[2017] UKUT 393 (TCC)

Appeal number: UT/2017/0011

CUSTOMS DUTY – Combined Nomenclature – whether artificial turf to be classified as other golf equipment within Heading 9506 or as other textile floor covering within Heading 5703 – correctly classified within Heading 9506 – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS **Appellants**

- and -

HUXLEY (UK) LIMITED

Respondent

TRIBUNAL: Judge Timothy Herrington
Judge Jonathan Cannan

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 25 July 2017

Simon Pritchard, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

Jeremy White, Counsel, instructed by VAT Advisory Services Ltd for the Respondent

DECISION

Introduction

1. This is an appeal by HMRC against a decision of the First-tier Tribunal ("FTT") (Judge Harriet Morgan and Mr Charles Baker) released on 23 August 2016 ("the Decision").

2. The FTT allowed in part the appeal of Huxley (UK) Limited ("the Company") against HMRC's decision to issue various Post Clearance Demand Notes for additional customs duty in relation to five different types of artificial turf (together "the Turf Products"). The Company had declared the Turf Products as subject to duty at 2.5% under heading 9506 39 90 of the Combined Nomenclature ("CN") as "other golf equipment". HMRC considered that the goods should have been declared as subject to duty at 8% under heading 5703 20 98 as "carpets and other textile floor coverings".

3. The FTT held that four of the Turf Products, that is Green Turf, Putting Turf and two types of Tee Turf (the "Non-Fringe Turf Products") were to be classified under Heading 9506 but that the fifth product, Fringe Turf, was to be classified under Heading 5703. Neither party had argued that the appeal should be allowed in part but the FTT considered that they were to be classified differently.

4. The basis of the Decision in relation to the Non-Fringe Turf Products was that there were various objective characteristics inherent in the products which gave them their essential character as a surface for playing golf, although those characteristics were unlikely to be fully appreciated by a person who does not have specialist knowledge of the design of artificial turf without further explanation or evidence. The basis of the Decision in relation to the Fringe Turf was that the intended use of that product as golf equipment was not readily ascertainable from its objective characteristics.

5. Permission to appeal against the Decision was granted to HMRC by Judge Sinfield on 31 January 2017. There was no appeal by the Company against the Decision in so far as it related to the Fringe Turf.

The Facts

6. The FTT made its findings of fact as to the characteristics of the Turf Products primarily by accepting the evidence of Mr Paul Huxley, a director of the Company, to the effect that the Turf Products were all designed specifically for use in the golf industry, the products having key characteristics which normal artificial turf for use as lawn or landscaping (or other purposes) do not have. That evidence was set out in detail at [15] to [29] of the Decision. The FTT also relied on an examination of samples of the Turf Products and a demonstration by Mr Huxley of the use of some of the products.

7. The FTT's findings generally and in relation to the Green Turf appear at [15] to [19] of the Decision as follows:

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

(1) Putting greens must enable a pure roll of the ball at a consistent and acceptable speed. This is typically measured at around 9 to 11 feet for average use on a Stimpmeter (a special machine for measuring this).

(2) Golf greens must offer a good/pure ball roll together with good ball reception, meaning realistic reception of the golf ball when it lands.

(3) Golf tees and practice tees must provide a stable and level foothold for the golfer, a tightly mown dense grass surface to provide good ball-striking characteristics and the ability to receive and hold a tee peg, which holds the ball higher off the ground when golfers choose to use a driver.

(4) Golf green fringes (also known as aprons or collars) must be sufficiently dense to enable the ball to sit on top of the grass and for a "chip shot" to be played. Fringes are the areas immediately around the green which separate the greens from the fairways which are mown to leave the grass higher than the green but lower than the fairway.

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

17. The characteristics of Green Turf are as follows:

(1) It is made of special nylon which is selected despite its high price as it ensures significantly more "memory" keeping its required true playing surface for the ball and the required density for walking on than the polypropylene or polyethylene material used for artificial lawn grass. So the "face weight" (ounces of yarn per square inch) is much higher than is required for lawn grass.

(2) The type of fibre used is A&O NT5530 Yarn 8 Ply 4400 Denier Nylon. This material has a width of 5.487 mm and a thickness of 1.016mm. It has a "face weight" of 42 oz per square yard.

(3) It has a unique stitch rate/gauge combination of 1 quarter of an inch for the gauge and 19 stitches per 3 inches. This combined with the height of the fibres gives an "open construction" to allow large Huxley Turfill infill to be used.

(4) It is made to a specific consistent and level height, using a tip shearing process, to give a pile height of 1 inch.

(5) It has a "K29 Primary backing" required to hold the heavy face weight without tearing.

(6) It requires large size Huxley Turfill infill to be inserted to keep the yarn fibres in place.

> (7) It requires specialised and skilled installation, in particular due to the use of the infill, over a specially prepared base.
>
> 18. The combination of the above features is required to ensure that the Green Turf fulfils the requirements set out above and, in particular, the correct ball impact for receiving full golf shots from a distance, a realistic reaction to ball spin, a pure ball roll to avoid deviation of putts and chips and the correct ball roll speed of 7 to 9 for average use measured on the Stimpmeter.
>
> 19. We examined a sample of the Green Turf and Mr Huxley demonstrated its use for putting shots compared with an artificial turf not designed for this purpose. It was clear that the true ball roll was much better on the Green Turf. Mr Huxley also demonstrated that the Green Turf enables a ball to be hit in either direction along the turf with no noticeable directional bias. This was not possible on the other general purpose turf. Mr Huxley was not able to demonstrate this product's use for receiving longer shots due to the constraints of the court room. We found the look and feel of this product to be different to other general purpose artificial turf of which we received samples."

8. At [29] the FTT found that the look and feel of the Fringe Turf was similar to that of the other artificial turf samples it examined and that this product had the least discernible difference to other artificial turf products both in look and appearance and in terms of the specifications.

9. The FTT made findings as to how the Turf Products were imported and how price was a key differentiator with other artificial lawn turf at [32] of the Decision as follows:

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

10. Finally, the FTT made the following findings as to the objective characteristics of the Turf Products (other than the Fringe Turf) at [108] of the Decision as follows:

> "On the basis of the evidence set out in 15 to 29 above, our view is that (leaving aside the Fringe Turf), the Products have such an intended use, specifically as a golf green, a putting green and tee green, which can be determined from the design and characteristics of those Products:
>
> > (1) As regards the Green Turf and the Putting Turf the relevant objective characteristics and properties are the combinations of the special materials and fibres used, the particular combination of gauge and stitch rate, the "face weight" of the fibres, the particular

consistent pile height achieved with shearing and the type of backing used which gives an "open faced construction" into which infill can be inserted to give the required surface.

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

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

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

The Law

Legislation and principles of interpretation

11. The FTT set out at [36] to [45] of the Decision a summary of the legislative framework for the classification of goods for the purpose of EU customs duty which we understand to be common ground. It is helpful to emphasise the following points which emerge from that summary:

(1) the tariffs and nomenclatures used by the EU in the CN conform to the Harmonised System administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as "HSENs";

(2) apart from the HSENs the European Commission also issues explanatory notes of its own to the CN which are known as "CNENs";

(3) the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The HSENs and the CNENs are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the HSENs and CNENs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions;

(4) the CN contains General Rules for the Interpretation of the CN, known as "GIRs". Unlike the HSENs and the CNENs, they have the force of law.

12. So far as material to this decision, the GIRs provide as follows:

"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. …

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) …

(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. ….

5….

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

Relevant classification provisions and explanatory notes

13. It was common ground that the Turf Products fell to be classified within either Chapter 57 of Section XI of the CN which has the title "Carpets and other textile floor coverings" or Chapter 95 of Section XX of the CN which has the title "toys, games and sports requisites; parts and accessories thereof".

14. Section XI covers textiles and textile articles. Note 1 (t) to Section XI of the CN excludes from that section and hence from Chapter 57 "articles of Chapter 95 (for example, toys, games, sports requisites and nets)."

15. Note 1 to Chapter 57 states:

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

16. Heading 5703 is the relevant heading in this case. The heading and its sub-headings so far as relevant read as follows:

> "5703 Carpets and other textile floor coverings, tufted, whether or not made up.
>
> 5703 10 00 - Of wool or fine animal hair
>
> 5703 20 - Of nylon or other polyamide
>
> 5703 20 12 - - - Tiles, having a maximum surface areas of 1m²
>
> 5703 20 18 - - - Other
>
> - - Other
>
> 5703 20 92 - - - Tiles, having a maximum surface area of 1 m²
>
> 5703 20 98 - - - Other"

17. HMRC contend that sub-heading 5703 20 98 applies in this case.

18. The HSENs for Chapter 57 contain a general note as follows:

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

19. The HSENs relating to heading 57.03 state:

> "This heading covers tufted carpets and other tufted textile floor coverings produced on tufting machines which, by means of a system of needles and hooks, insert textile yarn into a pre-existing backing (usually a woven

fabric or a non woven) thus producing loops or, if the needles and hooks are combined with a cutting device, tufts. The yarns forming the pile are then normally fixed by a coating of rubber or plastics. Usually before the coating is allowed to dry it is either covered by a secondary backing of loosely woven textile material, e.g., jute, or by foamed rubber.

The heading also covers tufted carpets and other tufted textile floor coverings made using a tufting gun or made by hand…"

20. Section XX covers miscellaneous manufactured articles. Note 1(v) to Chapter 95 provides that:

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

21. Heading 9506 is the relevant heading in this case. The heading and its relevant subheadings read as follows:

"9506 Articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and paddling pools.

9506 29 00 -- Other

- Golf clubs and other golf equipment

9506 31 00 - - Clubs, complete

9506 00 - - Balls

9506 39 - - Other

9506 30 10 - - - Parts of golf clubs

9506 39 90 - - - Other."

22. The Company contends that sub-heading 9506 39 90 applies in this case.

23. The HSENs for Chapter 95 contain the following general note:

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

24. HSEN (B) for heading 95.06 states that "This heading covers … Requisites for other sports and outdoor games (other than toys presented in sets, or separately, of

heading 95.03)" and it includes "Golf clubs and other golf equipment, such as golf balls, golf tees".

Approach to classification

25. We were referred to a number of authorities which assist on how to approach the classification of goods under the CN.

26. The Upper Tribunal summarised the relevant principles derived from judgments of the European Court of Justice ("ECJ") in *E.P. Barrus Ltd & Kubota (UK) Ltd* v HMRC [2013] UKUT 0449 (TCC) at [41] of its decision. Both parties referred us to this decision. The principles summarised which are relevant to this case are as follows:

> (1) 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 heading of the CN and of the notes to the sections or chapters;
>
> (2) The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities;
>
> (3) By the examination of the external characteristics the main purpose of the product must be inferred. It does not matter if there are other purposes for the product;
>
> (4) The CNENs and HSENs should be used as an aid to interpretation as can specific classification regulations, but the latter only in relation to products identical to those specifically classified; and
>
> (5) Marketing materials and a product's targeted use are not to be taken into account.

27. The Upper Tribunal in *Barrus* recognised that the primary task of a tribunal in classifying goods for customs purposes was to make a finding as to the intended purpose of the product from its objective characteristics but in so doing it should not be influenced by the actual use to which the product could be put by particular importers, or the possible use to which it could be put. The Upper Tribunal found that the FTT had fallen into error by relying on witness evidence as to the use that the products in question were put and the marketing material that suggested possible uses. The task for the tribunal was to determine the intended purpose of the product even though it could have been used for other purposes: see [48] and [49] of the decision. As the ECJ held in Case C-403/07 *Metherma v Hauptzollamt Dusseldorf*, 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: see [47] of the judgment.

28. We refer to other authorities cited to us when discussing the arguments of the parties below.

The Decision

29. Having reviewed the relevant case law at [100] to [105], the FTT at [106] correctly stated that the intended use of the Turf Products is relevant to their classification only if that use is capable of being assessed on the basis of the product's objective characteristics and properties. It recognised that a use which is highly theoretical is to be disregarded but, having referred to the warning in *Barrus* not to look at "targeted" use and to disregard marketing materials, observed that marketing materials may be relevant to the extent that they contain information as regards the objective characteristics of the relevant product which demonstrate intended use.

30. The FTT therefore stated at [107] that the starting point was that the Turf Products can be classified according to their intended use only if that particular use can be discerned from the composition and design of the Turf Products themselves. It noted that there was no dispute that the actual intended use of the products was as specialist artificial turf for golfing.

31. It then made the findings of fact as to the intended use of the Non-Fringe Turf Products at [108] of the Decision set out at [10] above. It considered that the features it had described were objective criteria. It said this at [110]:

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

32. At [112] the FTT stated that it would regard evidence of actual use, including in marketing materials which explain the objective features and their significance, and evidence of price as relevant. The terms in which it did so were as follows:

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

33. The FTT said at [113] that the pricing of the relevant products demonstrates that their use for any other purpose than that of specialist turf for golf was highly theoretical and that the pricing demonstrated that this was not a case where the marketed use is different to the intended use.

34. The FTT found at [115] that where, in a golfing context, a surface is specially made and designed for use in place of a natural surface, such a surface is part of the equipment required for playing golf with the result that the relevant products could be classified prima facie under heading 9506.

35. The FTT held that Note 1 (v) to Chapter 95 did not operate so as to exclude the products from that Chapter. Its reasoning was set out at [119] to [121] as follows:

> "119. In the appellant's view, if those Products are, as we have decided, prima facie classifiable under chapter 95, that is the end of the matter. We do not need to consider whether those Products are within chapter 57 as "other textile floor coverings". The appellant interprets Note 1(v) to chapter 95 as meaning that the items specified in that note being "carpets and other textile floor covering …and similar items having a utilitarian function" are excluded from chapter 95 only if they have a "utilitarian function". On that view even if the relevant Products can be viewed as "other textile floor coverings" they do not have a "utilitarian function", rather they have a sporting function, and therefore are not excluded. Further the appellant argues this means that the Products are only included in chapter 95. The appellant sees the note as seeking to classify the listed items in chapter 95 or chapter 57 according to whether they have a "utilitarian function" or not. If they do not, in the appellant's view, they are exclusively within chapter 95.
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> 120. HMRC argue that the "utilitarian function" wording relates only to "similar articles" after which it appears and not to the preceding items listed being "carpets or other textile floor coverings". In any event they assert that the Products do have a utilitarian function in that they can be walked on.
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> 121. Our view is that the appellant's view is the better one. If the intention was simply to exclude the specified items on the basis they fall within chapter 57, as HMRC in effect argue, the note could simply have said that. There are many examples in the CN where the notes refer to items being excluded from a chapter by reference to their inclusion in another chapter. However, the listing of the specified items, without specific reference to chapter 57 but with the reference to a utilitarian function, supports the appellant's view that the intention is to seek to distinguish between items on the basis of whether they have such a function or some other function. On that basis, therefore, we agree with the appellant that the Products fall within chapter 95 only on the basis that they have a sporting function. It follows from our determination that the Products have objective characteristics for use as specialist golf equipment that they have that function and not a "utilitarian" one."

36. The FTT did, however, go on to consider whether the Non-Fringe Turf Products could be classified under chapter 57 in case it was wrong on that point. It held at [125] that they could not be so classified because they did not regard those products as "floor coverings" for this purpose, finding that when "floor" was used in that chapter what was primarily intended was a floor in a building and, therefore, items which are a covering of such a floor.

37. The FTT did, however, note at [127] that some of the Turf Products can be and are used internally to create practice areas, but did not regard such products as falling within chapter 57 as "other textile floor coverings" because their primary function was to provide a surface for the playing of golf and not, as carpets or other floor coverings, to provide a way of covering a floor for walking or sitting upon.

38. In contrast, the FTT found at [131] to [133] that the Fringe Turf should fall within the heading of "other textile floor coverings" because the intended use of that product as golf equipment was not readily ascertainable from its objective characteristics and the Fringe Turf was plainly capable of being used as a covering of an external surface whether for walking on or some other purpose.

Grounds of Appeal and issues to be determined

39. HMRC has been granted permission to appeal on three grounds as follows:

(1) The FTT erred in determining that the relevant products were capable of being classified as "other golf equipment" pursuant to heading 9506. In support of this ground HMRC contends:

(a) the FTT failed to consider the objective characteristics of the products as opposed to their subjective characteristics and concerned itself with the actual use made of the relevant products;

(b) the FTT allowed itself to consider subjective evidence as to the intended purpose of the products, rather than restricting itself to consideration of the objective characteristics of the products themselves. The evidence on which the FTT relied came from a person with specialist knowledge of the products and was external to the products themselves. Such evidence was, as a matter of law, an irrelevant subjective characteristic;

(c) the FTT erred in having regard to marketing materials and price as evidence as to the use to which the products were put; and

(d) the FTT failed to have regard to the fact that the characteristics which the FTT identified as making the turf particularly suitable to golf also made the turf suitable for other uses.

(2) The FTT erred by misconstruing and then misapplying the term "utilitarian function" in Note (v) to Chapter 95 of the CN. In support of this ground HMRC contends:

(a) the FTT wrongly considered that the Note only applied to carpets and other textile floor coverings having a utilitarian function whereas the Note excludes all carpets and other textile floor coverings and in any event the relevant products have a utilitarian function;

(b) the FTT wrongly concluded that the fact that the relevant products could be used as a surface for golf meant that the products could not have a utilitarian function by construing the term "utilitarian" to exclude anything that could be used for "sporting" purposes.

(3) The FTT erred in deciding that the artificial turf products did not fall within Chapter 57 as "other textile floor coverings", as that term is used in the CN. In support of this ground HMRC contends:

(a) the FTT erred in drawing a distinction between internal and external floor coverings because "floor" can refer to both indoor areas and outdoor areas; and

(b) the FTT's finding that the Fringe Turf product was a "floor covering" demonstrated that external floor coverings are capable of falling within Chapter 57 and should have found that all of the artificial turf products fell within that Chapter.

40. If we determine that the FTT was correct in its finding that the Non-Fringe Turf Products prima facie fall within the scope of Heading 9506 then, because of the terms of Note 1 (t) to section XI of the CN, the appeal must be determined in the Company's favour unless HMRC are correct in their interpretation of Note 1(v) to Chapter 95 and we hold that Note 1(v) takes precedence over Note 1 (t) to section XI of the CN. In that case, the products concerned cannot fall within the scope of Chapter 95 and we will need to consider whether the products can be regarded as "other textile floor coverings" and therefore within the scope of Chapter 57.

41. We shall now proceed to consider each of HMRC's three grounds of appeal in turn.

Discussion

Ground 1: whether the Non-Fringe Turf Products fall within Heading 9506

42. There was no dispute between the parties that the five principles laid down in *Barrus*, as summarised at [26] above, provide the starting point for how to approach the question of classification of goods under the CN. The dispute between the parties centred around the extent to which intended use of the goods can be taken into account, what if any evidence as to that use can be adduced and whether the intended use must be assessed purely by reference to the objective characteristics of the goods which are apparent upon inspection.

43. In that regard, Mr Pritchard in his submissions on behalf of HMRC emphasised the requirement that the relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities. Further, that marketing materials and a product's targeted use are not to be taken into account. In his submission, the FTT erred by relying on external material to classify the products according to their intended use. Whilst he accepts that the intended use of a product may constitute an objective criterion for classification if it is inherent to the product, that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties. In this case, the FTT identified a number of characteristics of the Turf Products, such that they were made of fibre, had a strong backing, a pile, were made of yarn and were a type of artificial grass. It also found that the products were presented on import in rolls, in the same way that rolls of carpet would be imported. However, in his submission, rather

than classifying the products in accordance with these objective characteristics, the FTT had regard to the use to which the products would or could be put. In doing so it allowed itself to consider subjective evidence as to the intended use of the product, rather than restricting itself to consideration of the objective characteristics of the products themselves. He submits that this erroneous approach is illustrated by the FTT's findings at [110] where it stated that the features which it found to be inherent in the products would be unlikely to be fully appreciated by a person who does not have specialist knowledge of the design of artificial turf without further explanation or evidence. In his submission, evidence from a person with specialist knowledge of the products as to the use the products were intended to be put was, as a matter of law, an irrelevant subjective characteristic.

44. Mr Pritchard also submits that the FTT erred at [112] of the Decision by having regard to marketing materials as evidence as to the use to which the products would be put. The FTT therefore fell into the same error referred to at [48] of *Barrus*, namely by relying on evidence of "targeted use" as demonstrated by the marketing materials. Such materials might assist in identifying the objective characteristics of a product but they should not be used as evidence of intended commercial use.

45. Furthermore, he submits, the FTT erred at [112] in regarding evidence of price as relevant.

46. Mr Pritchard relies on the ECJ's judgment in Case C-228/89 *Farfalla Fleming v Hauptzollamt Munchen-West* [1990] ECR I-3387 where the ECJ considered whether glass paperweights could qualify for an exemption from customs duty as original works of art as they were executed by famous glassware artists and might never be used as paperweights. At [18] of the judgment the ECJ observed that certain works of art are exempt from duty on the basis that such works are entirely personal creations which do not compete economically either with each other or with other articles manufactured industrially.

47. The ECJ then went on to state (at [20]) that since the customs authorities can rely only on objective criteria relating to the external characteristics of goods, even where these goods are hand-made by artists, they must be regarded as goods of a commercial character because they appear similar to comparable articles manufactured industrially or as works of craftsmanship. It therefore found at [22]:

> "That conclusion is not invalidated by the fact that the paperweights in question are produced by hand in limited editions by well-known artists and are collected by collectors and displayed in museums without ever being used as paperweights. Just as an artistic value which an article may have is not a matter for assessment by the customs authorities, the method employed for producing the article and the actual use for which that article is intended cannot be adopted by those authorities as criteria for tariff classification, since they are factors which are not apparent from the external characteristics of the goods and cannot therefore be easily appraised by the customs authorities. For the same reasons, the price of the article in question is not an appropriate criterion for customs classification."

48. This case clearly provides support for Mr Pritchard's submission that price is an irrelevant factor in classification. However, we observe that the judgment says nothing on the question as to whether the inherent characteristics of the goods can be ascertained by reference to external evidence. In that case, the issue did not arise because the inherent characteristics of the goods could be ascertained simply by visual inspection.

49. Case C - 459/93 *Thyssen Haniel Logistic GmbH v Hauptzollamt Hamburg-St Annen* is an example of a case where the ECJ did have regard to external evidence in the classification process. The question was whether various amino acids used for the manufacture of infusion solutions should be classified as medical products or as "other food preparations".

50. At [13] the ECJ noted that 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. Accordingly, it said at [14] that if the intended use of the mixture inherent to its particular characteristics meant that it would be used for the preparation of infusion solutions the product would have to be regarded as a medical product.

51. At [16] the ECJ referred to the expert opinion produced before the national courts to the effect that the use of the amino acid mixtures as a foodstuff is theoretically conceivable but highly improbable from an economic point of view, because the product's high level of microbiological and chemical purity obtained at great expense preclude its use in that area, where recourse may be had to much cheaper options. It therefore held at [17] that the product was "naturally intended for medical use".

52. We observe that although the ECJ did appear to take into account the high cost of production it did so only to establish that the product had a high level of purity which was itself an objective characteristic indicating that it was not intended for human nutrition. We therefore do not regard this case as authority for the proposition that price is a relevant factor in classification.

53. Mr White on behalf of the Company placed considerable reliance on the ECJ's judgment in Case C-480/13 *Sysmex Europe GmbH v Hauptzollamt Hamburg-Hafen* for his submission that intended use of a product may be an objective characteristic and use in practice may demonstrate that the declared function of a product is the objective function.

54. The question for the court in *Sysmex* was whether a product intended for the analysis of white blood cells was to be classified either as a diagnostic or laboratory reagent under heading 3822 or as a dye or other colouring matter for retail sale under heading 3212.

55. An expert's report concluded that the product at issue could dye a textile with a blue colour, but that that colouring was nevertheless very light and could not be classified as "permanent".

56. The court considered the circumstances in which the intended use of a product may constitute an objective criterion for classification at [31] and [32] of its judgment as follows:

> "31 It must also be noted that the intended use of a product may also 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 (see *RUMA*, C-183/06, EU:C:2007:110, paragraph 36, and *Roeckl Sporthandschuhe*, EU:C:2010:237, paragraph 28).
>
> 32 In that connection, it has been held, with regard to a product having two possible uses, that, as one of those uses was no more than a purely theoretical possibility, that product was, on the basis of its objective characteristics and properties, naturally intended for the other use and therefore came under the tariff heading relating to that use (see, by analogy, *Thyssen Haniel Logistic*, C-459/93, EU:C:1995:160, paragraphs 17 and 18). Likewise, according to the case-law, in order to be classified under the tariff heading relating to a use, the product to be classified need not be solely or exclusively intended for that use. It suffices that that use is the main use for which the product is intended (see, to that effect, *Neckermann Versand*, C-395/93, EU:C:1994:318, paragraphs 8 and 9, and *Anagram International*, C-14/05, EU:C:2006:465, paragraph 26)."

57. The court held that in this particular case although the product in issue was covered by the wording of both heading 3822 and heading 3212 it was apparent from the expert report that the use of the product as a colouring matter "is no more than a purely theoretical possibility". The court therefore said at [42]:

> "it follows that the use of the product at issue as a laboratory reagent constitutes, in the light of its objective characteristics and properties, its exclusive use, which supports its classification under heading 3822…"

58. It was clear that the court had regard to the practical use to which the product would be put. It said at [45]:

> "45 In the light of the foregoing considerations, the answer to the question referred for a preliminary ruling is that the CN must be interpreted as meaning that a product, composed of solvents and of a polymethine-based substance, which, although it may have a weak and non-permanent dyeing effect on textiles, is not in practice used for its dyeing properties and is intended for the analysis of white blood cells, by means of the deposition of ions in defined components of those blood cells, which, when exposed to laser light, become fluorescent for a limited period, comes under heading 3822 of the CN."

59. As submitted by Mr White, it appears that the ECJ has developed the "naturally intended use" test applied in *Thyssen Haniel* to one of "use in practice" and, as in *Thyssen Haniel*, a purely theoretical use has been discarded. Again findings as to the

objective characteristics and properties of the product were ascertained with the assistance of an expert's report.

60. The ECJ made reference in its reasoning to Case C-14/05 *Anagram International Inc. v Inspecteur van de Belastingdienst Douanedistrict Rotterdam*, a case involving the classification of gas-filled balloons which had been described as a "plastic festive balloon" on which different motifs could be printed depending on the occasion for which it was to be used. The question was whether it could be correctly classified as a festive article or as a toy. The court held at [26] of its judgment:

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

61. It is therefore clear that "use in practice" as that term is used in *Sysmex* is a synonym for "main use". The main use of a product is therefore capable of constituting an objective characteristic if it can be established at the time of customs clearance. However, both *Thyssen Haniel* and *Sysmex* establish that the main use of a product can be ascertained by adducing evidence, notwithstanding that such evidence is not available to the customs officer at the point of entry.

62. Mr Pritchard relies on the Advocate General's opinion in Case C-376/07 *Kamino International Logistics BV v Staatssecretaris van Financiën* in support of his submission that the FTT erred by focusing on the targeted use of the Non-Fringe Turf Products. In that case, which the Upper Tribunal in *Barrus* relied on for the fifth of its principles summarised at [26] above, the ECJ had to consider the question as to the correct classification of a colour LCD monitor which, although marketed for use with automatic data processing machines, would also have other uses, such as for playing games.

63. In his opinion the Advocate General considered whether a product's target use or advertising material should be taken into account. The following extracts from his opinion were not specifically referred to by the court but he did say at [72] to [75]:

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

> 73. The possibility of taking account of the product's intended commercial use, in other words its 'target' use, in order to determine its normal use, seems to me to be more problematical. In my view, that option should be excluded.
>
> 74. It is in fact clear that if significance is attached to elements such as the product's declared use, as indicated on its packaging or in advertising material, there is an increased risk of abuse. In a variety of fields, instances of products which are surreptitiously presented as being intended for uses other than their real use, in order, for example, to circumvent sales bans or rule out producer liability, are in fact anything but infrequent, even though the relevant public is actually perfectly well aware of the real intended use of the products in question.
>
> 75. The position set out above seems to me, moreover, to be consistent with the case-law of the Court which, while in principle accepting the possibility of taking a product's intended use into account in order to determine its customs classification, has, nevertheless, stressed that that intended use must be based on specific and objective criteria."

64. We accept that there is a distinction between the main use of a product, ascertained by reference to its objective characteristics, and other possible uses of the product, which can be ascertained, for example, from marketing material. Where the marketing material includes the subjective views of those who are promoting the product in question it is not relevant to classification. There is the risk, identified in *Kamino*, that purported uses set out in the marketing material are in fact shams in order to obtain a reduced rate of duty or circumvent some restriction applicable to the import of the goods in question.

65. Mr Pritchard submits that in this case the FTT erroneously focused on a subjective view of the targeted use for the product rather than its inherent use as demonstrated by its objective characteristics readily apparent to a customs officer at the point of entry.

66. In our view, the authorities do not support Mr Pritchard's submissions that the FTT erred in this case insofar as it relied upon external evidence as to the main use to which the Non-Fringe Turf Products were put. There is nothing in the authorities referred to above that rules out the importer seeking to adduce evidence to the customs officer as to the main use or use in practice to which the goods in question will be put which may not otherwise be readily apparent from a physical inspection. Mr Pritchard relies upon the fact that the goods in this case will arrive in an uncut roll which will look like any other type of artificial turf. That approach suggests that all the customs officer needs to do is to ascertain that it looks like ordinary artificial turf to be classified accordingly without the importer having the right to explain that the inherent characteristics of this particular artificial turf require a different classification.

67. That is precisely what happened in *Thyssen Haniel* and *Sysmex*. Mr Pritchard seeks to distinguish those cases on the basis that in those instances the court was admitting expert evidence to ascertain the objective characteristics of the products in order to discount other possible uses, whereas in this case the FTT used external evidence in order to establish the targeted use of the products.

68. It seems to us that Mr Pritchard has misconstrued the term "target use". In submissions, he equated it to "the use for which a product is designed" but it is clear that the ECJ refers to it as the use for which a product is marketed. The design features of a product may well form part of its objective characteristics from which intended use can be ascertained.

69. We reject Mr Pritchard's submissions. In our view the approach of the FTT, as demonstrated by its findings at [108] of the Decision was to ascertain the intended main use of the products by reference to evidence of their objective characteristics. The FTT looked at the design features of the products and assessed those features objectively, having considered Mr Huxley's evidence. The technical specifications of the products, as found by the FTT at [108] of the Decision, were clearly part of the objective characteristics of the products and, as the FTT found, the products incorporated certain design features which made them particularly suitable for playing golf and which distinguish them from ordinary artificial turf. From that evidence, in our view, the FTT was entitled to conclude objectively that the main intended purpose of the Non-Fringe Turf Products was to play golf. Those design features were such that the inherent nature of the product was that of golf equipment rather than a floor covering. The fact that there are other possible uses for the product, such as a rather higher quality version of artificial turf for use as a lawn is, as the authorities demonstrate, irrelevant.

70. We therefore accept the FTT's reasoning at [110] of the Decision that the features it identified at [108] were not subjective criteria but were features inherent in the products and that evidence can properly be presented with the goods to demonstrate the significance of their particular objective features. As Mr White submitted, that is in practice what happens when an importer seeks to import a product whose inherent characteristics may not be readily apparent from a visual inspection by a customs officer. In contrast, *Farfalla Fleming* involved the relevance of artistic value which is plainly subjective and therefore not relevant.

71. Mr Pritchard submits that the FTT erred at [112] where it said that it would regard as relevant evidence of actual use, including evidence in marketing materials which explain the objective features and their significance. It also erred when it said that evidence of price was relevant.

72. In our view, the FTT was loose with its language in referring at [112] to "actual use" as opposed to the intended main use. Juxtaposed as that phrase was to the FTT's discussion of the role of marketing materials the Decision might be construed as a finding that evidence of actual use or of targeted use through marketing materials was relevant. However, the FTT went on to say in the third sentence of that paragraph that the decisions in *Kamino* and *Barrus* "do not preclude marketing materials being taken into account when those contain evidence as to the objective characteristics of the relevant goods." It is therefore clear to us that the FTT appreciated the distinction between evidence to ascertain the objective characteristics of products and evidence of use which is purely subjective. Accordingly, we detect no error of law in its approach to actual use and marketing materials.

73. We do, however, accept that the FTT appears to have fallen into error in determining that price was a relevant factor. *Farfalla Fleming* states clearly that price should not be a relevant factor. In our view, none of the authorities cited to us by Mr White in support of his submission that price could be relevant when used in an objective sense establish the opposite proposition. Having said that we do not regard the FTT's error as significant in this case. It was the design and the objective characteristics of the Non-Fringe Turf Products which formed the basis of its conclusion as to intended use for golf. In our view those objective characteristics are sufficient to establish the main intended use and it was not necessary to rely on evidence as to price to discount other possible uses, including possible use for bowls or croquet suggested by Mr Pritchard.

74. For these reasons, in our view HMRC has not made out its case on Ground 1 and we find no reason to interfere with the FTT's Decision on this ground.

Ground 2: the effect of Note 1(v) to Chapter 95

75. No authorities were cited to us which might assist in interpreting either Note 1(v) to Chapter 95 or its interaction with Note 1 (t) to section XI of the CN.

76. Mr Pritchard submits that Note 1(v) excludes "carpets and other textile floor coverings"; it does not merely exclude carpets and other floor coverings that have a utilitarian function because the words "utilitarian function" attach to the words "similar articles" and not the list of items which precede those words. It was therefore unnecessary to consider whether the Non-Fringe Turf Products have a utilitarian function. In any event, Mr Pritchard submits, the Non-Fringe Turf Products plainly have a utilitarian function; the FTT found that the artificial turf products provide a surface covering which can be walked on. He submits that the FTT erred in construing the term "utilitarian" to exclude anything that could also be used for "sporting" purposes. The FTT needed to consider whether the artificial turf products had a "utilitarian function" irrespective of (or in addition to) any "sporting function". He submits that Note 1(v) only falls for consideration where the items are otherwise within the scope of Chapter 95, that is where they might otherwise be said to be capable of having the function of a toy, game or piece of sporting equipment.

77. There is force in Mr Pritchard's submission that the phrase "utilitarian function" only refers to similar and not to the preceding items. But that is because all the items specifically identified might be expected to have a utilitarian function in that they are to be used, rather than simply admired. Textile floor coverings might serve various functions depending on the context. In a home context, they might provide a comfortable surface to walk on and help to insulate the floor. In a gardening context, they might function as artificial grass and keep weeds down. In a golfing context, they might function as an artificial surface on which golfers can stand and play the game. There is also force in Mr Pritchard's submission that the existence of a sporting function does not exclude the products from having a utilitarian function.

78. It seems to us that Note 1(v) is intended to exclude any of the specific articles listed because they have some sort of utilitarian function in addition to any function

within the relevant toy, game or sport. For example, a golf club has a sporting function but no other utilitarian function. In contrast apparel such as golf clothing bearing a distinctive pattern worn by some golfers has an additional utilitarian function of keeping the golfer decent and protecting from the elements. Therefore, we do not accept Mr White's submission that the fact that the product has a sporting function excludes it from also having a utilitarian function.

79. In our view, it is the existence of a utilitarian function over and above a sporting function which is the common characteristic of all the items covered by Note 1(v). If the Non-Fringe Turf Products do not have a utilitarian function in addition to their sporting function then that suggests they are not intended to be excluded from Chapter 95 by Note 1 (v). In this case, the Non-Fringe Turf Products only have the utilitarian function of providing a surface to walk and stand on in the context of playing golf and providing a surface which mimics different types of natural cut grass on a golf course. Whilst the products provide a surface to walk on that is only incidental to their function for playing golf. At different times, a user may be standing on a certain spot to play a ball, or a ball may be played from that spot. The objective characteristics of the Non-Fringe Turf Products are directed towards the way in which a tee and a golf ball react to the surface rather than towards providing a surface to stand and walk on. On that basis, there is no function other than a sporting function. Therefore, for different reasons to those found by the FTT, we conclude that Note 1(v) does not operate so as to exclude the Non-Fringe Turf Products from Chapter 95. They are not floor coverings for the purpose of Note 1(v).

80. We are reinforced in that view by consideration of how Note 1 (v) interacts with the exclusionary note which applies to Chapter 57. The latter provision, Note 1(t) to Section XI, operates so as to exclude all articles which fall within the scope of Chapter 95 whereas the exclusion from Chapter 95 in Note 1(v) operates by reference to specific descriptions of articles. In our view, this leads to an inference that it is necessary first to see whether the product concerned falls within the scope of Chapter 95. We have found that it does despite Note 1 (v), and therefore it falls to be excluded from the scope of heading 5703.

81. For these reasons, we see no reason to interfere with the Decision on the basis of Ground 2.

Ground 3: whether the Non-Fringe Turf Products fall within Chapter 57

82. We have found against HMRC on both Grounds 1 and 2. We are satisfied for the reasons given above that the FTT was right to find that the Non-Fringe Turf Products fall within heading 9506 rather than 5703. It is therefore not necessary for us to consider Ground 3 and in particular whether artificial turf generally is a "floor covering" within Heading 5703.

Disposition

83. The appeal is dismissed.

JUDGE TIMOTHY HERRINGTON **JUDGE JONATHAN CANNAN**

UPPER TRIBUNAL JUDGES

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