



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2010-046

VGI Village Green Imports

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, January 13, 2012*

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IN THE MATTER OF an appeal heard on July 5, 2011, pursuant to subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated October 8, 2010, with respect to a request for review of an advance ruling pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

VGI VILLAGE GREEN IMPORTS

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

Gillian Burnett
Gillian Burnett
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 5, 2011
Tribunal Member: Diane Vincent, Presiding Member
Counsel for the Tribunal: Eric Wildhaber
Research Director: Audrey Chapman
Research Officer: Gary Rourke
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PARTICIPANTS:**Appellant**

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by VGI Village Green Imports (VGI) with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*¹ from a decision made on October 8, 2010, by the President of the Canada Border Services Agency (CBSA), pursuant to subsection 60(4).

2. The issue in this appeal is whether certain oven mitts (the goods in issue) are properly classified under tariff item No. 6116.93.00 of the schedule to the *Customs Tariff*² as gloves, mittens and mitts, knitted or crocheted, other than impregnated, coated or covered with plastics or rubber, of synthetic fibres, as determined by the CBSA, or should be classified under tariff item No. 3926.20.92 as mittens or non-disposable gloves or, in the alternative, under tariff item No. 4015.90.10 as protective suits and parts thereof, to be employed in a noxious atmosphere, or, in the further alternative, under tariff item No. 4015.90.20 as diving suits, as claimed by VGI.

3. The parties are in disagreement as to the construction and composition of the goods in issue, which will be addressed below under in the section titled “Positions of Parties”. At the Tribunal’s request, the CBSA filed two physical exhibits of the goods in issue on June 15, 2011.³

PROCEDURAL HISTORY

4. On January 8, 2010, VGI applied for an advance ruling on the tariff classification of the goods in issue, pursuant to subsection 43.1(1) of the *Act*.⁴

5. On March 24, 2010, the CBSA issued an advance ruling pursuant to paragraph 43.1(1)(c) of the *Act*, in which it classified the goods in issue under tariff item No. 6116.99.00 as gloves, mittens and mitts, knitted or crocheted, other than impregnated, coated or covered with plastics or rubber, of other textile materials.⁵

6. On March 26, 2010, VGI requested a review of the advance ruling pursuant to subsection 60(2) of the *Act*.⁶

7. On October 8, 2010, the CBSA replaced the advance ruling of March 24, 2010, with a new advance ruling, pursuant to subsection 60(4) of the *Act*, in which it classified the goods in issue under tariff item No. 6116.93.00 as gloves, mittens and mitts, knitted or crocheted, other than impregnated, coated or covered with plastics or rubber, “of synthetic fibres.”⁷

1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. S.C. 1997, c. 36.
3. Exhibits B-01 and B-02.
4. Tribunal Exhibit AP-2010-046-01.
5. Tribunal Exhibit AP-2010-046-16B at 35.
6. Tribunal Exhibit AP-2010-046-01.
7. Tribunal Exhibit AP-2010-046-16B at 19.

8. On November 10, 2010, VGI filed the present appeal with the Tribunal pursuant to subsection 67(1) of the *Act*.⁸

9. On February 16, 2011, VGI requested that the Tribunal hear this appeal by way of written submissions. On February 22, 2011, the CBSA indicated that it did not object to this request. On February 25, 2011, after having considered the submissions filed by both parties on this issue, the Tribunal informed them of its decision to dispose of the matter on the basis of the written submissions before it, in accordance with rules 25 and 25.1 of the *Canadian International Trade Tribunal Rules*.⁹

10. On June 1, 2011, the CBSA filed an amended brief with the Tribunal.¹⁰ The Tribunal provided VGI the opportunity to file a written reply. On June 15, 2011, VGI responded that it had no objection to the amendments.¹¹

11. The Tribunal held a file hearing in Ottawa, Ontario, on July 5, 2011.

12. On August 17, 2011, the Tribunal received correspondence from VGI indicating that information that it had intended to be sent to the Tribunal relating to this matter had been inadvertently delivered to an another address and, therefore, had not been before the Tribunal at the time of the hearing into this matter. Given the exceptional and specific circumstances of this matter, the Tribunal allowed VGI the opportunity to file the information with the Tribunal by September 20, 2011. VGI missed that deadline by a day, submitting the information on September 21, 2011. It was nevertheless accepted by the Tribunal. The CBSA had been given until September 26, 2011, to file a reply submission on this new information, but it indicated to the Tribunal on September 21, 2011, that it would not be filing a reply submission.

13. On September 22, 2011, the Tribunal notified both parties that the record of the appeal was closed. The Tribunal reconvened to conclude its consideration of this matter on that day.

STATUTORY FRAMEWORK

14. In appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of goods in accordance with prescribed interpretative rules.

15. 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.¹² 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. Sections and chapters may include notes concerning their interpretation.¹³ Sections 10 and 11 of the *Customs Tariff* prescribe the approach that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification of goods.

8. Tribunal Exhibit AP-2010-046-01.

9. S.O.R./91-499.

10. Tribunal Exhibit AP-2010-046-16B.

11. Tribunal Exhibit AP-2010-046-20.

12. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

13. The Tribunal notes that section 13 of the *Official Languages Act*, R.S.C. 1985 (4th Supp.), c. 31, provides that the English and French versions of any act of Parliament are equally authoritative. Thus, the Tribunal may examine both the English and French versions of the schedule to the *Customs Tariff* in interpreting the tariff nomenclature.

16. Subsection 10(1) of the *Customs Tariff* provides as follows: “. . . the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System^[14] and the Canadian Rules^[15] set out in the schedule.”

17. The *General Rules* comprise six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on, until classification is completed.¹⁶

18. Section 11 of the *Customs Tariff* provides as follows: “In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System^[17] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,^[18] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.” Accordingly, unlike chapter and section notes, the *Explanatory Notes* are not binding on the Tribunal in its classification of imported goods. However, the Federal Court of Appeal has stated that these notes should be applied, unless there is a sound reason to do otherwise, as they serve as an interpretative guide to tariff classification in Canada.¹⁹

19. Classification therefore begins with Rule 1 of the *General Rules*, which provides as follows:

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.

20. The Tribunal must therefore first determine whether the goods in issue can be classified 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*. It is only if the Tribunal is not satisfied that that the goods in issue can be properly classified at the heading level through the application of Rule 1 of the *General Rules* that it becomes necessary to consider subsequent rules in order to determine in which tariff heading the goods in issue should be classified.

21. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.²⁰

14. S.C. 1997, c. 36, schedule [*General Rules*].

15. S.C. 1997, c. 36, schedule.

16. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Under Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level (i.e. to six digits). Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level (i.e. to eight digits).

17. World Customs Organization, 2d ed., Brussels, 2003 [*Classification Opinions*].

18. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

19. *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17.

20. Rule 6 of the *General Rules* stipulates as follows: “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 purpose of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

RELEVANT CLASSIFICATION PROVISIONS

22. The relevant provisions of Section VII provide as follows:

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

...

Chapter 39**PLASTICS AND ARTICLES THEREOF**

...

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

...

3926.20 -Articles of apparel and clothing accessories (including gloves, mittens and mitts)

...

---Other:

...

3926.20.92 ---Mittens;
Non-disposable gloves

...

23. There are no relevant notes to Section VII.

24. The relevant notes to Chapter 39 provide as follows:

2. This Chapter does not cover:

...

(l) Synthetic rubber, as defined for the purpose of Chapter 40, or articles thereof;

...

(p) Goods of Section XI (textiles and textile articles);

...

25. There are no relevant *Explanatory Notes* to Section VII.

26. The relevant *Explanatory Notes* to Chapter 39 provide as follows:

GENERAL

In general, this Chapter covers substances called polymers and semi-manufactures and articles thereof, **provided** they are not excluded by Note 2 to the Chapter.

...

General arrangement of the Chapter

...

... Heading 39.26 is a residual heading which covers articles, not elsewhere specified or included, of plastics or of other materials of headings 39.01 to 39.14.

...

Plastics and textile combinations

... The following products are also covered by this Chapter:

...

- (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**).

27. The relevant *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.

28. The following provisions of Chapter 40, which is also in Section VII, are also relevant to this matter:

Chapter 40

RUBBER AND ARTICLES THEREOF

...

40.15 **Articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.**

...

4015.90 **-Other**

4015.90.10 - - -Protective suits and parts thereof, to be employed in a noxious atmosphere

4015.90.20 - - -Diving suits

...

29. The relevant notes to Chapter 40 provide as follows:

1. Except where the context otherwise requires, throughout the Nomenclature the expression "rubber" means the following products, whether or not vulcanised or hard: natural rubber, balata, gutta-percha, guayule, chicle and similar natural gums, synthetic rubber, factice derived from oils, and such substances reclaimed.

2. This Chapter does not cover:
 - (a) Goods of Section XI (textiles and textile articles);...
4. In Note 1 to this Chapter and in heading 40.02, the expression “synthetic rubber” applies to:
 - (a) Unsaturated synthetic substances . . . ;...

30. Note 4 of the *Explanatory Notes* to heading No. 40.02 gives greater detail regarding the meaning of the terms “synthetic rubber” and “unsaturated synthetic substances” and provides as follows:

Note 4 (Definition of synthetic rubber)

This Note is in three parts. Whereas substances of Part (a) and (c) must comply with the vulcanisation, elongation and recovery criteria mentioned in Part (a), thioplasts of Part (b) are exempt from these requirements. It should be noted that the definition of **synthetic rubber** applies not only to heading 40.02 but also to Note 1. Consequently, wherever the term **rubber** is used in the Nomenclature, it includes synthetic rubber as defined in Note 4.

The expression “synthetic rubber” covers:

- (a) **Unsaturated synthetic substances**, which meet the requirements concerning vulcanisation, elongation and recovery as laid down in Part (a) of the Note. For the purposes of the test, substances necessary for the cross-linking, such as vulcanising activators, accelerators or retarders may be added. The presence of small amounts of breakdown products of emulsifiers (Note 5 (B) (ii)) and very small amounts of the special purpose additives mentioned in Note 5 (B) (iii) is also permitted. However, the presence of any substances not necessary for the cross-linking, such as pigments (other than those added solely for the purpose of identification), plasticisers, extenders, fillers, reinforcing agents, organic solvents is not permitted. Thus, the presence of mineral oil or dioctyl phthalate is not permitted for the purpose of the test.

...

Such unsaturated synthetic substances include styrene-butadiene rubbers (SBR) In order to be classified as synthetic rubber, all these substances must comply with the vulcanisation, elongation and recovery criteria mentioned above.

31. The relevant *Explanatory Notes* to Chapter 40 provide as follows:

Scope of the Chapter

This Chapter covers . . . articles wholly of rubber or whose essential character derives from rubber

...

Rubber and textile combinations

The classification of rubber and textile combinations is essentially governed by Note 1 (ij) to Section XI, Note 3 to Chapter 56 and Note 4 to Chapter 59, and as regards conveyor or transmission belts or belting by Note 8 to Chapter 40 and Note 6 (b) to Chapter 59. The following products are covered by this Chapter:

...

- (d) Plates, sheets and strip of cellular rubber, combined with textile fabrics (as defined in Note 1 to Chapter 59), felt or nonwovens, where the textile is present merely for reinforcing purposes.

32. Although not referenced by the parties, heading No. 40.08, and the *Explanatory Notes* to that heading are also relevant to this matter. Heading No. 40.08 provides as follows:

40.08 Plates, sheets, strip, rods and profile shapes, of vulcanized rubber other than hard rubber

-Of cellular rubber:

...

33. The *Explanatory Notes* to heading No. 40.08 provide as follows:

The classification of products made from vulcanised rubber (other than hard rubber) combined (either in the mass or on the surface) with textile materials is subject to the provisions of Note 3 to Chapter 56 and Note 4 to Chapter 59. Combinations of vulcanised rubber (other than hard rubber) with other materials remain classified in this heading **provided** they retain the essential character of rubber.

This heading thus includes:

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

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

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

...

The heading **excludes**, *inter alia*:

...

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

...

- (g) Rubberised textile fabrics as defined in Note 4 to Chapter 59 (**heading 59.06**).

34. The *Explanatory Notes* to heading No. 40.15 provide as follows:

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

- (1) Wholly of rubber.
- (2) Of woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, **other than** those falling in **Section XI** (see Note 3 to Chapter 56 and Note 4 to Chapter 59).
- (3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.

35. The relevant provisions of Section XI provide as follows:

**Section XI
TEXTILES AND TEXTILE ARTICLES**

...

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

...

59.06 Rubberized textile fabrics, other than those of heading No. 59.02.^[21]

36. Note 1 to Chapter 59 provides as follows:

1. Except where the context otherwise requires, for the purpose of this Chapter the expression “textile fabrics” applies only to the woven fabrics of Chapters 50 to 55 and headings 58.03 and 58.06, the braids and ornamental trimmings in the piece of heading 58.08 and the knitted or crocheted fabrics of headings 60.02 to 60.06.

37. Note 4 to Chapter 59 provides as follows:

4. For the purpose of heading 59.06, the expression “rubberised textile fabrics” means:
 - (a) Textile fabrics impregnated, coated, covered or laminated with rubber,
 - (i) Weighing not more than 1,500 g/m²; or
 - (ii) Weighing more than 1,500 g/m² and containing more than 50% by weight of textile material;
 - (b) Fabrics made from yarn, strip or the like, impregnated, coated, covered or sheathed with rubber, of heading 56.04; and
 - (c) Fabrics composed of parallel textile yarns agglomerated with rubber, irrespective of their weight per square metre.

This heading does not, however, apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40), or textile products of heading 58.11.

38. Chapter 61 is also relevant and provides as follows:

**Chapter 61
ARTICLES OF APPAREL AND CLOTHING ACCESSORIES, KNITTED OR
CROCHETED**

...

61.16 Gloves, mittens and mitts, knitted or crocheted.

...

-Other:

...

6116.93.00 - -Of synthetic fibres

-
21. Heading No. 59.02 is not relevant to this matter. That heading covers “[t]ire cord fabric of high tenacity yarn of nylon or other polyamides, polyesters or viscose rayon.”

39. The relevant notes to Section XI provide as follows:
1. This Section does not cover:
...
 - (h) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39;
 - (ij) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40;...
 7. For the purpose of this Section, the expression “made up” means:
...
 - (e) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);...
40. The relevant notes to Chapter 61 provide as follows:
1. This Chapter applies only to made up knitted or crocheted articles.
41. The relevant *Explanatory Notes* to Section XI provide as follows:
- In general, Section XI covers raw materials of the textile industry (silk, wool, cotton, *man-made fibres*, etc.), semi-manufactured products (such as yarns and woven fabrics) and the *made up articles made from those products*. . . .

[Emphasis added]

POSITIONS OF PARTIES

VGI

42. VGI argued that the goods in issue should be classified in heading No. 39.26 as other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14 because they are composed of neoprene, which is the “. . . needed, major, useful component . . .” of the goods in issue.²² VGI claimed that, since neoprene is a synthetic polymer, neoprene is therefore a plastic.

43. According to VGI, which describes the composition of the goods in issue in the same manner as its supplier, the ingredient for the goods in issue is 30 percent polyester and 70 percent SBR (styrene-butadiene rubber).²³ VGI submitted that the polyester textile contained in the goods in issue was used to give comfort on the inside and for decorative purposes on the outside.²⁴ VGI further submitted that the polyester textile was for reinforcing purposes only.²⁵

22. Tribunal Exhibit AP-2010-046-06A.

23. Tribunal Exhibit AP-2010-046-30.

24. Tribunal Exhibit AP-2010-046-06A.

25. Tribunal Exhibits AP-2010-046-12 and AP-2010-046-14.

44. VGI submitted that the goods in issue are not “rubberized textile fabric”, but rather oven mitts primarily composed of neoprene, to which a layer of polyester is added for decorative purposes only.²⁶ VGI argued that other neoprene oven mitts that are available on the market do not have a decorative layer of polyester, but that they still have the same function as the goods in issue. In other words, VGI argued that the decorative layer of polyester found on the goods in issue does not impact their function and should therefore not affect their classification.²⁷

45. On the basis that the polyester coating is for decorative purposes only, VGI appears to contest the CBSA’s laboratory reports that indicate that the knitted surface part, or the back and underside of the mitt and the back of the thumb (which VGI referred to as the polyester fabric component), is the major component of the goods in issue and that the black embossed part or the palm area of the mitt (which VGI referred to as the styrene-butadiene component) is the minor component of the goods in issue.

46. VGI relied on paragraph 11 of Memorandum D10-14-29²⁸ to support its position that the neoprene is *not* merely present for reinforcing purposes. In other words, VGI takes the position that Note (A) of the *Explanatory Notes* to heading No. 40.08 does not apply to the goods in issue.²⁹

47. In the alternative, VGI argued that the goods in issue should be classified under tariff item No. 4015.90.10 as protective suits and parts thereof, to be employed in a noxious atmosphere, because they are for protection against heat. VGI advanced that tariff item No. 4015.90.10 is preferred over tariff item No. 4015.90.20 (diving suits) because the former has a lower rate of duty than the latter.

48. In response to the CBSA’s position, VGI argued that the goods in issue were not knitted garments and were therefore not classifiable in heading No. 61.16.³⁰

CBSA

49. The CBSA argued that the goods in issue are properly classified in heading No. 61.16 as gloves, mittens and mitts, knitted or crocheted, which heading applies, *inter alia*, to articles made up of fabrics of heading No. 59.06.

50. The CBSA relies on two laboratory reports.³¹

26. Tribunal Exhibit AP-2010-046-30, attachment F at 4.

27. Tribunal Exhibit AP-2010-046-30.

28. “Tariff Classification of Gloves” (9 October 2009).

29. Paragraph 11 of Memorandum D10-14-29 provides as follows: “Gloves of cellular plastic or cellular rubber combined with a textile fabric in which the textile fabric is deemed to be for reinforcing purposes only (i.e., unfigured, unbleached, bleached, or uniformly dyed textile fabrics) are classified under either Chapter 39 (plastic) or chapter 40 (rubber)”.

30. Tribunal Exhibit AP-2010-046-06A.

31. Tribunal Exhibit AP-2010-046-16B. The first laboratory report (163922-001—Neoprene Oven Mitt) contains an analysis of Exhibit B-01. The second laboratory report (167866-001—Aeon Neoprene Oven Mitt) contains an analysis of Exhibit B-02.

51. The first laboratory report submitted by the CBSA provides as follows:

163922-001 NEOPRENE OVEN MITT

This sample [Exhibit B-01] is a printed oven mitt composed of (in approximate percentages by surface area) 79% knitted textile materials and 21% rubber. The knit textile fabric is composed of yarns of 100% synthetic fibres (polyester). This fabric is treated with a very small amount of a polymeric material which cannot be seen with the naked eye. An image of the sample (electronic and hard copy) is attached for your reference.

As you have requested more in depth information regarding the construction, this mitt is composed of the following materials (exterior to interior):

Knitted surface part (major constituent) [Component A]

1. a knit fabric of yarns of polyester fibres which is laminated to
2. a flexible, cellular layer (approximately 3 mm thick) of a compounded polymer of rubber (vulcanized) which is glued to
3. a knit fabric of yarns of polyester fibres.

Note: The weight of this fabric as a whole is approximately 668 g/m².

Black embossed part (minor constituent-grip) [Component B]

1. a black, flexible, embossed cellular layer (approximately 2 mm thick) of highly compounded synthetic rubber (vulcanized) which is laminated to
2. a knit fabric of yarn of polyester fibres.

Note: The weight of this fabric as a whole is approximately 1059 g/m². Please also note that the amount of sulphur and zinc found in the rubber portion is consistent with a rubber vulcanized with sulphur.

With regards to our conversation about vulcanized rubber, please note that to be considered “vulcanized rubber”, the material does not have to be vulcanized (or cross linked) by sulphur, however the initial rubber must be vulcanized by sulphur. There are other methods of vulcanization.

Furthermore, in addition to our conversation, according to the Explanatory Notes to Chapter 40, p. VII-40-5 (2007, 4th ed.), with regards to “Rubber and textile combinations”, it appears that the grip portion of this oven mitt would not meet the requirements of this section as it is the Laboratory’s opinion that the textile portion is not present merely for reinforcing purposes.

In our opinion, the material of the grip portion of this sample meets the technical requirements of heading 59.06 (2010) and the mitt as a whole meets the technical requirements of heading 61.16 (2010).

52. The second laboratory report provides as follows:

167866-001 AYEON NEOPRENE OVEN MITT

...

This multicoloured printed oven mitt [Exhibit B-02], for use on either hand, is made up of the following three components . . . :

- 1) [Component 1—back and underside of the mitt, back of the thumb] an approximately 4 mm thick material, present on the back and underside of the mitt as well as the back of the thumb. The material of this component weighs approximately 802 g/m² and consists of the following three layers laminated together:
 - i) a knit fabric, of synthetic (polyester) fibres, which has been printed with multicoloured dots of various sizes and is present on the outside of the oven mitt;

- ii) a flexible, beige cellular layer (approximately 3 mm thick) composed of compounded vulcanized rubber; and
- iii) a bright orange knit fabric, of synthetic (polyester) fibres, which is present on the inside of the oven mitt, next to the wearer's skin.

This component represents approximately 72% of the external surface area of the oven mitt.

- 2) [Component 2—palm area of the mitt] an approximately 4 mm thick black material, present only on the palm area of the mitt. The material of this component weighs approximately 1164 g/m² and consists of the following two layers laminated together:
 - i) an embossed, flexible, black cellular layer (approximately 3 mm thick), which is present on the outside of the oven mitt and is composed of compounded vulcanized rubber; and
 - ii) a black knit fabric, of synthetic (polyester) fibres, which is present on the inside of the oven mitt, next to the wearer's skin.This component represents approximately 19% of the external surface area of the oven mitt.
- 3) [Component 3—seam on the top edge of the mitt] grey seam binding, present around the top edge of the oven mitt as well as around the oval hole on the underside of the mitt. This component consists of a knit fabric, of synthetic (polyester) fibres, and represents approximately 9% of the external surface area of the oven mitt.

The material of [C]omponent 1 meets the technical requirement of a “rubberized textile fabric” as per Note 4 to Chapter 59.

In the Laboratory's opinion, the knit textile fabric layer of the material of [C]omponent 2 is **not** present merely for reinforcing purposes and therefore, the material of [C]omponent 2 would meet the technical requirements of a “rubberized textile fabric” as per Note 4 to Chapter 59.

Please note that even though the sample at issue is labelled as “Ayeon Neoprene Oven Mitts”, no neoprene was detected in this sample.

In response to your request:

With regards to your question as to whether the [present product] . . . is identical to the sample [product] covered by [the first laboratory report] . . . please note the following:

- other than the printed pattern on the outer knit fabric of [C]omponent 1, both [exhibits] . . . are similar in appearance and construction;
- the knit fabric layers of [C]omponents 1 and 2 of [Exhibit B-02] . . . are of the same composition and construction as the corresponding knit fabric layers of [Exhibit B-01] . . . covered by [the first laboratory report];
- although the black outer cellular layer of the palm area of both oven mitts is composed of compounded vulcanized rubber, the presence of a small amount of neoprene (i.e., chloroprene) was detected in the black cellular layer of [Exhibit B-01] . . . but was **not** detected in the black cellular layer of [Exhibit B-02] . . . ;
- the grey knit seam binding (i.e. [C]omponent 3 of [Exhibit B-02] . . . is composed of polyester whereas the grey knit seam binding of the [Exhibit B-01] . . . is composed of nylon.

For the purposes of the Harmonized System, the non-textile parts of [Exhibit B-02] (i.e., the beige cellular layer of the material of [C]omponent 1 and the black cellular layer of the material of [C]omponent 2 would meet the requirements for rubber as per Note 1 to Chapter 40.

53. The CBSA submitted that the laboratory reports indicate that the goods in issue consist of knitted textile fabrics of yarns of synthetic fibres (polyester). In support of that position, the CBSA relied on the definition of “textile fabric” of Chapter 59 and on Note 1 to Chapter 59.

54. The CBSA also submitted that the goods in issue meet the definition of a *rubberized textile fabric* set out in Note 4 to Chapter 59, as well as the weight condition set out in Note 4(a)(i) (not more than 1,500 g/m²).

55. The CBSA also relied on the *Explanatory Notes* to Section XI which indicate that the section “. . . covers . . . man-made . . . made up articles” of the textile industry, with the condition for “made up” articles of note 7(e) to Section XI being met in this instance.

56. Accordingly, the CBSA submitted that the goods in issue are properly classified in heading No. 61.16, which applies, *inter alia*, to articles made up of fabrics of heading No. 59.06.

57. The CBSA refuted VGI’s position with respect to heading No. 39.26, stating that, according to the laboratory reports, the goods in issue do not contain any plastic, but rather a synthetic rubber and that, therefore, they cannot be considered to be articles of plastic of that heading.

58. The CBSA refuted VGI’s position with respect to heading No. 40.15, stating that, according to the CBSA, the goods in issue are excluded from that heading because they are composed of rubber and a textile fabric and that, consequently, in accordance with Note 2(a) to Chapter 40, they should be excluded from Section XI.

59. The CBSA also argued that the goods in issue are not classifiable in heading No. 40.15 for the following reasons, which are dictated by the operation of the *Explanatory Notes* to Chapter 40: the goods in issue are not composed of felt, they do not contain nonwovens, the textile fabrics weigh less than 1,500 g/m², and the textile is *not* present merely for reinforcing purposes.

TRIBUNAL’S ANALYSIS

60. As mentioned above, the issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6116.93.00 as gloves, mittens and mitts, knitted or crocheted, other than impregnated, coated or covered with plastics or rubber, of synthetic fibres, as determined by the CBSA or should be classified under tariff item No. 3926.20.92 as mittens or non-disposable gloves or, in the alternative, under tariff item No. 4015.90.10 as protective suits and parts thereof, to be employed in a noxious atmosphere, or, in the further alternative, under tariff item No. 4015.90.20 as diving suits, as claimed by VGI.

Exclusionary Notes

61. Note 2(s) to Chapter 39 and Note 2(a) to Chapter 40 stipulate that the goods of Section XI (textiles and textiles articles, including goods of Chapter 61 which is in issue here) are excluded from these chapters. Similarly, exclusions exist in Notes 1(h) and (ij) to Section XI. Therefore, by virtue of these section and chapter notes, it appears that heading Nos. 39.26 and 40.15, on one hand, and heading No. 61.11, on the other hand, are mutually exclusive. As it has found in the past, the Tribunal considers that goods cannot be *prima facie* classifiable in two headings that are mutually exclusive by virtue of relevant legal notes.³²

32. See *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) [*Sher-Wood*]; *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT); *Dynamic Furniture Corp. v. President of the Canada Border Services Agency* (31 March 2009), AP-2005-043 (CITT); *Rutherford Controls International Corp. v. President of the Canada Border Services Agency* (26 January 2011), AP-2009-076 (CITT).

62. Accordingly, the Tribunal will determine, on the basis of the evidence before it, whether the goods in issue meet the terms of heading No. 39.26 and, in the alternative, those of heading No. 40.15 or those of heading No. 61.16. This analysis is done under the umbrella of Rule 1 to the *General Rules*, as the Tribunal does not need to go beyond that rule to determine the classification of the goods in issue.³³

Composition of the Goods in Issue

63. The laboratory reports submitted by the CBSA are based on two samples of the goods in issue presented as exhibits to the Tribunal. The reports describe the nature of the materials of each component of the oven mitts, the surface area, the weight, how each material is assembled together and how the components are assembled together to form the oven mitt.

64. The Tribunal notes the following: both samples/exhibits are similar in appearance and construction; the knit fabric layers in both samples are of the same composition and construction; a small amount of neoprene (i.e. chloroprene) was detected in the black cellular layer in the first sample, but not in the second sample; the grey knit seam binding in the second sample is composed of polyester, whereas the grey knit seam binding in the first sample is composed of nylon. Additionally, a supplement to the second laboratory report states that the three components of the goods in issue have been stitched together.³⁴

65. After visual examination of the exhibits, the Tribunal accepts the description of the composition and construction of the goods in issue as presented in the laboratory reports. It has no reason to believe that these expert reports do not describe properly the composition of the goods in issue. These reports are more detailed than the description provided by VGI in terms of composition and construction of the goods in issue and will help the Tribunal in its analysis for the classification of the goods in issue.

66. However, the laboratory reports also contain opinions offered by the authors on the legal application of the tariff provisions in relation to the goods in issue. The Tribunal will not give weight to these views, as this is the prerogative of the Tribunal in this proceeding. Therefore, the expert opinions provided in the two laboratory reports and accepted by the Tribunal will be limited to the composition and construction of the goods in issue.

Are the Goods in Issue Other Articles of Plastics of Heading No. 39.26?

67. According to VGI, the goods in issue should be classified in heading No. 39.26 because it views neoprene as a synthetic polymer, which is a plastic.³⁵ In its notice of appeal to the Tribunal, VGI included online *Encyclopaedia Britannica* definitions of styrene-butadiene and styrene-isoprene block copolymers, which, it claimed, supported VGI's interpretation that "... Styrene-Butadiene although it behaves like rubber, it is actually a synthesised plastic."³⁶ As is examined below, the Tribunal finds that the laboratory reports and the terms of the headings do not support that view. The Tribunal considers that the goods in issue cannot be classified in heading No. 39.29 because they do not contain any plastic.

33. In *Sher-Wood*, the Tribunal considered that the terms of relevant section and chapter notes made clear that the goods examined in that matter could be classified in only one of two competing headings; it followed that they could not be *prima facie* classifiable in two competing headings; therefore, the tribunal did not need to have regard to Rule 3 of the *General Rules*, which only applies when goods are *prima facie* classifiable in two or more headings.

34. Respondent's brief, tab 13.

35. Tribunal Exhibit AP-2010-046-01.

36. *Ibid.*

68. The laboratory reports and the information provided by the supplier of the goods in issue both indicate that the goods in issue contain a compounded vulcanized rubber, or SBR. There is no mention of plastic in any of the three components or layers, as reported in the laboratory reports.

69. Wherever the term “rubber” is used in the schedule to the *Customs Tariff*, reference must be made to Note 1 to Chapter 40, which contains a definition of “rubber” that is applicable throughout the schedule. That definition states that the term “rubber” comprises “synthetic rubber”. In addition, Note 4(a) to Chapter 40 indicates that the definition of the term “synthetic rubber” applies to “[u]nsaturated synthetic substances”, which in turn are defined in the *Explanatory Notes* to heading No. 40.02 as including SBRs; as above, these definitions are also applicable throughout the schedule. Finally, the *Explanatory Notes* to Chapter 40 indicate that vulcanized rubber refers to rubber, including synthetic rubber (and specifically SBR) that has been cross-linked with sulphur or any other vulcanizing agent.

70. On the basis of the evidence on the record of this matter, the Tribunal finds that the goods in issue contain SBR and that, in accordance with the *Explanatory Notes* to Chapter 40, that material is a synthetic rubber.

71. Accordingly the goods in issue are not made of plastic, as advanced by VGI, and the Tribunal concludes therefore that the goods in issue are not classifiable in heading No. 39.26.

Are the Goods in Issue Articles of Apparel and Clothing Accessories (Including Gloves, Mittens and Mitts), for All Purposes, of Vulcanized Rubber Other Than Hard Rubber of Heading No. 40.15?

72. VGI’s alternative position is that the goods in issue should be classified in heading No. 40.15 as articles of apparel and clothing accessories (including gloves, mittens and mitts), for all purposes, of vulcanized rubber other than hard rubber.

73. The relevant *Explanatory Notes* to heading No. 40.15 provide as follows:

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

- (1) Wholly of rubber.
- (2) Of . . . knitted . . . fabrics . . . laminated with rubber, **other than** those falling in **Section XI** (see . . . Note 4 to Chapter 59).
- (3) Of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.

74. As per the *Explanatory Notes* to heading No. 40.15, in order for the goods in issue to be classifiable in heading No. 40.15 they need first to be articles of apparel and clothing accessories (including gloves, mittens, and mitts), assembled by sewing. The Tribunal finds that the goods in issue meet these requirements. Both parties agree that these are articles are oven mitts, and the CBSA supplementary document to the laboratory reports states that the three components of the goods in issue have been stitched together.³⁷

37. Respondent’s brief, tab 13.

75. In order for the goods in issue to be classifiable in heading No. 40.15, they must also be either (1) wholly of rubber, (2) of knitted fabrics laminated with rubber, *other than those falling in Section XI as per Note 4 to Chapter 59* or (3) of rubber, with parts of textile fabric, when the rubber is the constituent giving the goods their essential character.

76. The goods in issue are not wholly of rubber, according to both the laboratory reports and VGI's description of the goods in issue. The Tribunal now turns to assessing whether the goods in issue meet the conditions described in Notes (2) and (3) of the *Explanatory Notes* to heading No. 40.15.

Are the Goods in Issue of Knitted Fabrics Laminated With Rubber, Other Than Those Falling in Section XI as per Note 4 to Chapter 59?

77. In this instance, the relevant part of the Note 4 to Chapter 59 provides as follows:

4. For the purpose of heading 59.06, the expression "rubberised textile fabrics" means:

- (a) Textile fabrics . . . laminated with rubber,
- (i) Weighing not more than 1,500 g/m²; or

. . .

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

78. The Tribunal finds that both Components 1 and 2 are made of textile fabrics and rubber laminated together, weighing not more than 1,500g/m².³⁸

79. However, Note 4 to Chapter 59 ". . . does not . . . apply to plates, sheets or strip of cellular rubber, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 40) . . ." Consequently, when goods are composed of plates, sheets and strip of cellular rubber and combined with textile fabric, where the textile fabric *is present* merely for reinforcing purposes, the goods would be classifiable in Chapter 40 (as per Note 2 of the *Explanatory Notes* to heading No. 40.15). This also means that, when such goods contain textile fabric that is *not present* merely for reinforcing purposes, such goods fail to meet the condition in Note 2 of the *Explanatory Notes* to heading No. 40.15, and the Tribunal would then need to assess whether the goods in issue meet the condition as described in Note 3 of the *Explanatory Notes* to heading No. 40.15.

80. The *Explanatory Notes* to heading No. 40.08 provide guidance on the meaning of "mere reinforcement purposes". Indeed, those notes indicate that "[f]igured [or] printed . . . textiles . . . are regarded as having a function beyond that of mere reinforcement." The *Explanatory Notes* to heading No. 40.08 also indicate that "[p]lates, sheets and strip of cellular rubber combined with textile fabric *on both faces*, whatever the nature of the fabric, are **excluded** from *this* heading [i.e. heading No. 40.08] (**heading 56.02, 56.03 or 59.06**)" [emphasis added]. Accordingly, the terms "**excluded** from this heading" in that note mean excluded from heading No. 40.08. Conversely, that heading also indicates that such goods should be *included* in one of the headings in brackets in those *Explanatory Notes*, in other words, in heading No. 56.02, 56.03 or 59.06.

38. Component 3 is described in the second laboratory report. As indicated previously, it represents the seam on the top edge of the mitt. The Tribunal is of the view that it is not necessary to analyze this component further in order for the Tribunal to dispose of the classification of the goods in issue.

81. Component 1 of the goods in issue (the back and underside of the mitt, and the back of the thumb) is described as being the following three layers laminated together:

- i) a knit fabric, of synthetic (polyester) fibres, which has been printed with multicoloured dots of various sizes and is present on the outside of the oven mitt;
- ii) a flexible, beige cellular layer (approximately 3 mm thick) composed of compounded vulcanized rubber; and
- iii) a bright orange knit fabric, of synthetic (polyester) fibres, which is present on the inside of the oven mitt, next to the wearer's skin.

82. Component 1 of the goods in issue has textile fabric on both sides of the vulcanized rubber as per i) and iii) above; therefore, the textile fabric is not present for mere reinforcing purposes. The Tribunal finds that the goods in issue contain, in Component 1, printed textile fabric where the textile fabric has a "... function beyond that of mere reinforcement" for the purpose of tariff classification.

83. Therefore, in application of Rule 1 of the *General Rules*, because of the presence of Component 1, the goods in issue *cannot* be found to be made of knitted fabrics laminated with rubber covered by heading No. 40.15 (as per Note 2 of the *Explanatory Notes* to heading No. 40.15), because they fall in Section XI by the application of Note 4 to Chapter 59. Component 1 is made rather of "rubberized textile fabrics" classifiable in heading No. 59.06 as explained below. Consequently, the goods in issue fail to qualify to meet the condition in Note (2) of the *Explanatory Notes* to heading No. 40.15.³⁹

Are the Goods in Issue of Rubber, With Parts of Textile Fabric, When the Rubber is the Constituent Giving the Goods Their Essential Character?

84. Component 2 (the palm area of the mitt) is further described in the second laboratory report as a cellular layer of compounded vulcanized rubber and "ii) a black knit fabric, of synthetic (polyester) fibres, which is present on the inside of the oven mitt, next to the wearer's skin." The Tribunal finds that Component 2 is made of vulcanized rubber for the following reasons.

85. In its brief, VGI submitted that the textile fabric is present for comfort on the inside and for decorative purposes on the outside, and submitted that it does not need the textile fabric to hold the goods in issue together. In a subsequent submission, VGI submitted that the textile fabric is not part of the integral function of the goods in issue. To support its view, it compared the goods in issue with other oven mitts sold in the market that do not have textile fabric. It therefore submitted that the fabric present in the goods in issue is present merely for reinforcing purposes.

86. On balance of the evidence before it, with the guidance of the tariff provisions on what constitutes "mere reinforcing purposes" as explained above, the Tribunal finds that Component 2 of the goods in issue is a sheet of vulcanized rubber where the textile fabric is present on one surface only, does not have an important role and is there merely for reinforcing purposes.

87. However, to conclude that the palm area of the goods in issue is of vulcanized rubber is not sufficient for the goods in issue to be classifiable in heading No. 40.15; it needs to meet the condition in Note 3 of the *Explanatory Notes* to heading No. 40.15. The test under Note 3 is whether the rubber (i.e. Component 2, which is the palm area of the mitt, made of vulcanized rubber), with parts of textile fabrics (i.e. Component 1, which is the back and underside of the mitt and the back of the thumb, made of rubberized textile fabrics), is the constituent giving the goods their essential character. The Tribunal is unable to reach such a conclusion in this instance for the reasons that follow.

39. The reasoning in this section relative to Components 1 and 2 is applicable, *mutatis mutandis*, to Components A and B described in the laboratory reports.

88. The Tribunal takes judicial notice of the following dictionary definition of the term “oven mitt”: “. . . an insulated mitten (usu. one of a pair) for handling hot pans . . .”⁴⁰ This definition is useful for the Tribunal’s analysis of the essential character of an oven mitt. As well, the Tribunal will take guidance from usual criteria typically applied by the Tribunal in such circumstances where a test on essential character is performed for classification purposes. Those criteria include the weight, surface, value and relative importance of any constituent parts of the goods in issue. In this instance, the goods in issue have two important components: Component 1, which is rubberized textile fabrics; and Component 2, which is vulcanized rubber.

89. The Tribunal finds that the goods in issue require both Components 1 and 2, assembled together, in order to function as a mitt. The component on the back of the hand and the thumb provides protection from heat and comfort, and is decorative. The component on the palm area protects from heat, provides comfort and provides easy grip through embossed rubber.⁴¹ Both components provide protection from heat, which is the purpose of an oven mitt, which is essentially an insulated mitten. The Tribunal finds that the bulk rubber layer in Component 1 is 3 mm thick, which is equal or greater than the bulk rubber layer in Component 2. The same is applicable in both samples analyzed by the CBSA. This supports the finding that Component 1 would provide an equal or greater effective protection from heat when the goods in issue are used (for instance when used to take out hot pans from the oven). The handling function of the goods in issue is provided by the palm area of embossed rubber, which provides an easy grip, as reported in the laboratory reports. Finally the external surface area and the total weight of Component 1 (about 80 percent) are more important than Component 2 (about 20 percent). The value of each component was not disclosed to the Tribunal; this criterion was therefore inconclusive.

90. On balance, in considering all the elements above, the Tribunal cannot conclude that the vulcanized rubber (Component 2) provides the goods in issue their essential character. Rather, the Tribunal is of the view that both the rubberized textile fabric (Component 1) and the vulcanized rubber (Component 2) contribute equally to giving the goods in issue their essential character.

91. Accordingly, the Tribunal finds that the goods in issue fail to meet the condition set out in Note (3) of the *Explanatory Notes* to heading No. 40.15 and that, therefore, the goods in issue are not classifiable in heading No. 40.15

Are the Goods in Issue Classifiable in Heading No. 61.16?

92. The CBSA argued that the goods in issue are classifiable in Chapter 61 (articles of apparel and clothing accessories, knitted or crocheted) and, more precisely, in heading No. 61.16 (gloves mittens and mitts, knitted or crocheted).

93. As presented above, the Tribunal finds that the goods in issue are made up of two components, one of vulcanized rubber and one of rubberized textile fabrics where the textile fabric is not present merely for reinforcing purposes. Accordingly, the rubberized textile fabric is not excluded from heading No. 59.06 in conformity with Note 4 to Chapter 59.

94. Under Rule 1 of the *General Rules*, the classification is to be determined according to the terms of the headings, and relevant section and chapter notes. In the Tribunal’s view, the terms of heading No. 61.16 squarely describe the goods in issue. Indeed, the goods in issue are “mitts” made of knitted rubberized

40. Canadian Oxford Dictionary, 2d ed., s.v. “oven mitt”.

41. Laboratory reports.

textile fabric. In addition, Note 1 to Chapter 61 directs that the chapter "... applies only to made up ... articles." The goods in issue are articles as described above. Finally, Note 7(e) to Section XI defines the expression "made up", among others, as "[a]ssembled by sewing ...". The goods in issue meet that requirement as explained above, i.e. the three components of the goods in issue have been stitched together.

95. In addition, having previously found that the goods in issue are not classifiable in Chapters 39 and 40, Notes 1(h) and (ij) to Section XI do not apply. These notes provide as follows:

1. This Section does not cover:

...

- (h) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39;
- (ij) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with rubber, or articles thereof, of Chapter 40.

96. As to the subheading and tariff item levels, in accordance with Rules 1 and 6 of the *General Rules*, the Tribunal notes that, according to the laboratory reports, the knitted textile fabrics are of polyester yarns and that polyester is a synthetic fibre. Consequently, the Tribunal finds that the goods in issue are properly classified under tariff item No. 6116.93.00 as knitted mitts of synthetic fibres, as determined by the CBSA.

97. In response to VGI's submissions regarding Memorandum D10-14-29 and how it does not adequately provide for guidance in classifying the particular goods in issue, the Tribunal reiterates its long-held view that the CBSA's D Memoranda are administrative documents that may provide certain guidance. However, they are ultimately not legally binding for the purposes of the Tribunal determining the proper classification of goods and must therefore be approached with caution.⁴²

DECISION

98. The appeal is dismissed.

Diane Vincent
Diane Vincent
Presiding Member

42. *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT).