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CUSTOMS AND EXCISE

CUSTOMS ACT

Appeal brought under *Customs Act*, R.S.C., 1985 (2nd Supp.), c. 1, s. 68 from Canadian International Trade Tribunal (Tribunal) decision regarding tariff classification of disposable shoe covers imported by respondent (Appeal No. AP-2017-065) — Tribunal finding that goods in issue classifiable under tariff item No. 3926.20.95 of Schedule to *Customs Tariff*, S.C. 1997, c. 36 (Tariff Schedule) as other articles of apparel, accessories, of plastics combined with nonwovens, as opposed to tariff item No. 6307.90.99, which applicable to other made up articles, including dress patterns, of other textile materials, as determined by taxing authority, Canadian Border Services Agency (CBSA) — Goods in issue imported in 2015, 2016 under tariff item No. 6307.90.99 — Applicable tariff for that item is 18% — Pursuant to Act, ss. 59(1), 60(1) respectively, respondent unsuccessfully seeking redetermination, then further redetermination of that decision, claiming that goods in issue ought to be classified under tariff item No. 3926.20.95 — Goods imported under that tariff item subject to lower tariff of 6.5% — Parties agreeing that goods in issue composed of layer of thermally bonded spunbond polypropylene (PP), textile, laminated on one side to sheet of chlorinated polyethylene (CPE), plastic — According to record, goods produced from rectangular-shaped cut-out of that material, bonded by heat-sealing; designed to be worn over shoes, have applications in clean rooms, food processing, real estate, health care, construction, manufacturing, energy, research, development — Customs Tariff implementing Canada's obligations under *International Convention on the Harmonized Commodity Description and Coding System* — Customs Tariff, ss. 10, 11 applying in present case — Harmonized System referred to in s. 10(1) using eight-digit classification system divided into sections, chapters, with each chapter listing goods under headings, subheadings associated to specific tariff item — Parties claiming that classification of goods in issue may be determined on application of General Rules for the Interpretation of the Harmonized System, Rule 1 alone, which provides that for legal purposes, classification to be determined according to terms of headings, any relative section or chapter Notes — Therefore, no need to consider remaining interpretative rules of Harmonized System — Tariff item No. 3926.20.95 found applicable to goods in issue by Tribunal found in Chapter 39 of Section VII of Tariff Schedule (Plastics and Articles thereof; Rubber and Articles thereof); referring more particularly to goods found under subheading No. 3926.20 (Articles of apparel and clothing accessories (including gloves, mittens and mitts)) of heading No. 39.26 (Other articles of plastics and articles of other materials of headings Nos. 39.01 to 39.14) — Item No. 6307.90.99 found applicable to goods in issue by CBSA found in Chapter 63 of Section XI of the Tariff Schedule (Textiles and Textiles Articles); referring more particularly to goods found under subheading No. 6307.90 (Other) of heading No. 63.07 (Other made up articles, including dress patterns) — After concluding that constituent material of goods in issue – nonwoven laminated with plastics – more specifically described in heading No. 39.26, Tribunal determining that goods coming within purview of tariff item No. 3926.20.95 as other similar articles; pursuant to Explanatory Notes to Chapter 63, were excluded from heading No. 63.07 — Pursuant to Act, s. 68(1), tariff classification decisions made under Act, ss. 60, 61 can be appealed to Court but on questions of law only — Appellant raising two questions of law — Claiming Tribunal erring in law by interpreting Note 8(a) to Section XI in such way to prevent reference to Chapters 50 to 60, in particular to Chapter 56, when determining whether constituent material of goods in issue can be classified as articles of textile under Chapters 61 to 63 — Further contending that Tribunal committed another error of law by failing to take into account Note 1 to Chapter 39, which provides that "any reference to 'plastics' … does not apply to materials regarded as textile materials of Section XI," when it classified goods in issue as articles of

plastics — Whether Tribunal erring in its interpretation of Note 8(a) to Section XI ; whether Tribunal erring in law in not considering Note 1 to Chapter 39 — Respondent's entire position resting on mischaracterization of Tribunal's findings — Mischaracterization lying in assertion that Tribunal found goods' constituent material to be intermediate "made up" material, that is material comprised of single sheet of PP nonwoven, CPE plastic *cut to shape,* sealed to create *sheeting of plastics,* thereby excluding, even having regard to interpretation of Note 8(a) advanced by appellant, any consideration of heading No. 56.03 in assessment of goods' constituent material — No statement in Tribunal's reasons supporting such assertion — While Tribunal, upon determining that goods in issue without "applied soles", could not, therefore, be classified under Chapter 64 of Section XII as footwear articles, stated that goods were "made of 'sheeting of plastics'", Tribunal holding that next step in Rule 1 analysis was to classify goods according to their constituent material, implying thereby that goods' constituent material had not yet been identified — Therefore, no indication whatsoever in Tribunal's findings of existence of "intermediate material" of kind put forward by respondent, *i.e.* material that is "made up" because it is "further worked" by being "cut to shape" — Approach of Tribunal in interpretation of Note 8(a) incorrect in law to extent that preventing application of Chapter 56 to constituent material of goods because goods themselves "made up" within meaning of Note 7 — In doing so, Tribunal conflating two distinct steps of classification analysis, failing, as a result, to draw distinction between determination of goods' constituent material on one hand, goods' classification on other — While clear that combined effect of Notes 7, 8(a) to Section XI preventing goods themselves from being classified under Chapter 56 because they are "made up", Chapter 56 remaining relevant as aid to assessment of goods' constituent materials — Tribunal's contrary view incorrectly departing from modern approach to statutory interpretation — Modern approach to statutory interpretation remaining relevant in tariff classification matters meaning that as any other legislative provisions, Note 8(a) to Section XI must be read in its entire context, in its grammatical, ordinary sense harmoniously with scheme of Act, object of Act, intention of Parliament — Once first step of Rule 1 analysis proves inconclusive of goods' classification, analysis, as properly determined by Tribunal, shifting to goods' constituent material — As such, appellant right that proper analysis of whether goods in issue are "of other textile materials", as contemplated by Chapter 63, requires assessment of whether material from which these goods are made can be classified as textile in Chapter 56 — Nothing in wording of Note 8(a) preventing Tribunal from undertaking such an analysis — Quite the contrary, prior reference to Chapters 50 to 60 crucial to determining whether "made up" shoe covers were of "textile materials" — Such interpretation consistent with scheme, structure of Tariff Schedule — Tribunal's error in interpreting Note 8(a) vitiated remainder of its analysis — Tribunal proceeded from incorrect interpretation of Note 8(a) that had effect of ousting consideration of Chapters 50 to 60 in relation to constituent material — Tribunal's error further exacerbated by fact that it took approach that departs from analytical framework set out in *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency*, 15 T.T.R. (2d) 336, 2011 CarswellNat 7159 (WL Can) (C.I.T.T.)*, Louise Paris Ltd. v. President of the Canada Border Services Agency*, AP-2017-001, 2019 CanLII 110897 (C.I.T.T.) for determining classification of textile, plastics combinations — According to that framework, Tribunal must first examine how constituent material would be classified before then classifying goods themselves — It was open to Tribunal to assess whether goods' constituent material, consisting of combination of textile, plastics, either was or wasn't textile under Chapter 56 — However, not open for Tribunal to sidestep that analysis entirely — In doing so, Tribunal committed error of law — Regarding second issue, having to determine whether presence of these mutually exclusive clauses suggests that steps involved in deciding whether goods combining textiles, plastics fall under Section XI or Chapter 39 should follow specific order, with first step in analysis being whether goods are textiles — Note 1 to Chapter 39 does provide for specific order in which materials, goods to be assessed — Review of exclusionary clauses at issue showing that broad exclusionary rule found in Notes 1 and 2(p) to Chapter 39 having no equivalent in said Section — Thus, while textile materials of Section XI not to be considered plastics within meaning of heading Nos. 39.01 to 39.14, converse not necessarily true, as plastic materials of Chapter 39 could possibly be considered textiles within meaning of Section XI — This is why Tribunal must first determine whether materials are textiles and then, only then, if finding they are not, further consider whether they are plastics as defined in Chapter 39 — In context of mutually exclusive headings such as heading Nos. 63.07, 39.26, Note 1 to Chapter 39 provides specific order in which materials, by extension, goods to be assessed — Thus, Tribunal not properly dismissing appellant's proposed characterization of goods' constituent

material as textile before finding that goods were made of plastics — In so doing, Tribunal failing to apply Note 1 to Chapter 39 — Therefore, Tribunal's decision set aside, matter remitted to different panel of Tribunal for redetermination in accordance with present reasons — Appeal allowed.

CANADA (ATTORNEY GENERAL) V. IMPEX SOLUTIONS INC. (A-296-19, 2020 FCA 171, LeBlanc J.A., reasons for judgment dated October 15, 2020, 34 pp.)