and outside with textile fabric. The box has an opening in the front allowing a cat to enter it and is big enough for a cat to sleep in it. On top of the box a paperboard tube is mounted vertically. The tube is covered with a cord of sisal fixed to it. The cord is made of spun sisal fibres and measures more than 20 000 decitex.

The tube is sustaining a wooden platform covered with textile fabric. The platform is big enough to allow a cat to lie on it.

A wooden tube covered in textile fabric on the inside and outside is fixed to the bottom of the platform. The tube is wide enough to allow a cat to crawl into it.

The textile fabric used is woven pile fabric (plush of polyester).

The total surface of the textile fabric is bigger than the surface of the sisal material.'

(2) Column (2) gives the classification CN code as 6307 90 98, being the heading for '*other made up textile articles*'.

(3) Column (3) refers to the classification as being determined by GIR 1, 3(b) and 6, note 7(f) to Section XI, and the wording of CN codes 6307, 6307 90 and 6307 90 98, and gives reasons for the classification code as follows:

'Given its objective characteristics, the article is intended to attract cats and keep them away from furniture that they would otherwise occupy.

[...]

The textile material (the woven textile fabric and the sisal cord) is essential in enabling the product to be used as intended because it attracts cats which can e.g. scratch their claws, sit, sleep on it and play with it. It is therefore

the textile material (not the wood or paperboard) that gives the article its essential character within the meaning of GIR 3(b).

As it cannot be determined whether the sisal or the woven textile material is more essential to attract cats, the bigger quantity of the woven textile fabric and the wider variety of activities it provides to the cat are considered to give the article its essential character within the meaning of GIR3(b) ... Within the meaning of note 7(f) to Section XI, the woven textile fabric is assembled by sewing and is consequently a made-up textile article of textile fabric.'

Conclusions on Cat Trees/Scratchers

52. The appellant has asserted that Regulation 350/2014 is invalid. To that end, it has urged on the Tribunal to apply the GIRs afresh, and on the premise that the CJEU has clearly stated that GIR1 and GIR3 must be applied in order, the correct CN code can be arrived at by applying GIR1, without invoking the GIR3 test as the EU Commission did in implementing Regulation 350/2014. It is averred for the appellant that the correct application of GIR1 with the CN headings alone should deliver the relevant code for wooden articles, whether it be 9403, 4420, or 4421, or in the alternative, as articles of rope under 5609. We consider each of these submissions in turn in relation to the Cat Trees/Scratchers.

Whether Regulation 350/2014 invalid

53. The general position in relation to classification regulations such as Regulation 350/2014 is set out in *Vtech* at [18]-[20], and as noted by Collins J at [20]: 'classification regulation is adopted ... on the advice of the Customs Code Committee where the classification of a particular product is such as to give rise to difficulty or to be a matter for dispute', as pertaining to the product being classified by Regulation 350/2014.

54. We have special regard to the legal status of Regulation 350/2014, as explained in *Vtech*:

'[21] Regulations, including classification regulations, are binding in their entirety from the date of their entry into force: EC Treaty, Article 249 (formerly Article 189). A regulation providing that goods of a specified description are to be classified under a particular CN code: (a) is determinative of the issue of how goods of that specified description should be classified; and (b) may be applicable by analogy to identical or similar products.

[22] ... where a Regulation concerns products which are similar to those in issue, then the classification in the Regulation must be followed unless and until there is a declaration from the European Court that the Regulation is invalid. ...'

55. The appellant's central contention against the relevance of Regulation 350/2014 to this appeal is that a Cat Tree is different from a Cat Scratcher, and that the Committee had only examined a product which could not be described as a Cat Tree; hence Regulation 350/2014 'neither applies directly nor by analogy'. (It is unclear whether the appellant is also asserting that the Cat Scratchers under appeal are also different to the simple cat scratcher examined by the Customs Code Committee to render Regulation 350/2014 invalid to its application.)

56. The 'more sophisticated cat scratcher' examined by the Customs Code Committee as depicted in a photograph appended to the Minutes of Meeting consists of a wooden box covered with woven fabric that is intended for cats to enter. A cardboard tube covered in sisal is attached to the box, and a further wooden platform big enough for a cat to lie on is also covered in woven fabric. A wooden tube covered in woven fabric is attached to the underside of the wooden platform and is wide enough for a cat to crawl in, and settle into sleep inside the tube.

57. We do not agree that there is such material difference between the appellant's Cat Trees and the 'more sophisticated cat scratcher' examined by the Committee. Contrary to the appellant's assertion, we are of the view that the articles examined by the Committee in the form of: (a) a 'simple cat scratcher' corresponds to the appellant's Cat Scratchers, and (b) 'a more sophisticated cat scratcher' corresponds to the appellant's Cat Trees. We find that the Cat Trees/Scratchers under appeal to be the 'same' products to the 'simple' and/or 'more sophisticated' cat scratchers being examined by the Customs Code Committee that led to the Implementing Regulation 350/2014. We reject the appellant's submission that Regulation 350/2014 cannot apply to the appellant's Cat Trees/Scratchers on the basis that the products in issue are the same as the particular products being examined which led to Regulation 350/2014.

58. As observed by Collins J in *Vtech* at [23]: 'Regulations may be declared invalid, but only by the European Court (or, in a direct action commenced by a private party, by the Court of First Instance of the EC).'⁷ Where a party asserts that a Regulation is invalid, the proper procedure was explained by Judge Fairpo in *AVF Group Ltd v HMRC* [2022] UKFTT 00014 (TC) at [22] as follows:

'Following the UK's departure from the EU, UK tribunals (and courts) continue to be generally prohibited from declaring EU law instruments (including a classification regulation) invalid; however, such challenges are permitted where provided for in regulations. In particular, the Challenges to Validity of EU Instruments (EU Exit) Regulations 2019/673 permits the Tribunal in certain circumstances to declare void an EU law instrument where the Tribunal finds the instrument to be invalid on any of the grounds set out in the second paragraph of Article 263 of the Treaty on the Functioning of the EU. The Tribunal may not make such declaration of invalidity unless notice of the proceedings has been given to a Minister of the Crown at least 21 days (or such other period as the Tribunal shall direct) before the date on which the declaration is made. The Minister is entitled to be joined as a party to the proceedings.'

59. Insofar as the appellant's case is premised on Regulation 350/2014 being invalid, this Tribunal has no jurisdiction to make a ruling on the validity of the Regulation as implemented by the EC Commission unless the Minister of the Crown has been given prior notification. No such notification has been given in relation to this appeal for this challenge to be relevant to our consideration.

60. Notwithstanding Mr Winter's tenacious efforts in taking us through the various candidates as the correct commodity code(s) for the Cat Trees/Scratchers, we do not think in the present case, the starting point is to start afresh the exercise of classifying the products in question. Unless and until Regulation 350/2014 is declared invalid by the European Court following the relevant procedure, national courts such as this Tribunal are obliged to give effect to the regulation.

61. We conclude that Regulation 350/2014 directly applies to the Cat Trees/Scratchers under appeal as they are the same products as those specified under the classification Regulation as 'other made up textile articles'. The variation of the CN code from 'woven' to 'knitted' following laboratory testing of the plush material sample is a fact that is not disputable, which means CN code 6307 90 10 applies to the products in question, as contended for by HMRC in reliance on the Regulation.

⁷ See *Firma Foto-Frost v Hauptzollamt Lubeck-Ost* [1987] ECR 4199, at [17].

The caveat to adoption of ‘reasoning by analogy’

62. In *Hewlett Packard*⁸ the European Court followed the reasoning of Advocate General Mischo, whose opinion at [18] referred to the fact that classification regulations are adopted ‘when the classification in the CN of a particular product is such as to give rise to difficulty or to be a matter for dispute’. AG Mischo continued by observing:

[21] It is thus not an abstract classification, since the purpose is to resolve the problem to which a particular product gives rise. But, as the Commission points out, the classification regulation has general implications, in so far as it does not apply to a given undertaking or a particular transaction, but, in general, to products which are the same as that examined by the Customs Code Committee.

[22] The classification regulation constitutes the application of a general rule to a particular case, and thus contains guidance on the interpretation of the rule which can be applied by the authority responsible for the classification of an identical or similar product.’

63. For these reasons, AG Mischo cautioned that the approach adopted by a classification regulation for a particular product could not be unhesitatingly or automatically adopted in the case of a similar product. ‘On the contrary, as always, where reasoning by analogy is employed great care is called for’: *Hewlett Packard* at [24].

64. We note the nuanced distinction in the caveat as regards ‘*reasoning by analogy*’ when the approach in a classification regulation is adopted for a *similar* product. In other words, the caveat only applies where the *reasoning* in a classification regulation is being adopted to a *similar* product by analogy. We are of the view that the caveat does not apply in the present case, since the Tribunal is able to make a finding of fact that the products in question are the *same as* (and not just *similar to*) the articles being examined by the Committee that led to Regulation 350/2014.

65. However, in case we are wrong with our interpretation that the relevance of the caveat is limited to a situation where reasoning by analogy is being adopted to classifying a product which is only *similar to* but not the same as the particular product specific to the classification regulation, we consider the appellant’s other contentions for the sake of completeness.

Whether GIR1 to be applied in preference to GIR3

66. It is common ground that according to EU jurisprudence, GIR1 and GIR3 must be applied in order, and where the titles of sections, chapters and sub-chapters are clear to arrive at an CN code, then there is no need to recourse to GIR3. However, we do not consider that there is any clear Heading applicable to Cat Trees and Scratchers to enable classification to be arrived at by resorting to GIR1 alone, because the products are of mixed components.

67. The GIRs recognise the need to find a classification pathway for goods of mixed components by providing under GIR2(b) that:

‘The classification of goods consisting of more than one material or substance shall be according to the principles of rule 3.’

68. GIR3 is therefore engaged when classifying goods comprising more than one material. The appellant does not dispute that the product comprises mixed components: wood, cardboard, sisal, plush, plastic, bolts. The Commission minutes support the conclusion that there is no clearly applicable Heading for the Cat Tress/Scratchers, and we reject the appellant’s submission that GIR1 applies to bypass the requirement to follow GIR3. In the final analysis,

⁸ *Hewlett Packard BV v Directeur Generala des Douanes* Case C-119/99, [2001] ECR I-3981

if there had been such clear Heading, there would have been no need for these proceedings; (nor the need to implementing Regulation 350/2014 for that matter).

Whether wooden component being its essential character

69. To the extent that the appellant is required to contend its case on the premise of GIR3, the appellant relies on *Bemis* and *Tomtom* (see §34(7)) by emphasising that the wooden component is the product's essential character as it is the material which on its own provides its 'stability, shape and structure', and that the component percentage of wood in the product accounts for at least 50% of the overall material (see §13), and is therefore determinative of the product's essential character.

70. In *Bemis*, the goods in question are toilet seats, and the Tribunal found at [38]:

'... the essential character of toilet seats are [sic] that they are a rigid object which conforms to a shape appropriate to its use, and which supports the weight of the person using it and is capable of being secured to the toilet itself to enable the product to be used safely.'

71. In *Tomtom*, the Upper Tribunal determined the appeal by replacing the finding from the First-tier Tribunal which found that the metal shaft gave the mounting bracket its essential character; the mounting bracket was designed to be used in conjunction with a satellite navigation device used in road vehicles. In reaching its decision, the Upper Tribunal highlights the differing emphasis in GIR3(a) and 3(b) at [44]:

'... It is possible, and may frequently be the case, that the "most specific description" (rule 3(a)) or the "essential character" (rule 3(b)) reflect the function of the article, but function is not part of the test in either of the sub-rules, and we see no reason why, on occasion, function and the most specific description or essential character should not diverge.'

72. The appellant's case, insofar as it engages with GIR3, is to say that the wooden component of the product is its 'most specific description', and performs the function of providing stability, shape and structure; thereby wood gives the product its essential character. It seems to us that underpinning the appellant's position is that the 'most specific description' under GIR3(a) and the 'essential character' test under GIR3(b) should align to make wood (as 'the most specific description') define the product's essential character.

73. However, as the Upper Tribunal in *Tomtom* pointed out, *function is not part of the test in either of the sub-rules*. We see no good reason why, on this occasion, 'the most specific description' and 'the essential character' of the Cat Trees/Scratchers should not diverge. With reference to case law principles on the interpretation of 'essential character' as set out at §34, we make the following findings of fact in relation to the Cat Trees/Scratchers, and reject the submission that the article in question is a wooden article for the following reasons.

(1) The intended purpose or function of the article is to provide scratching surfaces and sleeping and playing facilities for cats as an alternative to furniture (intended for human use) which the cats would otherwise scratch and occupy.

(2) It is apt to ask whether the essential character is retained if the plush material is removed. In other words, would the Cat Trees/Scratchers serve the intended function of attracting cats away from furniture if they were in bare wood finish without being covered with the plush fabric?

(3) We conclude that an article in its bare wood finish without the fabric cover would not serve its intended function of attracting cats away from household furniture such as armchairs, sofas, settees, which are covered with fabric. We conclude that it is the soft surface of the plush fabric which mimic the fabric covering of household furniture, and

it is the plush fabric which can attract the cats to nestle down onto its surface as an alternative to household furniture.

(4) We find therefore that a wooden structure in bare wood finish without any fabric covering in the shape of a Cat Tree/Scratcher will not serve its intended function of attracting cats away from furniture with fabric covering.

(5) As with the ink cartridge in *Turbon*, the Cat Trees/Scratchers can be described as comprising two main components: wood and plush fabric. The essential character of the article is given by the plush fabric by virtue of the function the article is intended to serve, even though the fabric (as with the ink in the cartridge) is ‘useless’ unless the fabric is mounted on the wooden structure which gives stability and shape to the article.

74. It is of note that the Customs Code Committee considering the sophisticated cat scratcher had specifically addressed whether Chapter 44 for CN code ‘*other article of wood*’ should be preferred. The Committee reached the conclusion that in the case of the sophisticated cat scratcher ‘the material that attracts cats is more essential than the material that gives the article its form’, which would seem to be in line with the principle in *Turbon*, and is our conclusion.

Whether sisal cord over plush fabric

75. As to the proposition that the essential character should be by reference to the sisal, and be classified as ‘*Articles of rope*’ under CN code 5609 at duty rate 5.8%. We reject the classification should be varied for the following reasons:

(1) As a matter of fact, sisal still falls within ‘textile’, albeit as ‘woven’ and not ‘knitted’, and does not fall under the Heading for ‘rope’.

(2) It is accepted that the article in question has multifunctionality, and the sisal cords are there for cats to claw on in place of furniture covering. As observed in *Vtech*, multifunctionality does not preclude one function from determining the essential character of an article if that function predominates. The material ratio between sisal and plush is that the plush predominates over sisal, with the exception of the Single Column Simple Cat Scratcher, where the sisal cord would appear to predominate.

(3) It is clear from the BTIs provided by the appellant that where the Cat Tree is covered, the commodity code classification is determined by reference to the material it is covered with (see B159-B182/B1/284 where Cat Trees were classified under 5609 under ‘Articles of Yarn’). The appellant’s reliance on BTI GBBTI 503791258 (B186/HB1/284) supports this contention, and that item was classified under ‘Textile Articles’ by reference to the material covering the structure, which was, in that case, woven. The BTI 503791258 was issued to HMRC with a validity period from 1 March 2018 to 28 February 2021, and the product details specified on the BTI are as follows:

‘A multilevel scratching tree for cats to rest and play, with cave/sleeping areas, poles and ladders, the Cat Tree is made of fibreboard, covered with faux fur, poles and ladders are covered with sisal.’

76. Whilst we reject the submission that the duty rate should be varied to 5.9% by reference to the sisal cord as ‘rope’, we are of the view that the Single Column Cat Scratchers where the sisal cord appears to predominate, the duty rate for the Single Column Cat Scratchers should be based on the sisal cord as ‘woven’ textile, and be reduced to 6.3%.

77. Our decision in principle is to dismiss this part of the appeal with the exception of the Single Column Cat Scratchers. It is expected that parties are able to ascertain the quantum of adjustment in relation to the Single Column Cat Scratchers being imported in the relevant period from January 2016 to May 2018 without further recourse to the Tribunal.

Metal Playpens/Panels

The competing commodity codes

78. The competing codes contended by the parties are tabulated as follows.

Metal Playpens/Fencing			
Appellant		HMRC	
7314 49 00	Fencing of iron or steel wire (0%)	7326 20 00 90	Other articles of iron or steel (2.7%)
7314 31 00	Articles of iron or steel (0%)		
7314 39 00	Articles of iron or steel (0%)		

Appellant's case

79. The relevant CN headings to arrive at the commodity code adopted by the appellant on import entries, and those subsequently relied upon, are summarised as follows:

- (1) CN Code 7314 49 00 (relevant duty rate 0%)
Section XV: Base metals and articles of base metals
Chapter 73: Articles of iron or steel
7314: Cloth (including endless bands) grill, netting and fencing, of iron or steel wire; expanded metal of iron or steel
7314 49: Other cloth, grill, netting and fencing
7314 49 00: Other
- (2) CN Code 7314 31 00 00 (relevant duty rate 0%)
Section XV: Base metals and articles of base metals
Chapter 73: Articles of iron or steel
7314: Cloth (including endless bands) grill, netting and fencing, of iron or steel wire; expanded metal of iron or steel
7314 31: Other grill, netting and fencing, welded at the intersection
7314 31 00: Plated or coated with zinc
- (3) CN Code 7314 39 00 00 (relevant duty rate 0%)
Section XV: Base metals and articles of base metals
Chapter 73: Articles of iron or steel
7314: Cloth (including endless bands), grill, netting and fencing, of iron or steel wire; expanded metal of iron or steel
7314 39: Other grill, netting and fencing, welded at the intersection
7314 39 00: Other

80. The relevant Explanatory Notes relied upon by the appellant in relation to the subheading for 7314: *Other cloth, grill, netting and fencing* are as follows:

- (1) Note 2 of the CNENs states:
'In this chapter, the word 'wire' means hot-or-cold-formed products of any cross-sectional shape of which no cross-sectional dimension exceeds 16mm.'
- (2) Note 7 of the CNENs states:
'Classification of composite articles:
Except where the headings otherwise require, articles of base metal (including articles of mixed materials treated as articles of base metal under the Interpretative rules) containing two or more base metals are to be treated as articles of the base metal predominating by weight over each of the other metals.'

For this purpose:

- a. Iron and steel, or different kinds of iron or steel, are regarded as one and the same metal.'

(3) The HSENs to Heading 73.14 state the following regarding the classification of items under this heading:

'(A) Cloth (including Endless Bands), Grill, Netting and Fencing

The products of this group are, in the main, produced by interlacing, interweaving, netting, etc., iron or steel wire by hand or machine. The methods of manufacture broadly resemble those used in the textile industry (for simple warp and weft fabrics, knitted or crocheted fabrics, etc.). The group includes wire grill in which the wires are welded at the points of contact or bound at those points by means of an additional wire, whether or not the wires are also interlaced. The term "wire" means hot- or cold-formed products of any cross-sectional shape, of which no cross-sectional dimension exceeds 16 mm, such as rolled wire, wire rod and flat strip cut from sheet (see Note 2 to this Chapter). *The material of the heading may be used for many purposes e.g., for the washing, drying or filtering of many materials; to make fencing, food protecting covers and insect screening, safety guards for machinery, conveyor belting, shelving, mattresses, upholstery, sieves and riddles, etc.; and for reinforcing concrete, etc. The material may be in rolls, in endless bands (e.g. for belting) or in sheets, whether or not cut to shape; it may be of two or more ply.'* (italics added)

HMRC's case

81. The CN headings to arrive at HMRC's commodity code for the Metal Playpens/Panels, and the relevant Explanatory Notes are set out as follows:

- (1) 7326 20 00 90 (applicable duty rate 2.7%)
Section XV: Base metals and articles of base metal
Chapter 73: Articles of iron or steel
7326: Other articles of iron or steel
7326 20: Articles of iron or steel wire
7326 20 00 90: Other

(2) Notes 2 and 7 of the CNENs referred to above are relevant to HMRC's case.

(3) In addition, HMRC rely on HSENs for 73.26 which states:

'This heading covers all iron or steel articles obtained by forging or punching, by cutting or stamping or by other processes such as folding, assembling, welding, turning, milling or perforating other than articles included in the preceding headings of this Chapter or covered by Note 1 to Section XV or included in Chapter 82 or 83 or more specifically covered elsewhere in the Nomenclature.

[...]

Articles of wire, such as snares, traps, mouse-traps, eelpots and the like; wire ties for fodder, etc.; tyre tringles; duplex or twin wire for making textile loom heads and formed by soldering together two single wires; nose-rings for animals; mattress hooks, butchers' hooks, tile hangers, etc.; waste paper baskets.'

Conclusion of Metal Playpens/Panels

82. It is noted that the parties agree on the correct Heading to be Chapter 73 for the Metal Playpens/Panels for ‘*articles of iron or steel*’. The point of dispute concerns the correct sub-heading, and specifically whether panels are ‘*Cloth ... netting and fencing*’ as the appellant asserts, or ‘*Articles of iron or steel*’ as HMRC maintain. In gist, the parties’ contentions are:

(1) Whether the products in question are a component part of a finished product under sub-heading 73.14 which refers to materials used as a component part of a finished product as described by the relevant explanatory notes at §80; see for example: ‘*The material may be in rolls, in endless bands (e.g. for belting) or in sheets, whether or not cut to shape; it may be of two or more ply*’ (§80(3)); or

(2) Whether the products are in their final form already, and fall under the sub-heading 73.26 contended for by HMRC in relation to a finished product, where the HSEs clearly state that the final product has undergone a manufacturing process of some kind, such as *forging, punching, cutting or stamping, welding* and so on. The notes then give examples of finished products, all of which have wire components.

83. GIR6 states that the classification process is the same whether considering the correct tariff for headings or sub-headings. We conclude that the more correct sub-heading applicable to Metal Playpens/Panels is 73.26 for the following reasons:

(1) Based on the photographic exhibits of the Metal Playpens/Panels, we find as a fact that the items include grills of iron or steel wire (welded at the intersections), and each of the grills has been ‘finished’ and powder coated to be rust-proof as required; the grills are incorporated into the outer forms with the inclusion of hinges, latches and brackets to create openings, and to allow the panels to be interlinked.

(2) The appellant’s descriptions of the products in correspondence dated 12 March 2019 and 19 July 2019 (§24) align with our finding of fact; that is to say, the products are ready for assembling into use to erect a barrier or enclosure of various dimensions.

(3) The process of assembling the Panels is not a manufacturing process, and the Panels are therefore supplied in their final form of manufacturing, ready to be put into use by simply assembling them into the required structure.

84. Mr Winter places heavy reliance on the word ‘fencing’ in the sub-heading for 73.14 of ‘*Cloth ... netting and fencing*’. It is averred that the panels are for erecting ‘fencing’ and therefore the sub-heading is more directly applicable.

85. We are not persuaded by Mr Winter’s submission that the Panels are items of fencing for these purposes. HSEN for 73.14 states ‘the material of the heading may be used for many purposes e.g., for washing, drying and filtering of many materials; to make fencing, food protecting covers and insect screening, safety guards for machinery, conveyor belting, shelving, mattresses, upholstery, sieves and riddles, etc and reinforcing concrete, etc’. Whilst referring to the ‘many purposes’ to which the relevant article can be put, items within 73.14 are indicative that the items are to be made into, or incorporated into, a finished product. The single word ‘fencing’ on which so much weight has been put to make the appellant’s case does not detract from the overall context of the sub-heading 73.14 as pertaining to the class of items which are a *component* – to be fashioned or incorporated into a finished product by some form of manufacturing process.

86. We reject therefore ‘fencing’ in the sub-heading is determinative of the classification exercise. We find the Panels are not a component to a finished product, but that the Panels are the products supplied in their final form.

87. In contrast, the sub-heading 73.26 as ‘Articles of iron or steel’ provides ‘the most specific description’ amongst the proposed CN candidates, and in accordance with GIR3(a), the sub-heading 73.26 is to be preferred.

88. In any event, even if the competing commodity codes were of equal merits, any residual ambiguity thus arising as to which should be the correct sub-heading for the Panels is to be resolved by virtue of GIR 3(c), whereby the preferred heading is to be determined by reference to the one which is last in numerical order, which would then be 73.26 and not 73.14. We therefore dismiss this part of the appeal.

DISPOSITION

89. The appeal is dismissed in principle, and the duty rates applicable in relation to all the products in question as per the C18 Demand Notices issued are confirmed, with the exception of the Single Column Cat Scratchers, for which the duty rate is to be reduced to 6.3% in accordance with the main textile component being of sisal, and is therefore to be classified as ‘woven’ and not ‘knitted’.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

**DR HEIDI POON
TRIBUNAL JUDGE**

Release date: 29th SEPTEMBER 2022