

BETWEEN

COMPTROLLER-GENERAL OF CUSTOMS

APPELLANT

AND



PHARM-A-CARE LABORATORIES PTY LTD

(ACN 003 468 219)

RESPONDENT

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APPELLANT'S POST-HEARING NOTE

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: NOTE

Introduction

2. These submissions are filed pursuant to the leave given by the Court at T¹ 27.1176-1178 to provide a note on "how the chapter notes relate to the headings".
- 20 3. The Court also granted the Comptroller leave to indicate a position on the draft Notice of Contention: T 48.2122-2131. The Comptroller does not object to the grant of leave to file the Notice of Contention. The issues raised by the Notice of Contention are issues of law which have been argued in writing and orally. The Notice of Contention ground should be rejected: the Tribunal erred in concluding that the subject vitamin preparations were not "food supplements" because, in reaching that purported conclusion, the Tribunal asked the wrong question. The Tribunal asked how the good would ordinarily be described, not whether the good fell within the meaning of the words in the Tariff.

ⁱ *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* [2019] HCATrans 203.

How do the Chapter Notes relate to the headings?

4. The Comptroller-General submits that, when classifying a good, one must apply any relevant headings and Chapter Notes *before* applying Rules 2, 3, 4 and 5. If a Chapter Note requires that a kind of good not fall within the Chapter, one does not – and cannot – then classify the good to a heading within the Chapter.
5. This submission reflects the general understanding articulated in the Harmonized System Explanatory Notes (**HSEN**),² relevant parts of which are provided with this Note.
6. In respect of Rule 1, the HSEN state:

- 10 (III) The second part of this Rule provides that classification shall be determined:
- (a) according to the terms of the headings and any relative Section or Chapter Notes, and
 - (b) where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4 and 5.

...

- 20 (V) In provision (III)(b), the expression “provided such headings or Notes do not otherwise require” is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate **only** to particular goods. Consequently those headings cannot be extended to include goods which might otherwise fall there by reason of the operation of Rule 2(b).

(emphasis in original)

7. Further, in respect of Rule 3, the HSEN state:

- 30 (II) The Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require**. For instance, Note 4(b) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be

² Prepared by the Harmonized System Committee under Art 7(1)(b) of the *International Convention on the Harmonized System (the Convention)*, and approved by the Customs Co-Operation Council under Art 8(2).

classified in one of the former headings. Such goods are to be classified according to Note 4(b) to Chapter 97 and not according to this Rule.

8. The HSEN not only identify the understanding of the parties to the Convention, they are admissible to construe terms in the *Customs Tariff Act 1995* taken from the Harmonized System (which include the Rules at Schedule 2): see AB 67-68 [51]; *Toyota Tsusho Australia Pty Ltd v Collector of Customs* [1992] FCA 211 at [24] (Black CJ, Gray and Heerey JJ); *Primaplas Pty Ltd v Chief Executive Officer of Customs* (2014) 242 FCR 268 at [72] (Siopis, Davies and Wigney JJ); *Acts Interpretation Act 1901* (Cth) s 15AB(1).
- 10 9. The position articulated in the HSEN is reflected in the express text of the *Customs Tariff Act 1995* (Cth) (*Customs Tariff Act*)
 - (a) Section 7 states that “[t]he Interpretation Rules must be used for working out the tariff classification under which goods are classified”.
 - (b) The “Interpretation Rules” are the rules set out in Schedule 2 of the *Customs Tariff Act*: see *Customs Tariff Act* s 3(1) (definition of “Interpretation Rules”).
 - (c) The opening words of Schedule 2 state that “[c]lassification of goods in Schedule 3 shall be governed by the following principles”. Those words are mandatory in form and effect.
 - 20 (d) The first Interpretation Rule – clause 1 of Schedule 3 – 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 ...”.
 - (e) Interpretation Rule 1 is also mandatory in terms and effect: classification *shall* be determined according to (inter alia) relevant Chapter Notes.
 - (f) Further, Interpretation Rule 1 creates an interactional rule: if a heading or Chapter Note *requires* a particular result, then the application of a later rule cannot yield a contrary result. For example, if a Chapter Note provides that a Chapter does not cover a particular a good, then the application of Rules 2, 3 or 4 cannot yield the result that the good is classified within that Chapter.

10. This approach to the order of application has not been in dispute at any stage in these proceedings. It reflects the order of analysis adopted in the Tribunal³ and the Full Court.⁴ The Comptroller advanced this submission at AS⁵ [5], and it was not denied (and has not been denied) by Pharm-A-Care.
11. The effect of this approach in this case is that, if Note 1(a) of Chapter 30 is engaged, then the goods could not ultimately be classified under Chapter 30 – whether through the application of Interpretation Rules 2, 3 or 4 or otherwise.
12. The approach set out in the HSEN is reflected in the position that has long been established in Australia.
- 10 13. The origins of this strand of jurisprudence are the decisions in *Re Liebert Corporation Australia Pty Ltd v Collector of Customs* [1992] FCA 65 (Foster J) and *Liebert Corporation Australia Pty Ltd v Collector of Customs* [1993] FCA 525; (1993) 23 AAR 287 (Wilcox, O'Connor and Drummond JJ).
14. Those cases concerned a Chapter Note to Section XVI which stated "1. This section does not cover: ... (m) Articles of Chapter 90".
15. Justice Foster and, subsequently, the Full Court of the Federal Court held that one must first ascertain whether a good fell within Chapter 90 and, if it did, it could not be classified within Section XVI.
16. At [38]-[40], Foster J held:

20 It is clear that in the hearing before the Tribunal there were competing contentions as to whether the subject machine fell for classification under Heading 8504 (or a sub-heading) or under Heading 9032 (or a sub-heading). The Tribunal was obliged to approach the resolution of this question by the application of the Rules in Schedule 2. Rule 1 required that the classification be determined "according to the terms of the headings and any relative Section or Chapter Notes". Consideration of subsequent provisions, in particular so far as this case is concerned, the provisions of Rule 3(b) was to take place only if the "headings or notes" did not "otherwise require".

³ Core Appeal Book (CAB) 19-23 [50]-[65].

⁴ CAB 59-64 [26]-[38].

⁵ Appellant's Amended Submissions dated 14 October 2019.

10 Section XVI, Note 1(m) specifically provided that the section which included Chapters 84 and 85 should not "cover Articles of Chapter 90". Although I was at first hesitant about the proposition, I have come to the view that this is a Note which "otherwise requires" within Rule 1. It produces the result, in my opinion, that whenever there is competition in the classification of goods between the headings of Chapter 90 and the headings of the Chapters falling within Section XVI, it is necessary before entering upon the question whether the goods may be appropriately classified under a heading or sub-heading of those Chapters, to positively exclude their classification under some heading of Chapter 90. To put the matter another way, where there exists a competition between such classifications, it is not appropriate to approach the question, in the first instance, by seeking to determine whether the goods should be classified under some heading in the Chapters of Section XVI.

This means, as was submitted by the appellant, that it was necessary for the Tribunal, in the present case, to have considered squarely whether or not the subject machine fell within the description prescribed by heading 9032 or any of its sub-headings, before giving consideration to the applicability of any of the headings in Chapter 85.

20 17. This reasoning was approved in an appeal to the Full Federal Court from a subsequent reconsideration decision of the Tribunal. The Full Court said (at 389-390):

It follows that the appropriate procedure for determining the proper classification of goods that might seem to fall within any of the sub-headings in Section XVI and Chapter 90 is first, to determine whether the goods can appropriately be classified under any of the headings in Chapter 90. If they can be, they are to be so classified and it is irrelevant that the goods might also fall within the terms of any of the headings in any of the Chapters of Section XVI or that they might be more appropriately classified under Section XVI than Chapter 90. The goods may be classified under Section XVI only if none of the headings in Chapter 90 is applicable. ...

30 Since this is the appropriate procedure for ascertaining the tariff classification of goods, some of which may be capable of falling within headings in both Section XVI and in Chapter 90, the determination whether the goods are classifiable to a heading in Chapter 90 is a final, and not just a prima facie, one. If the goods are so classifiable, that is the end of the matter even if they could also be classified to a heading in Section XVI; if they are not so classifiable, only then will it be necessary to turn to Section XV.

18. The approach in *Liebert* has subsequently been applied on many occasions by the Full Court of the Federal Court,⁶ the Federal Court⁷ and the Administrative Appeals Tribunal.⁸

⁶ *Collector of Customs v Johnson & Johnson Medical Pty Ltd* [1997] FCA 775 (Burchett, Tamberlin and Lehane JJ).

19. In this case, the Tribunal and the Full Court correctly appreciated that one must first address Note 1(a) to Chapter 30. If Note 1(a) applied, then Chapter 30 was inapplicable to the goods and the goods could not be classified under heading 3004. This has not been disputed at any point in this matter. The Tribunal held that Note 1(a) did not cover either the vitamin preparations⁹ or the garcinia preparations.¹⁰ Having so held, the Tribunal classified the vitamin preparations under heading 3004 without turning to Interpretation Rules 2, 3 and 4. Further, the Tribunal classified the garcinia preparations under heading 3004 by applying Rule 4 (but not Rule 2 or Rule 3), after finding that no heading directly applied: see CAB 33 [85] – [88].

10 20. That one must first ascertain whether Chapter Notes otherwise provide before ascertaining whether a good falls within a heading (or Interpretation Rules 2, 3 or 4 have a particular result) does not mean that headings and sub-headings are irrelevant to the *construction* of the Chapter Note. The construction of the Chapter Notes is anterior to their application. Headings and sub-headings could conceivably be relevant to that anterior constructional task, although the constructional weight they have will necessarily vary with the circumstances. This follows from basic principle. All material in the Schedules to the *Customs Tariff Act* (including the subheadings in Schedule 3) is part of the Act: see *Acts Interpretation Act 1901* (Cth) s 13(1). The meaning of any particular provision in the *Customs Tariff Act* “must be determined ‘by
20 reference to the language of the instrument viewed as a whole’”: *Project Blue Sky Pty Ltd v ABA* (1998) 194 CLR 355 at [69] (McHugh, Gummow, Kirby and Hayne JJ). The language of the *Customs Tariff Act* viewed as a whole includes the text with which

⁷ *Collector of Customs v Solo MGB Pty Ltd* [2017] FCA 315 at [59] (Moshinsky J); *Chief Executive Officer of Customs v Biocontrol Ltd* (2006) 150 FCR 64 at [18] (Young J); *Grundford Pumps Pty Ltd v Collector of Customs* [1996] FCA 462 (Heerey J); *Boehringer Mannheim Australia Pty Ltd v Collector of Customs* [1995] FCA 1503 at [16] (Whitlam J); *Vernon-Carus Australia Pty Ltd v Collector of Customs* [1995] FCA 1283 at [12]-[13]. See also *Cray Communications Ltd v Collector of Customs* [1998] FCA 122 (Madgwick J).

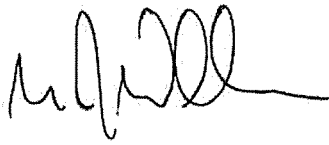
⁸ *BASF Australia Ltd and Chief Executive Officer of Customs* [2015] AATA 140 at [10] (Forgie DP); *Howard Australia Pty Ltd and Chief Executive Officer of Customs* [2009] AATA 926 at [19] (Fice M); *Monza Imports and Chief Executive Officer of Customs* [2006] AATA 71 at [20]; *Biocontrol Ltd and Chief Executive Officer of Customs* [2004] AATA 1381 at [47] (Forgie DP); *Mermel Australia Pty Ltd and Chief Executive Officer of Customs* [2004] AATA 653 at [42]-[43] (Forgie DP, Ermert and McLean MM); *Thirco Pty Ltd and Chief Executive Officer of Customs* [2001] AATA 1015 at [11] (Forgie DP); *Print & Pack Australia Pty Ltd* [2001] AATA 151 at [17] (Allen SM).

⁹ CAB 19-23 [50]-[65].

¹⁰ CAB 31 [79].

the subheadings are expressed. Nothing in Interpretation Rule 6 is inconsistent with this position. Interpretation Rule 6 is directed to the order in which provisions in Schedule 3 are to be applied, not the anterior task of construction of those provisions.

Dated: 23 October 2019



Neil Williams
Sixth Floor Selborne Chambers
(02) 9235 0156
njwilliams@sixthfloor.com.au



David Hume
Sixth Floor Selborne Chambers
(02) 8915 2694
dhume@sixthfloor.com.au

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Extract from the Harmonized System Explanatory Notes (HSEN) 5th Edition (2012).¹

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¹ As published when the goods the subject of the dispute were imported by the Respondent. The current version of the HSEN is the 6th Edition (2017). There are only minor differences between the 5th and 6th Editions, and none in relation to the part dealing with the Interpretation Rules, which is in this Extract.

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**Harmonized Commodity
Description and Coding System**

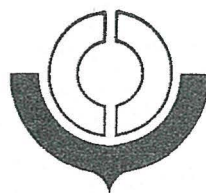
EXPLANATORY NOTES

Fifth edition (2012)

VOLUME 1

Sections I - VI

Chapters 1 - 28



WORLD CUSTOMS ORGANIZATION

(Established in 1952 as the Customs Co-operation Council)

Rue du Marché, 30

B 1210 - Brussels

Telephone +32-2-209.92.11

Fax +32-2-209.94.92

*The Customs Co-operation Council * (C.C.C.) was established by a Convention signed in Brussels on 15th December 1950.*

Under the terms of that Convention, the functions of the Council are :

- (a) To study all questions relating to co-operation in customs matters.*
- (b) To examine the technical aspects, as well as the economic factors related thereto, of customs systems with a view to proposing to its Members practical means of attaining the highest possible degree of harmony and uniformity.*
- (c) To prepare draft Conventions and amendments to Conventions and to recommend their adoption by interested Governments.*
- (d) To make recommendations to ensure the uniform interpretation and application of the Conventions concluded as a result of its work as well as those concerning the Nomenclature for the Classification of Goods in Customs Tariffs and the Valuation of Goods for Customs Purposes and, to this end, to perform such functions as may be expressly assigned to it in those Conventions in accordance with the provisions thereof.*
- (e) To make recommendations, in a conciliatory capacity, for the settlement of disputes concerning the interpretation or application of the Conventions referred to in paragraph (d) above.*
- (f) To ensure the circulation of information regarding customs regulations and procedures.*
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- (h) To co-operate with other inter-governmental organisations as regards matters within its competence.*

The Council possesses juridical personality.

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INTRODUCTION

This publication contains the official text of the **Explanatory Notes to the Harmonized Commodity Description and Coding System** (Harmonized System), including the text of the **Subheading Explanatory Notes** indicating the scope and content of certain of the Harmonized System subheadings (*).

Where a Subheading Explanatory Note is provided this is indicated by the sign (+) after the text of the heading.

The Explanatory Notes to the Harmonized System are published in English and French, the two official languages of the World Customs Organization. They are kept up-to-date by the issue of new pages to replace those affected by the amendments made.

(*) A heading number placed between square brackets indicates that the corresponding heading and Explanatory Note have been deleted (example : heading [25.27]).

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- 5 Products of animal origin, not elsewhere specified or included.

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- 33 Essential oils and resinoids; perfumery, cosmetic or toilet preparations.
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- 35 Albuminoidal substances; modified starches; glues; enzymes.

GENERAL RULES FOR THE INTERPRETATION OF THE HARMONIZED SYSTEM

Classification of goods in the nomenclature shall be governed by the following principles :

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.

EXPLANATORY NOTE

- (I) The Nomenclature sets out in systematic form the goods handled in international trade. It groups these goods in Sections, Chapters and sub-Chapters which have been given titles indicating as concisely as possible the categories or types of goods they cover. In many cases, however, the variety and number of goods classified in a Section or Chapter are such that it is impossible to cover them all or to cite them specifically in the titles.
- (II) Rule 1 begins therefore by establishing that the titles are provided "for ease of reference only". They accordingly have no legal bearing on classification.
- (III) The second part of this Rule provides that classification shall be determined :
- (a) according to the terms of the headings and any relative Section or Chapter Notes, and
 - (b) where appropriate, **provided the headings or Notes do not otherwise require**, according to the provisions of Rules 2, 3, 4, and 5.
- (IV) Provision (III) (a) is self-evident, and many goods are classified in the Nomenclature without recourse to any further consideration of the Interpretative Rules (e.g., live horses (heading 01.01), pharmaceutical goods specified in Note 4 to Chapter 30 (heading 30.06)).
-
- (V) In provision (III) (b) :
- (a) The expression "provided such headings or Notes do not otherwise require" is intended to make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount, i.e., they are the first consideration in determining classification. For example, in Chapter 31, the Notes provide that certain headings relate **only** to particular goods. Consequently those headings cannot be extended to include goods which otherwise might fall there by reason of the operation of Rule 2 (b).
 - (b) The reference to Rule 2 in the expression "according to the provisions of Rules 2, 3, 4 and 5" means that :
 - (1) goods presented incomplete or unfinished (e.g., a bicycle without saddle and tyres), and
 - (2) goods presented unassembled or disassembled (e.g., a bicycle, unassembled or disassembled, all components being presented together) whose components could individually be classified in their own right (e.g., tyres, inner tubes) or as "parts" of those goods,
 are to be classified as if they were those goods in a complete or finished state, **provided the terms of Rule 2 (a) are satisfied and the headings or Notes do not otherwise require.**

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.

EXPLANATORY NOTE

RULE 2 (a)
(Incomplete or unfinished articles)

- (I) The first part of Rule 2 (a) extends the scope of any heading which refers to a particular article to cover not only the complete article but also that article incomplete or unfinished, provided that, as presented, it has the essential character of the complete or finished article.
- (II) The provisions of this Rule also apply to **blanks** unless these are specified in a particular heading. The term "**blank**" means an article, not ready for direct use, having the approximate shape or outline of the finished article or part, and which can only be used, other than in exceptional cases, for completion into the finished article or part (e.g., bottle preforms of plastics being intermediate products having tubular shape, with one closed end and one open end threaded to secure a screw type closure, the portion below the threaded end being intended to be expanded to a desired size and shape).

Semi-manufactures not yet having the essential shape of the finished articles (such as is generally the case with bars, discs, tubes, etc.) are not regarded as "blanks".
- (III) In view of the scope of the headings of Sections I to VI, this part of the Rules does not normally apply to goods of these Sections.
- (IV) Several cases covered by the Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section XVI, and Chapters 61, 62, 86, 87 and 90).

RULE 2 (a)
(Articles presented unassembled or disassembled)

- (V) The second part of Rule 2 (a) provides that complete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article. When goods are so presented, it is usually for reasons such as requirements or convenience of packing, handling or transport.
- (VI) This Rule also applies to incomplete or unfinished articles presented unassembled or disassembled provided that they are to be treated as complete or finished articles by virtue of the first part of this Rule.

- (VII) For the purposes of this Rule, "articles presented unassembled or disassembled" means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, **provided** only assembly operations are involved.

No account is to be taken in that regard of the complexity of the assembly method. However, the components shall not be subjected to any further working operation for completion into the finished state.

Unassembled components of an article which are in excess of the number required for that article when complete are to be classified separately.

- (VIII) Cases covered by this Rule are cited in the General Explanatory Notes to Sections or Chapters (e.g., Section XVI, and Chapters 44, 86, 87 and 89).
- (IX) In view of the scope of the headings of Sections I to VI, this part of the Rule does not normally apply to goods of these Sections.

RULE 2 (b)

(Mixtures and combinations of materials or substances)

- (X) Rule 2 (b) concerns mixtures and combinations of materials or substances, and goods consisting of two or more materials or substances. The headings to which it refers are headings in which there is a reference to a material or substance (e.g., heading 05.07 - ivory), and headings in which there is a reference to goods of a given material or substance (e.g., heading 45.03 - articles of natural cork). It will be noted that the Rule applies only if the headings or the Section or Chapter Notes do not otherwise require (e.g., heading 15.03 - lard oil, **not ... mixed**).

Mixtures being preparations described as such in a Section or Chapter Note or in a heading text are to be classified under the provisions of Rule 1.

- (XI) The effect of the Rule is to extend any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances. The effect of the Rule is also to extend any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance.
- (XII) It does not, however, widen the heading so as to cover goods which cannot be regarded, as required under Rule 1, as answering the description in the heading; this occurs where the addition of another material or substance deprives the goods of the character of goods of the kind mentioned in the heading.
- (XIII) As a consequence of this Rule, mixtures and combinations of materials or substances, and goods consisting of more than one material or substance, if *prima facie* classifiable under two or more headings, must therefore be classified 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.

GIR

- (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

EXPLANATORY NOTE

- (I) This Rule provides three methods of classifying goods which, *prima facie*, fall under two or more headings, either under the terms of Rule 2 (b) or for any other reason. These methods operate in the order in which they are set out in the Rule. Thus Rule 3 (b) operates only if Rule 3 (a) fails in classification, and if both Rules 3 (a) and (b) fail, Rule 3 (c) will apply. The order of priority is therefore (a) specific description; (b) essential character; (c) heading which occurs last in numerical order.
- (II) The Rule can only take effect **provided the terms of headings or Section or Chapter Notes do not otherwise require**. For instance, Note 4 (B) to Chapter 97 requires that goods covered both by the description in one of the headings 97.01 to 97.05 and by the description in heading 97.06 shall be classified in one of the former headings. Such goods are to be classified according to Note 4 (B) to Chapter 97 and not according to this Rule.

RULE 3 (a)

- (III) The first method of classification is provided in Rule 3 (a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.
- (IV) It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that :
 - (a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).
 - (b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.

Examples of the latter category of goods are :

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

- (2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods of heading 88.01 or 88.02 but in heading 70.07, where it is more specifically described as safety glass.
- (V) 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 than the others. In such cases, the classification of the goods shall be determined by Rule 3 (b) or 3 (c).

RULE 3 (b)

- (VI) This second method relates only to :
- (i) Mixtures.
 - (ii) Composite goods consisting of different materials.
 - (iii) Composite goods consisting of different components.
 - (iv) Goods put up in sets for retail sales.
- It applies only if Rule 3 (a) fails.
- (VII) In all these cases the goods are to be classified as if they consisted of the material or component **which gives them their essential character**, insofar as this criterion is applicable.
- (VIII) 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.
- (IX) For the purposes of this Rule, composite goods made up of different components shall be taken to mean not only those in which the components are attached to each other to form a practically inseparable whole but also those with separable components, **provided** these components are adapted one to the other and are mutually complementary and that together they form a whole which would not normally be offered for sale in separate parts.

Examples of the latter category of goods are :

- (1) Ashtrays consisting of a stand incorporating a removable ash bowl.
- (2) Household spice racks consisting of a specially designed frame (usually of wood) and an appropriate number of empty spice jars of suitable shape and size.

As a general rule, the components of these composite goods are put up in a common packing.

- (X) For the purposes of this Rule, the term "goods put up in sets for retail sale" shall be taken to mean goods which :
- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;

- (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
- (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

The term therefore covers sets consisting, for example, of different foodstuffs intended to be used together in the preparation of a ready-to-eat dish or meal.

Examples of sets which can be classified by reference to Rule 3 (b) are :

- (1) (a) Sets consisting of a sandwich made of beef, with or without cheese, in a bun (heading 16.02), packaged with potato chips (French fries) (heading 20.04) :

Classification in heading 16.02.

- (b) Sets, the components of which are intended to be used together in the preparation of a spaghetti meal, consisting of a packet of uncooked spaghetti (heading 19.02), a sachet of grated cheese (heading 04.06) and a small tin of tomato sauce (heading 21.03), put up in a carton :

Classification in heading 19.02.

The Rule does not, however, cover selections of products put up together and consisting, for example, of :

- a can of shrimps (heading 16.05), a can of *pâté de foie* (heading 16.02), a can of cheese (heading 04.06), a can of sliced bacon (heading 16.02), and a can of cocktail sausages (heading 16.01); or
- a bottle of spirits of heading 22.08 and a bottle of wine of heading 22.04.

In the case of these two examples and similar selections of products, each item is to be classified separately in its own appropriate heading. This also applies, for example, to soluble coffee in a glass jar (heading 21.01), a ceramic cup (heading 69.12) and a ceramic saucer (heading 69.12) put up together for retail sale in a paperboard box.

- (2) Hairdressing sets consisting of a pair of electric hair clippers (heading 85.10), a comb (heading 96.15), a pair of scissors (heading 82.13), a brush (heading 96.03) and a towel of textile material (heading 63.02), put up in a leather case (heading 42.02) :

Classification in heading 85.10.

- (3) Drawing kits comprising a ruler (heading 90.17), a disc calculator (heading 90.17), a drawing compass (heading 90.17), a pencil (heading 96.09) and a pencil-sharpener (heading 82.14), put up in a case of plastic sheeting (heading 42.02) :

Classification in heading 90.17.

For the sets mentioned above, the classification is made according to the component, or components taken together, which can be regarded as conferring on the set as a whole its essential character.

- (XI) This Rule does not apply to goods consisting of separately packed constituents put up together, whether or not in a common packing, in fixed proportions for the industrial manufacture of, for example, beverages.

RULE 3 (c)

- (XII) When goods cannot be classified by reference to Rule 3 (a) or 3 (b), they are to be classified in the heading which occurs last in numerical order among those which equally merit consideration in determining their classification.

RULE 4

Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

EXPLANATORY NOTE

- (I) This Rule relates to goods which cannot be classified in accordance with Rules 1 to 3. It provides that such goods shall be classified under the heading appropriate to the goods to which they are most akin.
- (II) In classifying in accordance with Rule 4, it is necessary to compare the presented goods with similar goods in order to determine the goods to which the presented goods are most akin. The presented goods are classified in the same heading as the similar goods to which they are most akin.
- (III) Kinship can, of course, depend on many factors, such as description, character, purpose.

RULE 5

In addition to the foregoing provisions, the following Rules shall apply in respect of the goods referred to therein :

- (a) Camera cases, musical instrument cases, gun cases, drawing instrument cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. This Rule does not, however, apply to containers which give the whole its essential character;
- (b) Subject to the provisions of Rule 5 (a) above, packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

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EXPLANATORY NOTE

RULE 5 (a) **(Cases, boxes and similar containers)**

- (I) This Rule shall be taken to cover only those containers which :
- (1) are specially shaped or fitted to contain a specific article or set of articles, i.e., they are designed specifically to accommodate the article for which they are intended. Some containers are shaped in the form of the article they contain;
 - (2) are suitable for long-term use, i.e., they are designed to have a durability comparable to that of the articles for which they are intended. These containers also serve to protect the article when not in use (during transport or storage, for example). These criteria enable them to be distinguished from simple packings;
 - (3) are presented with the articles for which they are intended, whether or not the articles are packed separately for convenience of transport. Presented separately the containers are classified in their appropriate headings;
 - (4) are of a kind normally sold with such articles; and
 - (5) do not give the whole its essential character.
- (II) Examples of containers, presented with the articles for which they are intended, which are to be classified by reference to this Rule are :
- (1) Jewellery boxes and cases (heading 71.13);
 - (2) Electric shaver cases (heading 85.10);
 - (3) Binocular cases, telescope cases (heading 90.05);
 - (4) Musical instrument cases, boxes and bags (e.g., heading 92.02);
 - (5) Gun cases (e.g., heading 93.03).
- (III) Examples of containers not covered by this Rule are containers such as a silver caddy containing tea, or an ornamental ceramic bowl containing sweets.

RULE 5 (b) **(Packing materials and packing containers)**

- (IV) This Rule governs the classification of packing materials and packing containers of a kind normally used for packing the goods to which they relate. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use, for example, certain metal drums or containers of iron or steel for compressed or liquefied gas.
- (V) This Rule is subject to Rule 5 (a) and, therefore, the classification of cases, boxes and similar containers of the kind mentioned in Rule 5 (a) shall be determined by the application of that Rule.

RULE 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 otherwise requires.

EXPLANATORY NOTE

- (I) Rules 1 to 5 above govern, *mutatis mutandis*, classification at subheading levels within the same heading.
- (II) For the purposes of Rule 6, the following expressions have the meanings hereby assigned to them :

- (a) “subheadings at the same level” : one-dash subheadings (level 1) or two-dash subheadings (level 2).

Thus, when considering the relative merits of two or more one-dash subheadings within a single heading in the context of Rule 3 (a), their specificity or kinship in relation to a given article is to be assessed solely on the basis of the texts of the competing one-dash subheadings. When the one-dash subheading that is most specific has been chosen and when that subheading is itself subdivided, then, and only then, shall the texts of the two-dash subheadings be taken into consideration for determining which two-dash subheading should be selected.

- (b) “unless the context otherwise requires” : except where Section or Chapter Notes are incompatible with subheading texts or Subheading Notes.

This occurs, for example, in Chapter 71 where the scope assigned to the term “platinum” in Chapter Note 4 (B) differs from that assigned to “platinum” in Subheading Note 2. For the purpose of interpreting subheadings 7110.11 and 7110.19, therefore, Subheading Note 2 applies and Chapter Note 4 (B) is to be disregarded.

- (III) The scope of a two-dash subheading shall not extend beyond that of the one-dash subheading to which the two-dash subheading belongs; and the scope of a one-dash subheading shall not extend beyond that of the heading to which the one-dash subheading belongs.

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