Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2009-046

Igloo Vikski Inc.

v.

President of the Canada Border Services Agency

Decision issued
Wednesday, January 16, 2013

Reasons issued
Friday, January 25, 2013

Canada

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IN THE MATTER OF an appeal heard on September 20, 2012, pursuant to section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF 11 decisions of the President of the Canada Border Services Agency, made between May 14 and June 3, 2009, with respect to requests for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

IGLOO VIKSKI INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Eric Wildhaber
Eric Wildhaber
Secretary

The statement of reasons will be issued at a later date.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	September 20, 2012
Tribunal Member:	Diane Vincent, Presiding Member
Counsel for the Tribunal:	Georges Bujold Anja Grabundzija
Manager, Registrar Programs and Services:	Michel Parent
Registrar Officer:	Cheryl Unitt
Registrar Support Officer:	Rosemary Hong

PARTICIPANTS:

Appellant	**Counsel/Representative**
Igloo Vikski Inc.	Michael Kaylor
Respondent	**Counsel/Representative**
President of the Canada Border Services Agency	Geneviève Lecours

WITNESS:

Christophe Charbault
Brand Manager – Team Sports
Raymond Lanctôt Ltée

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: 613-993-3595
Fax: 613-990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal filed by Igloo Vikski Inc. (Igloo Vikski) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*[1] from decisions made between May 14 and June 3, 2009, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether five models of sports gloves designed for ice hockey goaltenders (the goods in issue) are properly classified under tariff item No. 6216.00.00 of the schedule to the *Customs Tariff*[2] as gloves, mittens and mitts, as determined by the CBSA, or should be classified under tariff item No. 3926.90.90 as other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14, as claimed by Igloo Vikski.

PROCEDURAL HISTORY

3. From November 10, 2003, to December 20, 2005, Igloo Vikski imported the goods in issue under tariff item No. 6216.00.00 as gloves, mittens and mitts.

4. Between June 14, 2005, and October 31, 2007, Igloo Vikski requested refunds of duty pursuant to paragraph 74(1)(*e*) of the *Act*, claiming that the goods in issue should be classified under tariff item No. 9506.99.90 as other articles or equipment for sports. Between December 10, 2007, and January 8, 2008, the CBSA issued re-determinations pursuant to paragraph 59(1)(*a*), stating that the goods in issue could not be classified in Chapter 95, as claimed by Igloo Vikski, and, therefore, denied the requests for refunds of duty. The CBSA determined that four models of the goods in issue would remain classified under tariff item No. 6216.00.00 and that two other models would be classified under tariff item No. 3926.20.92 as mittens or non-disposable gloves.

5. On February 15, 2008, Igloo Vikski requested further re-determinations pursuant to subsection 60(1) of the *Act*. Igloo Vikski claimed that all the models of the goods in issue should be classified under tariff item No. 3926.20.92. Between May 14 and June 3, 2009, the CBSA issued 11 decisions pursuant to subsection 60(4), determining that the goods in issue, save one model, were properly classified under tariff item No. 6216.00.00. The remaining model was classified under tariff item No. 3926.20.92.

6. On August 10, 2009, Igloo Vikski filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.

7. On August 27, 2009, the Tribunal informed the parties that the appeal would be held in abeyance pending the outcome in another appeal, that is, *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*.[3] The Tribunal's decision in *Sher-Wood* was issued on February 10, 2011. While this decision was subsequently appealed to the Federal Court of Appeal, this appeal was later withdrawn. Having been made aware of the outcome in *Sher-Wood*, on November 18, 2011, Igloo Vikski informed the Tribunal that it wished to pursue the present appeal.

8. On September 20, 2012, the Tribunal held a public hearing in Ottawa, Ontario.

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. (10 February 2011), AP-2009-045 (CITT) [*Sher-Wood*]. The Tribunal notes that, on August 20, 2009, Igloo Vikski requested that the present appeal be held in abeyance pending the outcome in *Sher-Wood*.

9. Igloo Vikski called one witness. Mr. Christophe Charbault, Brand Manager - Team Sports with Raymond Lanctôt Ltée, in Montréal, was qualified by the Tribunal as an expert in the design of hockey products, including goaltender gloves. The CBSA did not call any witnesses.

GOODS IN ISSUE

10. The goods in issue are five models of hockey gloves, designed to be worn by ice hockey goaltenders, imported by Igloo Vikski, that were allegedly erroneously classified under tariff item No. 6216.00.00 by the CBSA in the decisions at issue. These are models GMX3, GMX5 and GMX6 (goaltender catchers) and models GBX3 and GBX6 (goaltender blockers). Another model of goaltender blocker, namely, model GBX5, was classified by the CBSA under tariff item No. 3926.20.92 in one of the decisions at issue. As this is the tariff item under which all the models should have been classified according to the notice of appeal filed by Igloo Vikski, the Tribunal finds that Igloo was not aggrieved by the CBSA's decision pursuant to subsection 60(4) of the *Act* in respect of the tariff classification of model GBX5.

11. Pursuant to section 67 of the *Act*, only ". . . [a] person aggrieved by a decision of the [CBSA] made under section 60 . . ." may file an appeal with the Tribunal. Thus, the CBSA cannot request that the Tribunal review its own tariff classification decision in an appeal pursuant to section 67. Therefore, the Tribunal finds that the tariff classification of model GBX5 is not in dispute in this appeal.

12. The CBSA filed laboratory reports describing the composition of the goods in issue as part of an agreed statement of facts.[4] The composition of the goods in issue is therefore not in dispute.

13. The goods in issue are no longer sold in Canada by Igloo Vikski, and they were not filed as physical exhibits. The CBSA provided six physical exhibits consisting of hockey gloves, some of which were disassembled, that appear similar to the models that are the subject of this appeal.

14. In general, the laboratory reports describe the external components of the goods in issue as several pieces of material, composed of varying combinations of textiles and plastics, assembled, for the most part, by stitching.[5]

15. The laboratory reports also describe the inner padding materials, based on an analysis of representative goods.[6] According to this description, the goaltender blocker has padding material encased within the external surface of the glove consisting solely of plastics, while the goaltender catcher has padding materials encased within the external surface of the glove consisting of plastics and lesser amounts of textiles.

16. At the hearing, Mr. Charbault testified that he had not read the laboratory reports. With respect to the physical exhibits, Mr. Charbault testified that, without the interior padding, the product would be dangerous, illegal and useless.[7] He also stated that the purpose of the exterior textile fabrics was to hold the padding together to protect the hands and to add graphics.[8]

4. Tribunal Exhibit AP-2009-046-20A, tab 1 at 038-046.
5. For the most detailed description per model, see Tribunal Exhibit AP-2009-046-20A, tab C.
6. For the most detailed description, see Tribunal Exhibit AP-2009-046-20A, tab E.
7. *Transcript of Public Hearing*, 20 September 2012, at 36.
8. *Ibid.* at 30, 33.

ANALYSIS

Statutory Framework

17. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[9] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

18. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[10] and the *Canadian Rules*[11] set out in the schedule.

19. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides 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 other rules.

20. In this appeal, Igloo Vikski claims that Rules 2 (b) and 3 (b) should be considered by the Tribunal. These rules provide as follows:

> 2. . . .
>
> (b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.
>
> 3. When by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:
>
> . . .
>
> (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 Rule 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.

21. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[12] and the *Explanatory Notes to the Harmonized Commodity Description and Coding*

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9. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
10. S.C. 1997, c. 36, schedule [*General Rules*].
11. S.C. 1997, c. 36, schedule.
12. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

System,[13] published by the WCO. While the *Classification Opinions* and the *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[14]

22. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. If the goods in issue cannot be classified at the heading level through the application of Rule 1, then the Tribunal must consider the other rules.[15]

Tariff Classification at Issue

23. The parties agree and the evidence indicates that the goods in issue are a type of glove specifically designed for and used by ice hockey goaltenders.[16] Mr. Charbault testified at the hearing that goaltender gloves are commonly referred to as blocker gloves and catcher gloves.[17] Therefore, the Tribunal agrees with the parties that the goods in issue are gloves.

24. As such, the goods in issue cannot be classified in Chapter 95, which generally covers sports requisites, including sports or athletic equipment, because note 1(u) to Chapter 95 provides as follows:

> 1. This Chapter does *not* cover:
>
> . . .
>
> (u) Racket strings, tents or other camping goods, *or gloves*, mittens and mitts (*classified according to their constituent material*); or
>
> . . .
>
> [Emphasis added]

25. As was correctly submitted by the CBSA, since the goods is issue are excluded from Chapter 95 by virtue of this relevant chapter note, it follows that they must be classified elsewhere, according to their constituent material.[18]

26. The nomenclature of the *Customs Tariff* that Igloo Vikski claims should apply to the goods in issue provides as follows:

> **Section VII**
>
> **PLASTICS AND ARTICLES THEREOF;**
> **RUBBER AND ARTICLES THEREOF**
>
> . . .

13. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].
14. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that the *Explanatory Notes* be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to the *Classification Opinions*.
15. Rules 1 through 5 of the *General Rules* apply to classification at the heading level.
16. Tribunal Exhibit AP-2009-046-20A, tab 1 at 39.
17. *Transcript of Public Hearing*, 20 September 2012, at 32.
18. Tribunal Exhibit AP-2009-046-20A at 10.

Chapter 39

PLASTICS AND ARTICLES THEREOF

. . .

39.26	**Other articles of plastics and articles of other materials of headings 39.01 to 39.14.**

. . .

3926.90	**-Other**

. . .

3926.90.90	- - -Other

27. Note 2(m) to Chapter 39, in force at the time of the importation of the goods in issue, stipulates that Chapter 39 (and, thus, heading No. 39.26) does not cover "[g]oods of Section XI (textiles and textile articles)".

28. The *Explanatory Notes* to heading No. 39.26 provide as follows:

> This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.
>
> They include:
>
> (1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.

29. The *Explanatory Notes* to Chapter 39 provide additional guidance in order to determine whether materials combining plastics and textiles are regarded as textile materials of Section XI or as articles of plastics covered by Chapter 39. They provide as follows:

> **Plastics and textile combinations**
>
> Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by Note 1 (h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59. The following products are also covered by this Chapter:
>
> . . .
>
> (b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour;
>
> (c) Textile fabrics, impregnated, coated, covered or laminated with plastics, which cannot, without fracturing, be bent manually around a cylinder of a diameter of 7 mm, at a temperature between 15°C and 30°C;
>
> (d) Plates, sheets and strip of cellular plastics combined with textile fabrics (as defined in Note 1 to Chapter 59), felt or nonwovens, where the textile is present merely for reinforcing purposes.
>
> In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. Figured, printed or more elaborately worked textiles

> (e.g., by raising) and special products, such as pile fabrics, tulle and lace and textile products of heading 58.11, are regarded as having a function beyond that of mere reinforcement.
>
> Plates, sheets and strip of cellular plastics combined with textile fabric on both faces, whatever the nature of the fabric, are **excluded** from this Chapter (generally **heading 56.02**, **56.03** or **59.03**).

30. The nomenclature of the *Customs Tariff* that the CBSA considers applicable to the goods in issue provides as follows:

> **Section XI**
>
> **TEXTILES AND TEXTILE ARTICLES**
>
> . . .
>
> **Chapter 62**
>
> **ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, NOT KNITTED OR CROCHETED**
>
> . . .
>
> **6216.00.00 Gloves, mittens and mitts.**

31. Note 1(h) to Section XI (which includes Chapter 62) provides that Section XI does not cover "[w]oven . . . fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39".

32. Note 1 to Chapter 62 (which includes heading No. 62.16) provides as follows:

> 1. This Chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 62.12).

33. The *Explanatory Notes* to Chapter 62 are also informative in order to determine the scope of this heading. They provide as follows:

> This Chapter covers men's, women's or children's articles of apparel, clothing accessories and parts of apparel or of clothing accessories, made up of the fabrics (excluding wadding but including felt or nonwovens) of Chapters 50 to 56, 58 and 59. With the **exception** of the articles of heading 62.12, articles of apparel, clothing accessories and parts made of knitted or crocheted material are **excluded** from this Chapter.
>
> The classification of goods in this Chapter is not affected by the presence of parts or accessories of, for example, knitted or crocheted fabrics, furskin, feather, leather, plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes (particularly Note 4 to Chapter 43 and Note 2 (b) to Chapter 67, relating to the presence of furskin and feathers, respectively), or failing that, according to the General Interpretative Rules.

34. The *Explanatory Notes* to heading No. 62.16 are also relevant. They provide as follows:

> This heading covers gloves, mittens and mitts, of textile fabrics (including lace) **other than** knitted or crocheted fabric.
>
> The provisions of the Explanatory Note to heading 61.16 apply, *mutatis mutandis*, to the articles of this heading.
>
> The heading also covers gloves used for protection in industry, etc.

35. As previously noted and further discussed below, Igloo Vikski relies heavily on Rule 2 (b) of the *General Rules* in this appeal. In this regard, notes XI to XII of the *Explanatory Notes* to Rule 2 (b) provide useful guidance concerning the meaning and effect of Rule 2 (b). They provide as follows:

> (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.

36. The dispute between the parties arises at the heading level. Consequently, the Tribunal's first task is to determine which heading covers the goods in issue.

Positions of the Parties

Igloo Vikski

37. Igloo Vikski submitted that the goods in issue should be classified in heading No. 39.26 as other articles of plastics, pursuant to Rules 2 and 3 of the *General Rules*.

38. Igloo Vikski based this argument on its interpretation of the *Explanatory Notes* to Chapter 62, which provide as follows:

> The classification of goods in this Chapter is not affected by the presence of parts or accessories of . . . plastics . . . . Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes . . ., or failing that, according to the General Interpretative Rules.

39. In Igloo Vikski's view, the *Explanatory Notes* to Chapter 62 provide that, where articles of apparel of Chapter 62 include parts or accessories of other materials (such as plastics) that constitute more than mere trimming, those articles must be classified according to the *General Rules other* than Rule 1.[19] Indeed, Igloo Vikski suggested that the effect of the *Explanatory Notes* to Chapter 62 is to prevent Rule 1 from applying further in the analysis. As the plastic padding in the goods in issue constitutes more than mere trimming, Igloo Vikski suggested that they cannot be classified in heading No. 62.16 through the application of Rule 1 of the *General Rules*, but that Rules 2 and 3 must be considered in the classification exercise.

40. As a result of the above interpretation, Igloo Vikski submitted that heading Nos. 62.16 and 39.26 both become subject to Rule 2 of the *General Rules* and that, once resort is had to that rule, Rule 1 no longer precludes classification in heading No. 39.26.[20] Igloo Vikski argued that the presence of plastics as more than mere trimming is not sufficient to deprive the goods in issue of the character of a textile glove under

19. *Transcript of Public Hearing*, 20 September 2012, at 71-72.
20. *Ibid.* at 71.

heading No. 62.16, but that it has the effect of requiring the *prima facie* application of heading No. 39.26 to the goods in issue.[21]

41. In making this argument, Igloo Vikski also disputed the Tribunal's conclusion in *Sher-Wood* which was to the effect that goods cannot be *prima facie* classifiable in both heading Nos. 62.16 and 39.26 by virtue of the terms of relevant section and chapter notes (i.e. note 1(h) to Section XI and note 2(m) to Chapter 39, in force at the time of the importation of the goods in issue). Igloo Vikski suggested that, once Rule 1 of the *General Rules* no longer applies, the section and chapter notes are no longer relevant.[22] Essentially, Igloo Vikski submitted that, where recourse to Rule 2 is necessary, these section and chapter notes do not preclude the Tribunal from finding that the goods are *prima facie* classifiable in both competing headings.

42. As a result of the above argument, Igloo Vikski suggested that, through the application of Rule 2 (b) of the *General Rules*, the goods in issue are *prima facie* classifiable in two headings; accordingly, Igloo Vikski submitted that Rule 3 (b) must be applied to determine their proper classification. On this issue, it submitted that it is the plastic padding that gives the goods in issue their main protective attributes or essential character, thus making them fall in heading No. 39.26 pursuant to Rule 3 (b).

CBSA

43. The CBSA's position was that the goods in issue are properly classified as gloves, mittens and mitts under tariff item 6216.00.00 on the basis of Rules 1 and 2 (b) of the *General Rules*.

44. The CBSA submitted that the goods in issue are gloves used by ice hockey goaltenders, have the main characteristics of gloves and are commonly described as gloves in the industry. The CBSA further submitted that the goods in issue meet the conditions to be classified in heading No. 62.16 as gloves of textile fabrics, since they are (1) "made-up" articles; (2) of any textile fabric; and (3) other than knitted or crocheted fabric.

45. The CBSA further submitted that, on the basis of Rule 2 (b) of the *General Rules*, a reference in a heading to goods of a given material shall be taken to include a reference to goods consisting partly of such material, which means that the goods in issue can be classified as an article of textile fabrics even if they are partly composed of plastics. In the CBSA's view, in this case, the presence of plastic components does not deprive the goods in issue of their character of gloves, which meets the requirement in note XII of the *Explanatory Notes* to Rule 2 (b).

46. The CBSA submitted that the classification of the goods in issue can be resolved under Rule 2 (b) of the *General Rules* and that resort to Rule 3 (b) is not legally permissible, since the goods in issue are not *prima facie* classifiable in two competing headings. The CBSA submitted that, even if Rule 3 (b) was deemed applicable by the Tribunal, the real nature of the goods in issue is that of gloves used for protection, such that it cannot be said that it is the internal plastic padding components that provide their essential character.

21. *Ibid.* at 71-72.
22. *Ibid.* at 77.

Tribunal's Assessment

Are the Goods in Issue Gloves, Mittens and Mitts of Heading No. 62.16?

47. Igloo Vikski did not take issue with the CBSA's contention that the goods in issue meet the terms of heading No. 62.16 and of the relative section and chapter notes that must be considered in accordance with Rule 1 of the *General Rules* and that, as a result, the goods in issue meet the conditions to be *prima facie* classifiable in that heading as gloves of textile fabrics. That Igloo Vikski considers that the goods in issue are *prima facie* classifiable in heading No. 62.16 is confirmed by its reliance on Rule 3 (b) in this appeal. Indeed, Rule 3 can only be relied upon where ". . . by application of Rule 2 (b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings . . . ." Consequently, if Igloo Vikski considered that the goods in issue were not *prima facie* classifiable in both competing headings, including heading No. 62.16, it would not have been necessary for it to invoke Rule 3 in order to determine in which tariff heading the goods in issue should be classified.

48. At any rate, the evidence summarized in the agreed statement of facts indicates that the external surface of the goods in issue is primarily composed of textile fabrics of Chapters 56 and 59. Igloo Vikski further admitted that ". . . the presence of the plastic [padding] in the glove doesn't take it out under Rule 1 of being a textile glove."[23]

49. The Tribunal agrees with the parties that a plain reading of the terms of heading No. 62.16 and the relative notes in accordance with Rule 1 of the *General Rules* suggests that the goods in issue are classifiable in heading No. 62.16.

50. The central issue in this appeal is whether the *Explanatory Notes* to Chapter 62 have the effect of requiring the Tribunal to consider the *General Rules* other than Rule 1 in the classification exercise and, if so, whether Rule 2 (b) operates to make the goods in issue also classifiable in heading No. 39.26, as argued by Igloo Vikski. In relevant part, the *Explanatory Notes* to Chapter 62 provide as follows:

> The classification of goods in [Chapter 62] is not affected by the presence of parts or accessories of . . . plastics . . . . Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes . . ., or failing that, according to the General Interpretative Rules.

51. The Tribunal notes that it is accepted between the parties that the *padding*, made predominantly of plastics, as evidenced by the laboratory reports, encased within the exterior surface of the goods in issue constitutes more than mere trimming.

52. The Tribunal will analyze below the question of whether the goods in issue are correctly classified in heading No. 62.16 ". . . in accordance with the relative Chapter Notes . . ., or failing that, according to the General Interpretative Rules", as directed by the *Explanatory Notes* to Chapter 62. However, before addressing that question, the Tribunal will deal with Igloo Vikski's argument that the further effect of the *Explanatory Notes* to Chapter 62 and of the application of Rule 2 (b) of the *General Rules* is to make the goods in issue also *prima facie* classifiable in heading No. 39.26.

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23. *Ibid.* at 68.

Are the Goods in Issue Goods Answering the Description in Heading No. 39.26?

53. Igloo Vikski submitted that the goods in issue should be classified in heading No. 39.26 in accordance with the principles of Rule 3 of the *General Rules*, more specifically Rule 3 (b), which provides that composite goods consisting of different materials or made up of different components are to be classified as if they consisted of the material or component which gives them their essential character. As previously noted, classification can only be effected through the application of Rule 3 (b) when goods are *prima facie* classifiable in two or more headings. In order to succeed in this appeal, Igloo Vikski must therefore establish that the goods in issue are also *prima facie* classifiable in heading No. 39.26.

54. In this regard, Igloo Vikski indicated during the hearing that, applying Rule 1 of the *General Rules*, the goods in issue would *not* be *prima facie* classifiable in heading No. 39.26 as articles of plastics. It stated as follows:

> It's quite true that that the gloves in issue would not fall in heading 39.26, but only because of the application of Rule 1. Because, as the Tribunal said [in *Sher-Wood*] when it read the Explanatory Notes to heading 39.26, in order to fall in that heading, the Explanatory Note said that it had to consist of articles of plastic, i.e., those that are made by sewing or sealing sheets of plastic. That doesn't describe the goods in issue.[24]

55. The Tribunal agrees that, on the facts of this case, Rule 1 of the *General Rules does not* make the goods *prima facie* classifiable in heading No. 39.26. In *Sher-Wood*, where the Tribunal had occasion to consider the scope of that heading fully, the Tribunal determined that, as it pertains to articles of apparel or clothing accessories, such as the goods in issue, heading No. 39.26 is limited to those that are made by ". . . sewing or sealing sheets of plastics . . ."; conversely, heading No. 39.26 does not describe articles of apparel or clothing accessories that are made up of textile fabrics.[25] In addition, the presence of plastic padding in such articles of apparel is not relevant in this regard.[26]

56. Igloo Vikski does not dispute the Tribunal's previous interpretation and conclusion in *Sher-Wood* that only certain specific plastics and textile combinations are covered by Chapter 39 and, thus, by heading No. 39.26. It is also beyond dispute that the goods in issue are not articles of apparel or clothing accessories made by ". . . sewing or sealing sheets of plastics . . ." of heading No. 39.26 and, as such, are not a type of plastic and textile combination covered by Chapter 39.[27]

57. In view of the foregoing, the Tribunal sees no reason to depart from its finding in *Sher-Wood* that the terms "[o]ther articles of plastics . . ." do not include articles of apparel and clothing accessories made by sewing together *textile* products, but that incorporate plastic components in the form of padding materials. Thus, correctly interpreted, the terms of heading No. 39.26 do not describe the goods in issue. The mere fact that the goods in issue contain plastic padding materials does not make them "[o]ther articles of plastics . . ." within the meaning of the terms of heading No. 39.26.

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24. *Ibid.* at 71.
25. *Sher-Wood* at para. 72.
26. *Ibid.* at para. 73.
27. Given this admission (*Transcript of Public Hearing*, 20 September 2012, at 71), the Tribunal considers that it is not necessary to examine whether the goods in issue meet the conditions set out in the *Explanatory Notes* to Chapter 39 in order to determine whether the materials combining plastics and textiles used to make the goods in issue are regarded as textile materials of Section XI or as articles of plastics covered by Chapter 39. Therefore, on the basis of the evidence before it, the Tribunal accepts that the goods in issues are not woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof that are classifiable in Chapter 39.

58. The Tribunal understands that Igloo Vikski's argument is that, despite the fact that the goods in issue are not "[o]ther articles of plastics . . .", as these terms have been previously interpreted by the Tribunal (i.e. they are not goods that answer the description in heading No. 39.26 in accordance with Rule 1 of the *General Rules*), they can nevertheless be brought within the ambit of that heading by virtue of the *Explanatory Notes* to Chapter 62 and Rule 2. This further led Igloo Vikski to argue that Rule 3 (b) definitively applies to classify the goods in issue in heading No. 39.26.

59. For ease of reference, the relevant part of the *Explanatory Notes* to Chapter 62 is reproduced here:

> . . . Where, however, the presence of such materials [as plastics] constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes . . ., or failing that, according to the General Interpretative Rules.

60. Igloo Vikski submitted that, where the *Explanatory Notes* to Chapter 62 direct that classification be completed ". . . according to the General Interpretative Rules", they direct classification according to the *General Rules other* than Rule 1. Igloo Vikski submitted that, by removing Rule 1 from the analysis, the *Explanatory Notes* to Chapter 62 further direct the Tribunal to consider Rule 2 in relation to not only headings within Chapter 62, such as heading No. 62.16, but also heading No. 39.26. Since Rule 2 has the effect of extending the application of any heading to goods consisting partly of the material that it describes, this rule operates, according to Igloo Vikski, to bring the goods in issue within the purview of heading No. 39.26.

61. The Tribunal disagrees with Igloo Vikski's interpretation of the *Explanatory Notes* to Chapter 62 and its consequences on the application of Rule 1 of the *General Rules*. The Tribunal is also unable to accept Igloo Vikski's argument that, on the facts of this appeal, the application of Rule 2 (b) has the effect of extending the scope of heading No. 39.26 to cover the goods is issue.

62. The *Explanatory Notes* direct the classification of the goods ". . . according to the General Interpretative Rules."[28] The Tribunal notes that the *Explanatory Notes* do not direct to the application of the *other General Rules*, as is argued by Igloo Vikski. Thus, on their face, the *Explanatory Notes* do not render Rule 1 of the *General Rules* inapplicable to the classification exercise even if the presence of non-textile materials in the goods in issue constitutes more than mere trimming.[29]

63. Contrary to Igloo Vikski's submission, the Tribunal does not interpret the *Explanatory Notes* to Chapter 62 to mean that Rule 1 of the *General Rules* no longer has relevance for the classification of the goods in issue even if their plastic component constitutes more than mere trimming. In the Tribunal's opinion, the *Explanatory Notes* to Chapter 62 do not direct that the classification be effected by resorting to the other *General Rules*, including Rule 2, and to ignore Rule 1 in such circumstances.

64. Indeed, a classification exercise must always begin by considering the terms of a heading in accordance with Rule 1 of the *General Rules*. This is evident from Rule 2 (b) and the *Explanatory Notes* thereto.

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28. The Tribunal notes that the *Explanatory Notes* to Chapter 62 first point in the direction of two chapter notes, but these are not relevant in this appeal.
29. A similar conclusion was reached by the Tribunal in dealing with a note to Chapter 63, which has comparable language. See *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) at paras. 69-72; *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (6 August 2010), AP-2009-019 (CITT) at paras. 40-48.

65. While Rule 2 (b) of the *General Rules* has the effect of extending any heading referring to a material or substance to include mixtures or combinations of that material or substance with other materials or substances and of extending any heading referring to goods of a given material or substance to include goods consisting partly of that material or substance, note XII of the *Explanatory Notes* to Rule 2 provides that one cannot, through Rule 2 (b) ". . . widen [a] heading so as to cover goods which cannot be regarded, *as required under Rule 1*, as answering the description in the heading . . ." [emphasis added].

66. This means that, before Rule 2 (b) of the *General Rules* can be invoked to establish that the scope of a given heading referring to a material or substance is widened to include mixtures or combinations of that material or substance with other materials or substances or goods consisting partly of that material or substance, it must be established that the goods in issue answer the description in that heading. Igloo has ignored this fundamental step of the classification exercise in this appeal. In particular, it has not presented arguments or filed evidence to persuade the Tribunal that the goods in issue are *prima facie* classifiable in heading No. 39.26 as "[o]ther articles of plastics . . ." on the basis of the terms of that heading and the relevant notes. On the contrary, as discussed above, Igloo Vikski conceded that the terms of heading No. 39.26 do not describe the goods in issue.

67. Applying these rules to the facts of this appeal, the Tribunal notes that it has already determined that heading No. 39.26 does not describe the goods in issue and that the insertion of the plastic padding material in the goods in issue is not sufficient for them to be regarded, as required by Rule 1 of the *General Rules*, as goods answering the description or meeting the terms of heading No. 39.26. Since the goods in issue do not answer the description in heading No. 39.26 (i.e. they are not "[o]ther articles of plastics . . ." within the meaning of the terms of heading No. 39.26), Rule 2 (b) cannot widen the scope of that heading to cover them.

68. Therefore, the Tribunal finds that, as a matter of law and on the facts of this appeal, the *Explanatory Notes* to Chapter 62 and Rule 2 of the *General Rules* cannot have the effect of broadening the scope of heading No. 39.26 contrary to the terms of and notes relative to that heading. In other words, heading No. 39.26 cannot become relevant in the classification at issue only by virtue of the *Explanatory Notes* to Chapter 62 and Rule 2 (b).

69. In summary, in the absence of a demonstration that the goods in issue answer the description in heading No. 39.26 pursuant to Rule 1 of the *General Rules*, Rule 2 (b) cannot extend the scope of that heading to include the goods in issue. It is only to the extent that goods answer the description of "[o]ther articles of plastics . . ." in heading No. 39.26 that they may be classifiable in that heading by virtue of Rule 2 (b) in the event that they consist only partly of plastics or combine plastics with other materials or substances. Since this is not the case in this appeal, the goods in issue are not *prima facie* classifiable in heading No. 39.26 through the application of Rule 2 (b).

70. Accordingly, the Tribunal finds that, as it relates to articles of apparel and clothing accessories such as the goods in issue, heading No. 39.26 only includes articles that are made by ". . . sewing or sealing sheets of plastics . . ." and that the goods in issue are not goods that meet this condition. As such, they are not a type of plastic and textile combination covered by Chapter 39. The goods in issue do not meet the description of heading No. 39.26; therefore, they are not *prima facie* classifiable in heading No. 39.26 as "[o]ther articles of plastics and articles of other materials of headings 39.01 to 39.14" by application of Rule 2 (b) of the *General Rules*.

The Goods in Issue are Classified in Heading No. 62.16 Pursuant to Rule 2 (b)

71. In the Tribunal's opinion, consistent with the *Explanatory Notes* to Chapter 62, to the extent that Rule 1 of the *General Rules* is insufficient to definitively classify the goods in issue in heading No. 62.16, resort may be had to the remaining rules. As Rule 2 (a) is not relevant in this appeal, the next step is to consider Rule 2 (b). The Tribunal agrees with the CBSA that the goods in issue are properly classified in heading No. 62.16 applying Rule 2 (b).

72. Rule 2 (b) of the *General Rules* provides as follows:

> . . . Any reference [in a heading] 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.

73. In addition, notes XI to XII of the *Explanatory Notes* to Rule 2 (b) of the *General Rules* further elicit the meaning and effect of Rule 2 (b). They provide as follows:

> (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.

74. Read together, these notes make clear that the goods in issue may remain classified in heading No. 62.16 as gloves of textile fabrics even if they consist only partly of textile fabrics. If the presence of another material in the goods in issue constitutes more than mere trimming, the question becomes, under Rule 2 (b) of the *General Rules*, whether the goods in issue can still be regarded as answering the description in heading No. 62.16.

75. Notes XI and XII of the *Explanatory Notes* to Rule 2 (b) of the *General Rules* also indicate that, to the extent that the addition of another material does *not* deprive the goods in issue of the character of goods of the kind mentioned in the heading, the goods should still be regarded as meeting the description in the heading under consideration.

76. The agreed statement of facts submitted by the parties indicates that the goods in issue are gloves made up of textile fabrics, assembled mostly by stitching. The gloves contain padding made of plastics encased within the external surface.[30] In this regard, the Tribunal's following analysis in *Sher-Wood* is applicable to the goods in issue:

> 90. In the Tribunal's view, the addition or insertion of high-density foam and hard plastic pads inside the goods in issue does not "depriv[e] the goods of the character" of those of the kind mentioned in heading No. 62.16. It is the textile fabrics sewn together to form the goods in issue that results in them being gloves. Thus, the addition of the foam and plastic padding materials does not

30. Tribunal Exhibit AP-2009-046-20A, tab 1.

> transform them into goods that can no longer be regarded as answering the description in the heading.
>
> 91. Moreover, the *Explanatory Notes* to heading No. 62.16 provide that "[t]his heading also covers gloves for protection in industry, etc." While this provision is not directly applicable to the goods in issue, it confirms that heading No. 62.16 covers certain protective gloves. The Tribunal considers that this implies that heading No. 62.16 may cover gloves that incorporate materials that have protective attributes, such as foam and plastics. The Tribunal therefore finds that the goods in issue remain gloves of textile fabrics of heading No. 62.16 even if the foam and plastic padding parts that they contain appear to constitute more than mere trimming.

77. The Tribunal is of the opinion that the goods in issue fall squarely in heading No. 62.16, applying Rule 2 (b) of the *General Rules*.

78. In coming to this conclusion, the Tribunal notes that the last sentence of Rule 2 (b) of the *General Rules* provides that goods consisting of more than one material shall be classified according to the principles of Rule 3. However, as noted above, note XIII of the *Explanatory Notes* to Rule 2 (b) clarifies that this can occur only if the goods are *prima facie* classifiable in two or more headings. In other words, contrary to Igloo Vikski's argument, when recourse to Rule 2 (b) is required, this does not necessarily mean that Rule 3 becomes applicable.

79. This is consistent with note XII of the *Explanatory Notes* to Rule 2 (b) of the *General Rules*, which clarifies that Rule 2 (b) does not allow extending the terms of a heading to the point where Rule 1 is ignored. This note also reinforces the Tribunal's opinion that it is an error to apply Rule 2 to extend the terms of a heading without first having determined that the goods in issue answer the description in that heading and, thus, that the heading being considered *prima facie* describes the goods in issue pursuant to Rule 1.

80. In this appeal, the Tribunal has already determined that the goods in issue are not goods that answer the description or meet the terms of heading No. 39.26 and, as such, that they are not *prima facie* classifiable in the two competing headings. Therefore, Rule 3 of the *General Rules* is not applicable.

Conclusion

81. The Tribunal has already determined, and Igloo Vikski acknowledged, that the goods in issue meet the terms of heading No. 62.16. The Tribunal further considers that the presence of the plastic components in the goods in issue does not deprive them of their character as gloves of textile fabrics. In light of the above, on the basis of Rules 1 and 2 (b) of the *General Rules*, the Tribunal concludes that the goods in issue are gloves of textile materials classified in heading No. 62.16. Accordingly, the Tribunal considers that there is no legal basis to consider Igloo Vikski's arguments concerning the application of Rule 3 (b) to the goods in issue.

82. As heading No. 62.16 is not divided at the subheading or tariff item level, the Tribunal need not consider Rule 6 of the *General Rules* or Rule 1 of the *Canadian Rules* to determine the proper classification at the subheading and tariff item levels. Thus, the goods in issue are properly classified under tariff item No. 6216.00.00.

DECISION

83. The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member