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UT (Tax & Chancery) Case Number: UT/2025/000032

Upper Tribunal
(Tax and Chancery Chamber)

CUSTOMS DUTY – classification of Wetsuits comprised of panels of neoprene panels, majority of which are covered on both sides with textile – whether classified within Chapter 40 (plastics and rubber) or Chapter 61 (textiles) – FTT held that textile was present merely for reinforcement and Wetsuits classified under Chapter 40 – held – appeal allowed – decision of FTT set aside and remade classifying Wetsuits under Chapter 61

Hearing venue: The Rolls Building
London
EC4A 1NL

Heard on: 21 and 22 January 2026
Judgment date: 26th March 2026

Before

MR JUSTICE MICHAEL GREEN
JUDGE JEANETTE ZAMAN

Between

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Appellants

and

O'NEILL WETSUITS LIMITED

Respondent

Representation:

For the Appellants: Edward Waldegrave, counsel, instructed by the General Counsel and Solicitor for His Majesty's Revenue and Customs

For the Respondent: Kevin Starr, Hexagon Consulting Limited

DECISION

INTRODUCTION

1. This is an appeal against the decision of the FTT in *O'Neill Wetsuits Ltd v HMRC* [2024] UKFTT 001071 (TC) (the "FTT Decision") in relation to the classification of the wetsuits imported by O'Neill Wetsuits Ltd ("O'Neill") into the UK (the "Wetsuits"). HMRC had issued an Advanced Tariff Ruling certificate on 27 October 2022 stating that the Wetsuits should be classified as garments made from "rubberised textile fabric" under Commodity Code 6113 0010 00 (within Chapter 61).

2. The FTT allowed O'Neill's appeal and decided that the Wetsuits should be classified as "apparel" made of "vulcanised rubber" under Commodity Code 4015 9000 00 (within Chapter 40). The Upper Tribunal granted HMRC permission to appeal on three grounds.

3. For the reasons set out below, we have allowed HMRC's appeal. We have set aside the FTT Decision and re-made it, concluding that the Wetsuits should be classified under Commodity Code 6113 0010 00.

4. References in the form FTT[x] are to paragraphs of the FTT Decision.

RELEVANT LAW

5. Section 8 Taxation (Cross-Border Trade) Act 2018 requires HM Treasury to make regulations establishing the customs tariff which classifies goods according to their nature, origin or any other factor and gives codes to the goods as so classified.

6. HM Treasury made the Customs Tariff (Establishment) (EU Exit) Regulations 2020 SI 2020/1430 (the "2020 CT Regulations") to fulfil this requirement. Regulation 2 provides for the establishment of a system which involves the classification of goods according to their description as specified in the "Goods Classification Table" under Sections, Chapters, Sub-chapters, Headings and Sub-headings and the use of ten digit "commodity codes" set out in the Goods Classification Table as applicable to the goods as so classified. The first two digits of a commodity code denote the Chapter and the next two denote the relevant Heading. This system is the "UK Tariff" and the Goods Classification Table is set out in Annex I of Part Three of the 2020 CT Regulations.

7. Three Chapters are relevant to this appeal, Chapter 40 in Section VII (Plastics and articles thereof; rubber and articles thereof), Chapter 59 and Chapter 61 (both in Section XI (Textiles and textile articles)).

Commodity codes

8. Commodity code "4015 9000 00" of the UK Tariff is associated with the following descriptions:

> "Section VII: Plastics and articles thereof; rubber and articles thereof
>
> Chapter 40: Rubber and articles thereof
>
> Heading 4015: Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber
>
> Subheading 4015 9000: Other"

9. Commodity code "6113 0010 00" of the UK Tariff is associated with the following descriptions:

> "Section XI: Textiles and textile articles
>
> Chapter 61: Articles of apparel and clothing accessories, knitted or crocheted

> Heading 6113: Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907
>
> Subheading 6113 0010: Of knitted or crocheted fabrics of heading 5906"

10. Heading 6113 is defined with reference to Heading 5906, which in turn refers to Heading 5902. The descriptions associated with Headings 5902 and 5906 in the UK Tariff are as follows:

> "Section XI: Textiles and textile articles
>
> Chapter 59: Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use
>
> Heading 5902: Tyre cord fabric of high-tenacity yarn of nylon or other polyamides, polyesters or viscose rayon
>
> Heading 5906: Rubberised textile fabrics, other than those of heading 5902."

Rules of interpretation

11. Regulation 3 of the 2020 CT Regulations provides that the rules of interpretation in (a) Part Two of the UK Tariff, and (b) notes to a Section or Chapter of the Goods Classification Table have effect.

12. The first six rules of interpretation in Part Two of the UK Tariff are the General Interpretative Rules (the "GIRs"):

> "PART TWO – GOODS CLASSIFICATION TABLE RULES OF INTERPRETATION
>
> SECTION 1
>
> Classification of goods in the Goods Classification Table shall be governed by the following Rules.
>
> General Interpretive Rules
>
> Rule 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.
>
> Rule 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.
>
> Rule 3

> When, by application of Rule 2(b) or for any other reason, goods are prima facie classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

13. The classifications used in the UK Tariff are based on the classification system in the International Convention on the Harmonised Commodity Description and Coding System (generally known as the "Harmonised System) administered by the World Customs Organisation which publishes explanatory notes to the Harmonised System known as "HSENs". The HSENs should be taken into account when deciding whether an item should be classified under a particular Heading (*Hasbro European Trading BV v HMRC*, Newey LJ at [18]). The GIRs in Part Two of the UK Tariff are the General Rules of Interpretation provided for in the Harmonised System.

14. The notes to Sections and Chapters in the Goods Classification Table (which are legally binding pursuant to Regulation 3 of the 2020 CT Regulations) and the HSENS to which the parties referred are set out in the Appendix to this Decision.

European Regulation

15. European Commission Regulation (EC) No. 2345/2003 of 23 December 2003 (the "European Regulation") provides that wetsuits similar to the Wetsuits should be classified under 6113 0010. The European Regulation is no longer of legal effect in the UK.

16. The Annex thereto sets out the reasons for this classification, to which both parties referred, as follows:

> "The classification is determined by the provisions of general rules 1, 3 (b) and 6 for the interpretation of the Combined Nomenclature (GIR), by note 7(e) to Section XI, by notes 2(a) to Chapter 40, 4 to Chapter 59, 1 to Chapter 61, and 1(e) to Chapter 95, as well as the wording of CN codes 6113 and 6113 00 10.
>
> The article is made up within the meaning of note 7(e) to Section XI and consists mainly of cellular rubber panels covered on both faces with a layer of textile fabric. These panels of combined materials give the essential character to the garment (GIR 3b).
>
> As the cellular rubber is covered on both faces with a layer of textile fabric, the latter is regarded as having a function beyond that of mere reinforcement, since it confers the essential character of textile to the material. Therefore, the textile fabric being present not merely for reinforcing purposes within the meaning of Chapter note 4, last paragraph, to Chapter 59, it is considered to

be the constituent material of the article. (See also the HS Explanatory Notes to heading 4008, third paragraph, and fourth paragraph, (A)).

Thus, the article is a garment made up of knitted fabrics of heading 5906 and, in accordance to note 1 to Chapter 61, is classified in subheading 6113 00 10.

Classification in heading 4015 is excluded within the meaning of GIR 3b as only a minor part of the garment is made of sheets of cellular rubber covered only on one face with a textile fabric being present merely for reinforcing purposes (heading 4008)."

FTT DECISION

17. The FTT described the Wetsuits as follows:

> "85. The Wetsuits in the appeal before us are described as all-in-one wetsuits designed for surface water sports. The Wetsuits are intended to cover the upper and lower part of the body, reaching from the shoulders to the ankles and enveloping each leg separately, with long sleeves, round turtle style neckline, reinforcement on the knees and a small discreet key pocket to the side of the lower right leg. The Wetsuits also have a zip fastener to the front, across the upper chest. The company name appears to the right front and back chest area. The Wetsuits comprise of neoprene panels, with the majority covered on both sides with a knitted textile. There is an area to the front chest, and a small area to the lower back, where the neoprene is only covered by textile on the inside."

18. We refer to the neoprene rubber that was covered on both sides with a textile as "Double-sided Panels" and those where the neoprene was only covered by textile on one side (the inside) as "Single-sided Panels". The Wetsuits are made up of both Double-sided Panels and Single-sided Panels stitched together (FTT[4] and [85]); the majority of the panels are Double-sided Panels, with Single-sided Panels being used for an area to the front chest and a small area to the lower back (FTT[85]).

19. The FTT set out the matters that were not in issue at FTT[37] as being:

(1) The Wetsuits are "articles of apparel".

(2) The neoprene element of the panels on the Wetsuits constitutes "vulcanised rubber".

(3) The textile layers on the panels used to make the Wetsuits constitute "knitted fabric".

(4) Wetsuits that are comprised only of Single-sided Panels fall under Heading 4015 of the UK Tariff.

20. The FTT accepted these as facts at FTT[62] and also made the following findings:

(1) The neoprene provides insulation and not the textile (FTT[62(4)]).

(2) The inner and outer textile layers "are present merely for reinforcing purposes" (FTT[110]).

(3) The major component of the Wetsuits is the neoprene. The metrics of the Wetsuits indicate that the neoprene is greater by volume and weight in order to provide insulation (FTT[115]).

21. We consider the detailed reasoning of the FTT further when addressing the grounds of appeal but it can be summarised as follows:

(1) Heading 4015 clearly refers to "Articles of apparel and clothing accessories…, for all purposes, of vulcanised rubber other than hard rubber". HMRC accept that the Wetsuits are "articles of apparel" and "vulcanised rubber" (FTT[101]).

(2) The FTT referred to the Chapter note and Additional chapter note to Heading 4015 and the HSEN in relation to Heading 4015 (FTT[102] to [108]) and reached the following conclusions:

(a) The Wetsuits were not within Item (1) as they are not wholly of rubber (FTT[109]).

(b) They are not within Item (2). The effect of the final part of Note 5 of Chapter 59 is to exclude from the scope of Heading 5906 rubberised textile fabrics where the textile fabric is present merely for reinforcing purposes and here both textile layers were present merely for the purposes of reinforcement of the neoprene rubber (FTT[109] and [113]).

(c) Referring to Item (3), the Wetsuits are of rubber, with parts of textile fabric, and the rubber is the constituent giving the goods their "essential character". There was considerable force in Mr Starr's submission that one can end the enquiry here (FTT[110]).

(3) Even if categorisation had to be approached by means of Rule 3(b) of the GIRs (on the basis that both commodity codes were potentially equally applicable), Rule 3(b) provides that goods are to be "classified as if they consisted of the material or component which gives them their essential character" and the essential character of the Wetsuits is the neoprene rubber. This results in the Wetsuits being categorised under Heading 4015 (FTT[110] to [111]).

(4) As the textile layers are present merely for reinforcing purposes the Wetsuits are excluded from Chapter 59 by Note 5 (FTT[110]).

(5) HSEN 4008 is not applicable, "not least because in the Appellant's case the rubber has been further worked and, therefore, it is irrelevant. It is, clearly, necessary to have regard to the final product" (FTT[115]).

GROUNDS OF APPEAL

22. The Upper Tribunal granted HMRC permission to appeal on three grounds:

(1) Ground 1 – The FTT failed to recognise that the effect of the relevant provisions is that a sheet of rubber covered with textile on both sides falls to be treated as a "textile", and a product made out of such material will be treated as made out of textile.

(2) Ground 2 – The FTT failed to recognise that in any event a sheet of rubber covered on one or both sides with textile will be treated as a "textile" unless the textile is only present for "reinforcement", and it further erred in taking the view (contrary to the undisputed evidence before it) that the textile elements of the panels are present solely for reinforcement.

(3) Ground 3 – The FTT erred in its application of GIR 3(b).

Summary of HMRC's submissions on the grounds of appeal

23. Mr Waldegrave submitted that in concluding that the Wetsuits should be classified under Heading 4015 the FTT had made the following errors of law.

Ground 1

24. Mr Waldegrave submitted that the FTT erred by failing to appreciate the significance of the HSEN to Heading 4008.

25. The HSEN to Heading 4008 makes clear that, where a rubber sheet is combined with textile on both sides, that material will be classified as textile (regardless of the purpose of the textile layers). This means that a sheet of rubber lined on both sides with textile fabric is not classified under Heading 4008 (which applies to plates and sheets of "vulcanised rubber"). Instead, the HSEN directs that it is to be classified under Heading 5906 (which applies to "rubberised textile fabrics"). Such material must be classified in this way regardless of whether, as a matter of fact, the textile is present solely for the purposes of reinforcement: the composite product is definitively treated as falling within Heading 5906.

26. The FTT stated at FTT[115] that this HSEN was not applicable "not least because in the Appellant's case the rubber has been further worked and, therefore, it is irrelevant. It is, clearly, necessary to have regard to the final product." This approach involved an error of law, as the question posed by both Heading 6113 and Heading 4015 is: what is the Wetsuit made of? It was essential for the FTT to consider the material from which the Wetsuits were made, and the HSEN to Heading 4008 is relevant to that issue as it explicitly states that rubber lined with textile on both sides is to be treated as textile within Heading 5906.

27. The FTT considered Item (3) in the HSEN to Heading 4015 to be determinative. However, Item (2) in the HSEN to Heading 4015 effectively excludes from that Heading something which falls within Section XI. Had the FTT recognised that the effect of the HSEN to Heading 4008 is to treat the Double-sided Panels (and so the finished Wetsuits) as falling within Section XI, it would have realised that Item (3) in the HSEN to Heading 4015 could not apply. Items (2) and (3) are mutually exclusive, such that once goods are within the opening words of Item (2) they cannot then be within Item (3), irrespective of whether they are within the exclusion in Item (2).

Ground 2

28. HMRC's primary position was that the question whether the textile was present merely for reinforcing is a legal issue and not a question of fact. If, however, we did not accept this, then the FTT's finding of fact would be relevant and Mr Waldegrave submitted that the FTT erred in concluding at FTT[110] and [113] that the textile layers of the panels were present merely for reinforcing purposes.

29. Mr Waldegrave submitted that this finding was not reasonably open to the FTT on the evidence before it. The only relevant evidence before the FTT was an email from O'Neill's representative dated 10 October 2022 which stated that the inner textile layer "aids comfort". This evidence was recorded by the FTT at FTT[95].

30. Mr Waldegrave submitted that the FTT made an error of law in making a finding of fact which was not supported by any evidence before it. This was not a case in which the FTT needed to evaluate evidence capable of supporting different conclusions. The factual question was discrete and straightforward, and there was no dispute between the parties; it was agreed that the inner layer of textile has a function of making the Wetsuits more comfortable.

31. Had the FTT concluded, as it should have done, that the inner textile layer (which was present on both the Single-sided Panels and the Double-sided Panels) is present for purposes which go beyond reinforcement, then it would have concluded that the panels fall to be regarded as textiles (within Heading 5906).

Ground 3

32. HMRC submitted that the FTT erred in its approach to the application of Rule 3(b) of the GIRs. The FTT considered that, if it was necessary to consider Rule 3(b), that would result in the Wetsuits being classified under Heading 4015 because the Wetsuits derive their "essential character" from the neoprene element in the panels and not from the textile layers.

33. Mr Waldegrave submitted that Rule 3(b) does not require (or permit) an open-ended assessment of whether the essential character of the Wetsuits is derived from "neoprene" or "textile", or from the ultimate purpose of the Wetsuit. Rule 3(b) operates as a "tie-breaker" between the competing Commodity Codes (or, in the circumstances of this case, in effect the competing Headings) which might be applicable.

34. In this case, the competing Headings were 4015 and 6113. The Wetsuits would fall to be classified under Heading 4015 if made out of "rubber", and Heading 6113 if made out of "textile". The FTT should have concluded that the Double-sided Panels fall to be regarded as textiles. Had it so concluded, and had it also taken the view that the Single-sided Panels fall to be regarded as rubber, then it should have applied Rule 3(b) by asking whether the Wetsuits derived their essential character from the Double-sided Panels ("textile") or the Single-sided Panels ("rubber"). The Double-sided Panels form the overwhelming majority of each Wetsuit, so the only answer that the FTT could have given to this question would have been that the Wetsuits derive their essential character from the Double-sided Panels, and therefore fall to be classified under Heading 6113.

Summary of O'Neill's submissions

35. Mr Starr's written and oral submissions were not framed by reference to the particular grounds of appeal relied upon by HMRC but he did explain the basis on which O'Neill submitted that the FTT's decision was correct.

36. Mr Starr set out O'Neill's position as follows:

> (1) The first step in classifying any product is to refer to the notes to the Heading relevant to the product in issue, and then to refer to other Chapter notes and Section notes if so guided. For this reason, the classification of the Wetsuits should start with the HSEN to Heading 4015.
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> (2) The Wetsuits are best described by Item (3) within the HSEN to Heading 4015 as "Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character". The FTT was correct to recognise the significance of this third item. The overriding consideration when assessing essential character must be the respective roles of the constituent materials in relation to the use of the goods. The function of the Wetsuit is to keep the wearer warm in cold water, and it is the neoprene (and only the neoprene) that does this.
>
> (3) HMRC's approach of looking at the fabric first has led HMRC into looking at notes that are inapplicable, namely the HSEN to Heading 4008 and Note 5 of the Chapter notes to Chapter 59:
>
> > (a) Mr Starr submitted that the HSEN to Heading 4008 refers to the fabrics and does not apply to a finished garment. He accepted that rubber sheets covered on both sides are classified as textile by this HSEN (but not that they would be a "rubberised textile fabric"). Mr Starr submitted that it would then be a "leap of faith" to say that the finished garment is also textile. If the intention is to exclude garments made from Double-sided Panels from Heading 4015, the place to have put such an exclusion is within a HSEN to Heading 4015. There is no such note; and this would contradict Item (3) of that HSEN. Mr Starr's position was that even

if a garment is comprised solely of Double-sided Panels, the classification is determined by Item (3), based on the essential character and the function of the product. The HSEN to Heading 4015 does not invite us to look at the HSEN to Heading 4008.

(b) Mr Starr submitted that HMRC have focused on the terms of the exclusion in Note 5 of the Chapter notes to Chapter 59, ie that the heading "does not, however, apply, to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40)…" and concluded that this means that if the textile is more than reinforcement, then Chapter 40 does not apply. However, Mr Starr submitted that this note is referring to the fabric, not to the finished products.

(4) The Wetsuits are not in any event "rubberised textile fabrics" within the definition in Note 5 of Heading 5906. Note 5 describes "rubberised textile fabrics" as "Textile fabrics impregnated, coated, covered or laminated with rubber", whereas Mr Starr submitted that the Wetsuits, by contrast, are manufactured by adding a layer of textile to each side of a neoprene panel. The panels are manufactured by bonding textile to rubber, and not by adding rubber to textile. By the same reasoning, the panels are not within Item (2) of the HSEN to Heading 4015.

37. Mr Starr submitted the HSEN to Heading 4015 should be applied as follows, and that this determines the classification of the Wetsuits:

(1) The HSEN envisages three separate material compositions.

(2) HMRC and O'Neill (as well as the FTT) agree that Item (1) is inapplicable as the Wetsuits are not "Wholly of rubber".

(3) Contrary to HMRC's submissions, Item (2) does not apply. The panels are neoprene bonded with textile, which is an entirely different process to the description in Item (2) of fabrics "impregnated, coated, covered or laminated with rubber". Mr Starr referred to the reasons given in the European Regulation (which concluded that wetsuits similar to those in issue in these proceedings should be classified under Heading 6113). The European Regulation describes the article as "The article is made up within the meaning of note 7(f) to Section XI and consists mainly of cellular rubber panels covered on both faces with a layer of textile fabric." Mr Starr agreed that this description is accurate, but disputed the conclusion reached in the European Regulation. Mr Starr submitted that the European Regulation does not provide that the panels are "rubberised textile fabric".

(4) It is Item (3) that best describes the material composition of the Wetsuits, as "the rubber is the constituent giving the goods their essential character". Mr Starr submitted that the term "essential character" in this HSEN is used in conjunction with Rule 3(b); they are inextricably linked by the use of this phrase. The HSEN to Rule 3(b) states that the factor which determines essential character will vary as between different kinds of goods but that it may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods. When determining essential character, it is the material that contributes all or most to the function of the article that prevails. For a Wetsuit, this is the neoprene.

38. We asked Mr Starr to explain O'Neill's position on Ground 2 of HMRC's grounds of appeal, and whether the textile layers were merely for reinforcement. Mr Starr submitted that the question of reinforcement is irrelevant; reinforcement is referred to in the notes to the UK Tariff (and the HSEN), and Rule 3(b) applies where goods cannot be classified according to

those notes. Mr Starr submitted that once it becomes necessary to apply Rule 3(b) of the GIRs, this renders any notes redundant and the only relevant matters are the characteristics of the product. Mr Starr did, however, agree that as a matter of fact the textile layers of the panels are for more than reinforcement purposes.

39. During his submissions, Mr Starr also challenged the process leading to the implementation of the European Regulation. Mr Starr referred to the notes of a meeting of the Statistical Nomenclature Section of the Customs Code Committee (Textiles) on 25 to 26 June 2003. The meeting notes record that the UK had classified wetsuits constructed predominantly of double-sided panels under Chapter 61 but that a Tribunal had allowed a trader's appeal overturning this classification and replacing it with Chapter 40. The notes state that "UK therefore requires a regulation with full details so that they can continue to classify to chapter 61". Mr Starr submitted that this showed that the European Regulation did not result from an unbiased reappraisal.

40. Mr Starr drew attention to the fact that it is accepted by HMRC that wetsuits covered on only one side with textile are classified under Heading 4015; and submitted that HMRC have not explained the grounds on which they believe that the addition of a single piece of textile fabric, which contributes nothing to the functionality of the Wetsuit, is sufficient to change the essential character from an article of apparel of rubber to an article of apparel of textile.

DISCUSSION

41. We address first Ground 2 of HMRC's three grounds of appeal and then Grounds 1 and 3 together.

Ground 2: whether the textile was merely for reinforcement

42. HMRC's primary position was that the classification of the Wetsuits does not depend on whether, as a question of fact, the textile layers were present merely for reinforcement as the effect of the HSEN to Heading 4008 is that where rubber is covered on both sides by textile, it is deemed to be for purposes which go beyond reinforcement, whereas where rubber is covered by textile on only one side the textile is deemed to be merely for reinforcement. (Mr Waldegrave emphasised that it is for this reason that HMRC accepts that wetsuits comprised only of Single-sided Panels are classified under Heading 4015.) However, if we were to conclude that the factual position does matter (eg because the HSEN, unlike notes to a Section or Chapter in the UK Tariff, is not of legal force, or that the HSEN to Heading 4008 is of no relevance to the classification of a finished product), then Mr Waldegrave submitted that the FTT made an error of law in finding as a fact that the textile was present merely for reinforcement purposes as this was not a finding that was reasonably open to the FTT.

43. The FTT stated at FTT[110] that "we consider that the inner and outer textile layers are present merely for reinforcing purposes". The FTT then explained this further at FTT[113]:

> "113. Whilst it was not disputed by the Appellant that the textile layers on the panels used to make the Wetsuits constitute "knitted fabric", the Heading goes on to refer to "garments, made up of knitted or crocheted fabrics of heading…5906…". In relation to Heading 5906 (and returning to the "reinforcement" point), we are satisfied that the knitted textile fabrics are there for reinforcement, and not to insulate. In this respect, it was accepted by the parties that a single-sided wetsuit - where the textile lining was on the inside - was properly considered to be categorised on the basis that the textile material was present merely for reinforcement and, therefore, fell outwith Heading 5906 (by virtue of Note 5 to Chapter 59); and fell to be categorised under Chapter 40 (4015 9000 00). We find that the same internal lining exists in the Wetsuits under consideration, and that there is simply a further external lining, which was to provide protection from abrasion and wear and tear to the

> external surfaces of the neoprene. This evidence was undisputed. Taken together, the internal fabric was merely for the purposes of reinforcement and that the outer textile covering was merely protective. We find that both textile layers, despite any comments to the contrary, were present merely for the purposes of reinforcement of the neoprene rubber."

44. The FTT Decision does not refer to any evidence in support of this conclusion. The FTT referred to the evidence and submissions in the following terms:

> (1) At FTT[17] the FTT referred to representations which had been made by O'Neill's agent in correspondence, which "stated that the textile layers on the Wetsuits have no use in terms of the primary function (i.e., keeping the wearer warm). Rather the outer surface textile is there to improve durability, whilst the textile lining (i.e., the inner layer) aids comfort".
>
> (2) At FTT[95] the FTT summarised Mr Starr's submissions as "The textile covering the outer surface of the Wetsuits is for "reinforcement purposes" only as the neoprene has a propensity to tear. The optional textile covering on the inner surface exists to provide a degree of additional comfort and is not essential to the function of the Wetsuits."

45. This ground of appeal was included in the application for permission to appeal which was made to the FTT, and whilst describing its conclusion on reinforcement as a "material finding of fact by the Tribunal" the FTT judge did not refer to any evidence on which this was based. Furthermore, Mr Starr did not refer to any evidence in support of this finding in his skeleton argument before the Upper Tribunal, and at the hearing Mr Starr accepted that the textile layer on the inside of the Wetsuits (which was present on both the Single-sided Panels and the Double-sided Panels) was for more than reinforcement.

46. Whilst recognising that an appellate tribunal should be slow to interfere with the fact-finding tribunal's conclusions on primary facts, we are satisfied that the FTT's conclusion that the textile layers were merely for reinforcement purposes was plainly wrong. This finding by the FTT was not supported by any evidence and was contrary to the position which was common ground between the parties, namely that the inner textile layer was for comfort. The FTT made an error of law by concluding that the textile layers were merely for reinforcement.

Grounds 1 and 3: Classification of the Wetsuits

47. The GIRs set out the approach to take to the classification of goods, and these rules "provide a hierarchical set of principles" (*HMRC v Flir Systems AB* [2009] EWHC 82 (Ch), per Henderson J, as he then was, at [14]).

48. Rule 1 of the GIRs states that "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." Rule 2(b) states that 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, and the classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3. Rule 3 then states that when goods are prima facie classifiable under two or more headings, classification shall be according to Rules 3(a), (b) and (c). Rule 3(a) does not assist (as the competing headings are to be regarded as equally specific) and Rule 3(b) states that "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, insofar as this criterion is applicable."

49. HMRC identified the two competing headings which are potentially applicable as Heading 4015 (Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber) and Heading 6113 (Garments, made up of knitted or crocheted fabrics of heading 5906) based on its analysis of the composition of the panels of the Wetsuits by reference to the notes in the UK Tariff and the HSENs. Mr Starr submitted that Heading 6113 cannot apply as the panels are not "rubberised textile fabric" and that the Wetsuits can only be classified under Heading 4015.

50. The reasoning of the FTT focused first on Heading 4015, setting out the terms of that heading, the statement in Note 2 of the notes to Chapter 40 that the chapter does not cover goods of Section XI (textiles and textile articles) and the HSEN to Heading 4015, before continuing as follows:

> "109. Taking Notes (1) to (3) of Heading 40.15 in turn, it is clear that the Wetsuits are not "wholly of rubber", given the textile fabrics included. Note (1) is not, therefore, applicable. In respect of Note (2), the Wetsuits are clearly not "of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, other than those falling in Section XI" (with reference to Note 5 to Chapter 59). Heading 5906 refers to "Rubberised textile fabrics, other than those of heading 5902". While textile clearly is present on the Wetsuits, we have already observed that the effect of the final part of Note 5 of Chapter 59 is, however, to exclude from the scope of Heading 5906 rubberised textile fabrics "where the textile fabric is present merely for reinforcing purposes and textile fabrics of Heading 5811". We shall return to the "reinforcement" point later.
>
> 110. In respect of Note (3) of Heading 40.15 of the HSENs, we are satisfied that the Wetsuits are of rubber, with parts of textile fabric, as the rubber is the constituent giving the Wetsuits their "essential character". We find that there is considerable force in Mr Starr's submission that one can end the enquiry with Note (3) of Heading 40.15 of the HSENs. Furthermore, we consider that the inner and outer textile layers are present merely for reinforcing purposes (see paras. 113 and 114 below) and, therefore, the Wetsuits are excluded from Chapter 59 by virtue of Note 5 and would fall to be characterised pursuant to Chapter 40. We are further satisfied that even if one is to approach categorisation by means of rule 3(b) of the GIRs (on the basis that commodity codes 4015 9000 00 and 6113 0010 00 are potentially equally applicable and in case we are wrong in respect of Note (3) of Heading 40.15 or the exclusion by virtue of Note 5 of Chapter 59), rule 3(b) clearly provides that:
>
> "(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, insofar as this criterion is applicable."
>
> 111. HMRC do not dispute that regard must be had to the "essential character" of the Wetsuits. We find that there is considerable force in Mr Starr's submission that the essential character of the Wetsuits is to provide insulation for the wearer in colder water temperatures. This has not been challenged by HMRC. Such insulation is achieved by the neoprene (the rubber element) because of the manufacturing process that creates bubbles in the neoprene as the air bubbles are an effective insulator. We are, therefore, satisfied that the essential character of the Wetsuits is the neoprene rubber. As the neoprene provides the essential character of a wetsuit, the analysis under rule GIR 3(b) would, equally, result in categorisation of the Wetsuit under Heading 4015 (in particular 4015 9000 00)."

51. The FTT then set out the notes to Section XI so far as relevant to Heading 6113 at FTT[112], and at FTT[113] stated that both parties agreed that a wetsuit comprised solely of Single-sided Panels was categorised on the basis that the textile was present merely for reinforcement and therefore fell outwith Heading 5906 (by virtue of Note 5 to Chapter 59) and was classified under Heading 4015. The FTT then found that both textile layers in the Wetsuits were present merely for the purposes of reinforcement of the neoprene rubber. This is the reason given by the FTT for Heading 6113 being inapplicable.

52. We have considered the parties' submissions in relation to Heading 4015 and Heading 6113 as well as the approach required by the GIRs, in particular Rule 3(b). We first address the relationship between Chapters 40 and 59 (to which Chapter 61 refers).

53. The notes to the Sections and Chapters of the UK Tariff and the HSENs to which we were referred are set out in the Appendix. It is clear that there is a degree of symmetry (albeit imperfect) between Chapters 40 and 59 (to which Chapter 61 refers). This can be seen from, eg:

(1) Note 2 of the notes to Chapter 40 (Rubber and articles thereof) provides that this chapter does not cover goods of Section XI (textiles and textile articles).

(2) The HSEN to Heading 4008 states that the following are excluded from this heading:

(a) plates, sheets and strip of cellular rubber combined with textile fabric on both faces (Heading 5602, 5603 or 5906) (in the third paragraph of Item (A)); and

(b) rubberised textile fabrics as defined in Note 5 to Chapter 59 (Heading 5906) (at (g) in the list of exclusions).

(3) Note 1 of the notes to Section XI (textiles and textile articles) states that this section does not cover "woven knitted or crocheted fabrics … impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40".

(4) Note 5 of the notes to Chapter 59 defines "rubberised textile fabrics" as "textile fabrics impregnated, coated, covered or laminated with rubber". The exclusion in the final paragraph then states that Heading 5906 "does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40) …".

(5) The Additional chapter note to Chapter 40 states that "Where the woven, knitted or crocheted fabrics, felt or nonwovens are present merely for reinforcing purposes, gloves, mittens or mitts impregnated, coated or covered with cellular rubber belong to Chapter 40".

54. Thus whilst the GIRs set out the rules for classification which include, at Rule 3, a tie-breaker provision which applies where goods are classifiable under two or more headings, the notes to the headings themselves apply first to exclude some materials or goods which fall within the classification of another heading.

55. We now turn to what Mr Waldegrave submitted are the two competing headings, recognising that Rule 1 of the GIRs requires that classification starts with the headings, and here the two potential headings include reference to the material out of which the goods are made. Mr Starr submitted that Heading 6113 is not a competing heading at all, but we nevertheless start with Heading 6113.

Heading 6113

56. Heading 6113 covers "Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907". The Wetsuits are "garments" and "made up" for this purpose, and the textile layers are "knitted … fabric".

57. The key issue is then whether the panels of the Wetsuits are within Heading 5906. Heading 5906 is "Rubberised textile fabrics, other than those of heading 5902". Heading 5902 applies to "Tyre cord fabric…" and is clearly inapplicable. "Rubberised textile fabrics" are then defined in Note 5 of the notes to Chapter 59 in the following terms:

> "For the purposes of heading 5906, the expression "rubberised textile fabrics" means:
>
> (a) textile fabrics impregnated, coated, covered or laminated with rubber:
>
> - weighing not more than 1,500 g/ g/m^2; or
>
> - weighing more than 1,500 g/m^2 and containing more than 50% by weight of textile material;
>
> ...
>
> This heading does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 5811."

58. Mr Starr submitted that the panels of the Wetsuits cannot be described as being made of "rubberised textile fabrics" as Note 5 requires that such fabrics are manufactured by impregnating, coating, covering or laminating a textile fabric with rubber, whereas he submitted that the Wetsuits are manufactured by adding a layer of textile to each side of a neoprene panel. We agree with Mr Starr that it appears (at least initially) counterintuitive to focus on the textile being "rubberised", given that it is the neoprene rubber in the Wetsuits that provides the insulation (FTT[62(4)]) and it is the neoprene that is the greater by volume and weight (FTT[115]). However, we agree with Mr Waldegrave's submission that the term "rubberised textile fabrics" is defined in Note 5 and it is that definition which determines the meaning of "rubberised textile fabrics". On that basis we agree with HMRC that both the Double-sided Panels and the Single-sided Panels which make up the Wetsuits are "textile fabrics impregnated, coated, covered or laminated with rubber…" within (a) of the definition of "rubberised textile fabrics". The FTT found at FTT[85] that the neoprene panels were covered on one or both sides with a knitted textile and we conclude that this meets the description of the textile being "coated, covered or laminated with rubber". We consider that it makes no difference for this purpose whether the process (in relation to which the FTT did not make any detailed findings) is described as textile being covered with rubber or rubber being covered with textile. This interpretation is also supported by the following:

(1) Note 5(a) deals separately with fabrics of weights of not more than or more than 1,500 g/m^2. It was common ground that the panels of the Wetsuits weigh not more than 1,500 g/m^2. For those fabrics above this threshold, there is an additional requirement that the combined product contains more than 50% by weight of textile material, but there is no such requirement for the textile to be predominant where the weight is not more than 1,500 g/m^2. This shows that "rubberised textile fabrics" can encompass a combination of materials which (as with the Wetsuits) is mostly rubber.

(2) The terms of the exclusion in Note 5 show that in principle a plate, sheet or strip of rubber combined with textile can be a "rubberised textile fabric", otherwise there would be no need for such exclusion.

(3) The HSEN to Heading 4008 states "The classification of products made from vulcanised rubber (other than hard rubber) combined (either in the mass or on the surface) with textile materials is subject to the provisions of Note 3 to Chapter 56 and Note 5 to Chapter 59." This expressly recognises that a product made from vulcanised rubber combined with textile material on the surface can be within Note 5 of Chapter 59, ie can be a "rubberised textile fabric". This is also apparent from Item (A) within this HSEN as the third paragraph within that Item states "Plates, sheets and strip of cellular rubber combined with textile fabric on both faces, whatever the nature of the fabric, are excluded from this heading (heading 56.02, 56.03 or 59.06)".

59. The reasoning above applies to both the Double-sided Panels and the Single-sided Panels. Mr Waldegrave submitted that the exclusion in the final paragraph of Note 5 then applies differently to these two types of panels. The exclusion is as follows:

> "This heading does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 5811"

60. Mr Waldegrave submitted that whilst the terms of this exclusion appear to ask a factual question as to whether the textile fabric is present merely for reinforcing purposes, this is not the correct approach and instead this exclusion needs to be interpreted by reference to the deeming provisions in the HSEN to Heading 4008. This HSEN states at Item (A) that this heading includes:

> "(A) Plates, sheets and strip of cellular rubber combined with textile fabrics (as defined in Note 1 to Chapter 59), felt or nonwovens, provided that these textile materials are present merely for reinforcing purposes.
>
> In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles and special products, such as pile fabrics, tulle and lace, are regarded as having a function beyond that of mere reinforcement.
>
> Plates, sheets and strip of cellular rubber combined with textile fabric on both faces, whatever the nature of the fabric, are **excluded** from this heading (**heading 56.02, 56.03 or 59.06**)."

61. Mr Waldegrave submitted that the result of this is as follows:

(1) textile fabrics applied to one face only of rubber plates, sheets or strip "are regarded as serving merely for reinforcing purposes", such that Single-sided Panels are then excluded from Heading 5906 by the exclusion in Note 5 and remain within Chapter 40; and

(2) rubber plates, sheets and strip combined with textile fabric on both sides are excluded from Heading 4008, such that the textile in Double-sided Panels is deemed to be for more than reinforcing purposes and are "rubberised textile fabrics" within Note 5 (and not taken out of Heading 5906 by the terms of the exclusion).

62. Mr Starr submitted that we should reject such an approach; he submitted that the HSEN to Heading 4015 does not provide for any such deeming, and that, if it were intended to apply for the purposes of Heading 4015, this language would need to have been included in the HSEN to Heading 4015 (and it is not). Mr Starr submitted that it was HMRC's approach of looking at the fabric of the Wetsuits first that had (wrongly) led them to focus on notes that were inapplicable.

63. Looking at the structure of Chapters 40 and 59, as well as the notes applicable to Headings 4008 and 5906, we conclude that these two headings operate as mirror images of each other, both being concerned with the materials rather than the finished product, and that the notes in the HSEN to Heading 4008 are to be applied when interpreting the HSEN to Heading 4015 and note 5 of the notes to Chapter 59. In particular:

(1) The exclusion in Note 5 of the notes to Chapter 59 that applies where the textile fabric is present merely for reinforcing purposes cross-refers to Chapter 40, and it is the HSEN to Heading 4008 that then addresses what is regarded as being for reinforcing purposes. This is made even more clear by the HSEN to Heading 5906, which cross-refers in the list of exclusions at (c) to Heading 4008, and adds "As regards criteria for distinguishing between these products and similar products of heading 59.06, see Item (A) of the Explanatory Note to heading 40.08".

(2) Item (2) in the HSEN to Heading 4015 (considered further below) contains an exclusion for fabrics "falling in Section XI (see … Note 5 to Chapter 59). This therefore directs you to the meaning of "rubberised textile fabrics" and the exclusion (along with its reference back to Chapter 40).

64. We therefore agree with Mr Waldegrave that the Double-sided Panels are within the definition in Note 5 of the notes to Chapter 59 and are excluded from Heading 4008, such that the textile is effectively deemed to be for more than reinforcing purposes and accordingly they are not within the exclusion to Note 5. The Double-sided Panels are therefore "of heading … 5906" for the purposes of Heading 6113. The textile layer on the Single-sided Panels is regarded as merely being for reinforcing purposes, and so the Single-sided Panels are excluded from Heading 5906 by the exclusion in Note 5.

Heading 4015

65. Heading 4015 applies to "Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber". The Wetsuits are "articles of apparel" and "vulcanised rubber".

66. The Chapter notes provide at Note 2 that "This chapter does not cover: (a) goods of Section XI (textiles and textile articles)…" but are of no further assistance. Mr Waldegrave and Mr Starr both then relied on the HSEN to Heading 4015, as did the FTT at FTT[110] to [111]. The HSEN states that goods within this heading may be:

> "(1) Wholly of rubber.
>
> (2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, **other than** those falling in Section XI (see Note 3 to Chapter 56 and Note 5 to Chapter 59).
>
> (3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character."

67. Mr Waldegrave submitted that the panels of the Wetsuits (both the Double-sided Panels and the Single-sided Panels) are within the opening words of Item (2), the Double-sided Panels are then excluded on the basis that they fall within Section XI (relying on Note 5 to Chapter 59), such that they cannot then be within Heading 4015, and the Single-sided Panels are not excluded and remain within Heading 4015. Mr Starr submitted (and the FTT agreed) that the Wetsuits are within Item (3) and this determines their classification under Heading 4015.

68. We agree with Mr Waldegrave that the three listed categories of goods in this HSEN are mutually exclusive, such that goods which are within the opening words of Item (2) cannot also be within Item (3). Items (2) and (3) describe different ways in which goods may be comprised of both rubber and textile, with Item (2) referring to fabrics "impregnated, coated,

covered or laminated with rubber" and Item (3) referring to rubber "with parts of textile fabric". This language alone does not exclude the possibility of an overlap between the two Items. However, the exclusion in Item (2) excludes goods "falling in Section XI (see Note 3 to Chapter 56 and Note 5 to Chapter 59)"; this would be rendered redundant if goods within the opening words of Item (2) could be excluded from that Item (and thus Heading 4015) by the operation of this exclusion but then still be within Heading 4015 on the basis that they were within Item (3).

69. We therefore need to decide whether the panels of the Wetsuits are within Item (2) or Item (3).

70. The language of Item (2) is very similar to that used in Note 5 to Chapter 59. We have concluded in that context that both the Double-sided Panels and the Single-sided Panels are textile fabrics coated, covered or laminated with rubber, and consider that this applies equally for the purposes of Item (2). The Double-sided Panels are then excluded from Item (2) and Heading 4015 as they fall in Section XI, whereas the Single-sided Panels are not excluded and remain in Heading 4015. This precludes both types of panels from falling within Item (3). In any event, we agree with Mr Waldegrave that the phrase "Of rubber, with parts of textile fabric …" is to be interpreted as capturing goods where the rubber and textiles are separate components of the goods, whereas here, even on Mr Starr's submissions, the textile is bonded with the rubber to manufacture the panels which then are made into the Wetsuits.

71. Mr Starr emphasised that Item (3) refers to the rubber being "the constituent giving the goods their essential character", and this was relied upon by the FTT. However, goods must first be capable of falling within Item (3) and we have concluded that the Wetsuits are not. We record for completeness that we do not agree with Mr Starr that the use of the phrase "essential character" in Item (3) means that this Item is inextricably linked to Rule 3(b) of the GIRs. We recognise that both provisions use this same phrase, but it is clear from Rule 3 that Rules 3(a), (b) and (c) are only to be applied where goods are prima facie classifiable under two or more headings. Mr Starr submitted that it is only Heading 4015 that can apply, ie there is no competing heading. The natural consequence of this is that, if we had accepted his submission that it is only Heading 4015 that can apply, there would be no need to have recourse to Rule 3 at all.

72. The FTT decided at FTT[109] that Item (2) clearly did not apply to the Wetsuits, referring to its conclusion that the textile was present merely for reinforcing purposes. The FTT then decided at FTT[110] that the Wetsuits were within Item (3), and thus fell to be classified under Heading 4015. The only reference by the FTT to the HSEN to Heading 4008 and its potential relevance is at FTT[115] where it stated "We further accept that Note 40.08 of the HSENs is not applicable, not least because in the Appellant's case the rubber has been further worked and, therefore, it is irrelevant. It is, clearly, necessary to have regard to the final product."

73. For the reasons set out above, the FTT made an error of law by concluding that the HSEN to Heading 4008 was irrelevant and in failing to recognise that the effect of that HSEN (when applied for the purposes of Heading 4015 and Heading 5906) is that the Double-sided Panels fall to be treated as "rubberised textile fabrics" and "textile" falling within Section XI and that Item (3) of the HSEN to Heading 4015 was inapplicable.

Competing headings and Rule 3(b) of the GIRs

74. The Wetsuits are made up of both Double-sided Panels and Single-sided Panels. The Double-sided Panels are within the terms of Heading 6113 and the Single-sided Panels are within the terms of Heading 4015. The classification of the Wetsuits then needs to be determined by the application of the GIRs.

75. Rule 3 is the tie-breaker, providing

> "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:…"

76. Rule 3(a) cannot assist (as two or more headings each refer to part only of the materials or substances contained in mixed or composite goods and so those headings are to be regarded as equally specific in relation to those goods). Rule 3(b) then provides:

> "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, insofar as this criterion is applicable."

77. The HSEN to Rule 3(b) at (VIII) states that "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."

78. The FTT decided that the Wetsuits should be categorised under Heading 4015 and that it did not therefore need to apply Rule 3(b). However, it then decided (in the event that it were wrong) at FTT[111] that "the essential character of the Wetsuits is to provide insulation for the wearer in colder water temperatures", and this insulation was achieved by the neoprene; the essential character of the Wetsuits was therefore the neoprene rubber, and Rule 3(b) would also result in classification under Heading 4015.

79. Mr Waldegrave submitted that the FTT erred by treating this as an open-ended enquiry at this stage, ignoring the prior analysis of the two types of panels. Mr Waldegrave submitted that it was necessary to look at the two headings which were potentially applicable, and which of the types of panels provide the essential character of the Wetsuits. He submitted that the Double-sided Panels form the substantial majority of the Wetsuits, and so Rule 3(b) requires classification under Heading 6113. This is notwithstanding that the rubber forms the bulk of the Wetsuit as a whole; it is the Double-sided Panels and not the Single-sided Panels that are the dominant component, and they determine the essential character.

80. Mr Starr submitted that once it becomes necessary to apply Rule 3(b), this renders any notes to Sections and Chapters redundant, and the only relevant matters are the characteristics of the finished product. He submitted that the FTT had therefore correctly identified that the essential character of the Wetsuits was the rubber.

81. It is clear from the GIRs themselves that classification is to be determined according to the terms of the headings and any notes to Sections or Chapters (Rule 1). These rules apply hierarchically, and there is no basis for concluding that, once it has become necessary to apply Rule 3(b), the terms of the headings and the notes can be ignored in favour of a single question asking about the essential character of the finished product. Instead, the GIRs continue to focus on the material or substance to which a heading refers, with Rule 2(b) providing that references 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.

82. The Wetsuits are "Mixtures, composite goods consisting of different materials or made up of different components" for the purposes of Rule 3(b). Rule 3(b) requires they be classified as if they consisted of the material or component which gives them their essential character. Rule 2(b) acknowledges that the material to which a heading refers may be only part of that component.

83. The two competing headings for the Wetsuits have been identified on the basis that the Double-sided Panels are within Heading 6113 (knitted fabrics) in Section XI (Textiles and textile articles) and the Single-sided Panels are within Heading 4015 (rubber) in Section VII (Rubber and articles thereof). Rule 3(b) needs to be applied to determine which of these two headings should be used to classify the Wetsuits, and for this purpose we agree that we should continue to apply the reasoning which led to the identification of the two competing headings, and in particular continue to recognise that the headings were not identified on the basis that as a matter of fact the Wetsuits are comprised of neoprene rubber panels and textile layers, but because they are made up of Double-sided Panels and Single-sided Panels (this approach having been required by the various notes). The Double-sided Panels are the predominant component of the Wetsuits, certainly by quantity and weight, and also by their role in relation to the use of the goods (as the Wetsuits are mainly comprised of Double-sided Panels). They give the Wetsuits their essential character, and Rule 3(b) should therefore be applied to classify the Wetsuits under Heading 6113.

84. The FTT made an error of law in its approach to Rule 3(b) of the GIRs.

European Regulation

85. Both parties referred us to the European Regulation and the reasons set out by the Commission for concluding that wetsuits (of similar composition to the Wetsuits) should be classified under Heading 6113. (Mr Starr agreed with the description by the Commission of the wetsuits as being mainly of cellular rubber panels covered on both faces with a layer of textile fabric.)

86. The reasons set out by the Commission are quite condensed (see [16] above).

87. We accept Mr Waldegrave's submission that HMRC's submissions in this appeal are consistent with the reasons set out by the Commission, in particular:

(1) it is the panels covered on both faces with a layer of textile that give the essential character to the garment (for the purposes of Rule 3(b));

(2) where the panels are covered on both faces with a layer of textile fabric the textile "is regarded as" having a function beyond that of mere reinforcement (indicating that the Commission is relying on a deeming provision);

(3) the textile is present not merely for reinforcing purposes within the meaning of what is now note 5 of Chapter 59;

(4) the cross-reference to the paragraphs of the HSEN to Heading 4008 which distinguish between single-sided panels and double-sided panels; and

(5) classification under Heading 4015 is excluded by Rule 3(b) as only a minor part of the garment is made of single-sided panels with the textile being present merely for reinforcing purposes.

88. HMRC submitted that the reasoning in the European Regulation should be treated as persuasive (recognising that the European Regulation is no longer of legal effect). We have not placed any weight on this reasoning, although it appears that the Commission adopted similar reasoning and conclusions to those that we have come to as set out above.

DISPOSITION

89. Section 12(2) of the Tribunals Courts and Enforcement Act 2007 provides that if the Upper Tribunal finds that the making of the decision under appeal involved the making of an error on a point of law then the Upper Tribunal "may (but need not)" set aside the decision of the FTT. The errors of law we have identified above are material to the FTT Decision. We set aside the FTT Decision.

90. As we have set aside the decision of the FTT, we must decide whether to re-make it or remit it. Neither party submitted that we should consider remitting the case to the FTT, and we consider that we should re-make the decision.

91. Section 12(4) provides that in re-making the decision the Upper Tribunal (a) may make any decision which the FTT could make if the FTT were re-making the decision, and (b) may make such findings of fact as it considers appropriate. .

92. We re-make the decision on the basis that the FTT's findings of fact are undisturbed, save that we find that the textile fabric on both the Double-sided Panels and the Single-sided Panels has a function of making the Wetsuits more comfortable and as a matter of fact was present for more than reinforcement purposes.

93. For the reasons set out above, the Wetsuits should be classified under Heading 6113 0010 00.

94. HMRC's appeal is therefore allowed, we set aside the FTT Decision and re-make it to dismiss O'Neill's appeal against HMRC's classification of the Wetsuits.

MR JUSTICE MICHAEL GREEN

JUDGE JEANETTE ZAMAN

Release Date: 26th March 2026

APPENDIX
SECTION AND CHAPTER NOTES IN THE UK TARIFF AND HSENS

CHAPTER 40: RUBBER AND ARTICLES THEREOF

1. Commodity code "4015 9000 00" of the UK Tariff is associated with the following descriptions:

> "Section VII: Plastics and articles thereof; rubber and articles thereof
>
> Chapter 40: Rubber and articles thereof
>
> Heading 4015: Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber
>
> Subheading 4015 9000: Other"

2. The Chapter notes to Chapter 40 provide:

> "1. Except where the context otherwise requires, throughout the classification the expression "rubber" means the following products, whether or not vulcanised or hard …
>
> 2. This chapter does not cover:
>
> a. goods of Section XI (textiles and textile articles)…"

3. The Additional chapter note to Chapter 40 provides:

> "Where the woven, knitted or crocheted fabrics, felt or nonwovens are present merely for reinforcing purposes, gloves, mittens or mitts impregnated, coated or covered with cellular rubber belong to Chapter 40, even if they are:
>
> - made up from woven, knitted or crocheted fabrics (other than those of heading 5906), felt or nonwovens impregnated, coated or covered with cellular rubber, or
>
> - made up from unimpregnated, uncoated or uncovered woven, knitted or crocheted fabrics, felt or nonwovens and subsequently impregnated, coated or covered with cellular rubber.
>
> (Note 3(c) to Chapter 56 and note 5, last paragraph, to Chapter 59)."

4. The HSEN to Heading 4008 provides as follows:

> "40.08 - Plates, sheets, strip, rods and profile shapes, of vulcanised rubber other than hard rubber.
>
> - Of cellular rubber:
>
> 4008.11 - - Plates, sheets and strip
>
> 4008.19 - - Other
>
> - Of non-cellular rubber:
>
> 4008.21 - - Plates, sheets and strip
>
> 4008.29 - - Other
>
> This heading covers :
>
> (1) **Plates, sheets and strip (having any cross-sectional dimension exceeding 5 mm) in the length, or merely cut to length or into rectangles (including squares).**
>
> (2) **Blocks of regular geometric shape.**

(3) **Rods and profile shapes (including threads of any cross-sectional shape, of which any cross-sectional dimension exceeds 5 mm).** Profile shapes are obtained in the length in a single operation (generally extrusion), and they have a constant or repetitive cross-section, from one end to the other. They are classified in this heading, whether or not they are cut to length, but not cut to a length less than the greatest cross-sectional measurement.

The products of this heading may be surface-worked (e.g., printed, embossed, grooved, channelled, ribbed); they may also be plain or coloured (either in the mass or on the surface). Profile shapes with an adhesive surface, used for sealing window frames, are classified in this heading. The heading also covers rubber flooring material in the piece, and tiles, mats and other articles, obtained merely by cutting plates or sheets of rubber into rectangular (including square) shapes.

The classification of products made from vulcanised rubber (other than hard rubber) combined (either in the mass or on the surface) with textile materials is subject to the provisions of Note 3 to Chapter 56 and Note 5 to Chapter 59. Combinations of vulcanised rubber (other than hard rubber) with other materials remain classified in this heading provided they retain the essential character of rubber.

This heading thus includes:

(A) Plates, sheets and strip of cellular rubber combined with textile fabrics (as defined in Note 1 to Chapter 59), felt or nonwovens, provided that these textile materials are present merely for reinforcing purposes.

In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles and special products, such as pile fabrics, tulle and lace, are regarded as having a function beyond that of mere reinforcement.

Plates, sheets and strip of cellular rubber combined with textile fabric on both faces, whatever the nature of the fabric, are **excluded** from this heading (**heading 56.02, 56.03 or 59.06**).

(B) Felt impregnated, coated, covered or laminated with vulcanised rubber (other than hard rubber) containing 50 % or less by weight of textile material or completely embedded in rubber.

(C) Nonwovens, either completely embedded in rubber, or entirely coated or covered on both sides with rubber, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour.

The heading **excludes**, inter alia :

(a) Conveyor or transmission belts or belting, of vulcanised rubber, whether or not cut to length (**heading 40.10**).

(b) Plates, sheets and strip, whether or not surface-worked (including square or rectangular articles cut therefrom), with bevelled or moulded edges, or with rounded corners, openwork borders or otherwise worked, or cut into shapes other than rectangular (including square) (**heading 40.14, 40.15** or **40.16**).

(c) Woven textile fabrics combined with rubber thread (**Chapters 50 to 55 or 58**).

(d) The products of heading 56.02 or 56.03.

(e) Textile carpets or carpeting, with a backing of cellular rubber (**Chapter 57**).

(f) Tyre cord fabric **(heading 59.02**).

(g) Rubberised textile fabrics as defined in Note 5 to Chapter 59 (**heading 59.06**).

(h) Knitted or crocheted fabrics combined with rubber thread (**Chapter 60**)."

5. The HSEN to Heading 4015 provides as follows:

"40.15 - Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanised rubber other than hard rubber (+).

- Gloves, mittens and mitts:

4015.12 - - Of a kind used for medical, surgical, dental or veterinary purposes

4015.19 - - Other

4015.90 - Other

This heading covers articles of apparel and clothing accessories (including gloves, mittens and mitts) e.g., protective gloves and clothing for surgeons, radiologists, divers, etc., whether assembled by means of an adhesive or by sewing or otherwise obtained. These goods may be:

(1) Wholly of rubber.

(2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, **other than** those falling in Section XI (see Note 3 to Chapter 56 and Note 5 to Chapter 59).

(3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.

The goods in the three categories cited above include capes, aprons, dress-shields, bibs, belts and corset-belts.

The following articles are **excluded** from the heading :

(a) Articles of apparel and clothing accessories of textile materials combined with rubber threads (**Chapter 61** or **62**).

(b) Footwear and parts thereof of **Chapter 64**.

(c) Headgear (including bathing caps) and parts of headgear, of **Chapter 65**."

SECTION XI: TEXTILES AND TEXTILE ARTICLES

6. The Section notes to Section XI include the following:

"1. This section does not cover:

…

ij. woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40;

…

7. For the purposes of this section, the expression "made up" means:

…

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)"

CHAPTER 59: IMPREGNATED, COATED, COVERED OR LAMINATED TEXTILE FABRICS; TEXTILE ARTICLES OF A KIND SUITABLE FOR INDUSTRIAL USE

7. The descriptions associated with Headings 5902 and 5906 in the UK Tariff are as follows:

> "Section XI: Textiles and textile articles
>
> Chapter 59: Impregnated, coated, covered or laminated textile fabrics; textile articles of a kind suitable for industrial use
>
> Heading 5902: Tyre cord fabric of high-tenacity yarn of nylon or other polyamides, polyesters or viscose rayon
>
> Heading 5906: Rubberised textile fabrics, other than those of heading 5902."

8. The expression "rubberised textile fabrics" (used in Heading 5906) is defined in Note 5 to Chapter 59 of the UK Tariff as follows:

> "For the purposes of heading 5906, the expression "rubberised textile fabrics" means
>
> (a) textile fabrics impregnated, coated, covered or laminated with rubber:
>
> - weighing not more than 1,500 g/m^2; or
>
> - weighing more than 1,500 g/m^2 and containing more than 50% by weight of textile material;
>
> ...
>
> This heading does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 5811."

9. This Note 5 is the same as Note 5 of the HSEN to Chapter 59.

10. The HSEN to Heading 5906 then provides:

> "59.06 – Rubberised textile fabrics, other than those of heading 59.02
>
> …
>
> This heading covers:
>
> (A) Textile fabrics impregnated, coated, covered or laminated with rubber, including dipped fabrics (**other than** those of **heading 59.02**), of a weight:
>
> (1) not exceeding 1,500 g/m^2, irrespective of the proportion of textile and rubber; or
>
> (2) if exceeding 1,500 g/m^2, containing more than 50% by weight of textile material.
>
> …
>
> The heading **excludes**:
>
> …
>
> (c) Plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (heading 40.08). As regards criteria for distinguishing between these products and similar products of heading 59.06, see Item (A) of the Explanatory Note to heading 40.08.
>
> …"

CHAPTER 61: ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, KNITTED OR CROCHETED

11. Commodity code "6113 0010 00" of the UK Tariff is associated with the following descriptions:

> "Section XI: Textiles and textile articles
>
> Chapter 61: Articles of apparel and clothing accessories, knitted or crocheted
>
> Heading 6113: Garments, made up of knitted or crocheted fabrics of heading 5903, 5906 or 5907
>
> Subheading 6113 0010: Of knitted or crocheted fabrics of heading 5906"

RULE 3 OF THE GIRS

12. Rule 3 states as follows:

> "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:
>
> …
>
> (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, insofar as this criterion is applicable."

13. The HSEN to Rule 3(b) at (VIII) states:

> "The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods."