FEDERAL COURT OF AUSTRALIA

Primaplas Pty Ltd v Chief Executive Officer of Customs
[2016] FCAFC 40

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| Appeal from: | *Primaplas Pty Ltd v Chief Executive Officer of Customs* [2014] FCA 1358  |
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| File number: |  |
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| Judge(s): | **SIOPIS, DAVIES AND WIGNEY JJ** |
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| Date of judgment: | 15 March 2016 |
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| Catchwords: | **STATUTORY INTERPRETATION** – tariff classification of imported polyethylene goods under the *Customs Tariff Act 1995* (Cth) – whether the tariff classification should be based on the overall specific gravity of the goods, including additives – where the primary judge referred to extrinsic material as an aid to interpretation – whether the primary judge’s construction of the classification provisions was incorrect – appeal dismissed  |
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| Legislation: | *Customs Tariff (Anti-Dumping) Act 1975* (Cth) *Customs Tariff Act 1995* (Cth), ss 3, 6*Judiciary Act 1903* (Cth), s 39B *International Convention on the Harmonized Commodity Description and Coding System*  |
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| Cases cited: | *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112*Chief Executive Officer of Customs v Biocontrol Ltd* (2006) 150 FCR 64*Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377*Toyota Tsusho Australia Pty Ltd v Collector of Customs* [1992] FCA 282 |
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| Date of hearing: | 29 May 2015 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 75 |
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| Counsel for the Respondent: | Mr G Kennett SC |
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| Solicitor for the Respondent: | Australian Government Solicitor |

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| **Table of Corrections** |  |
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| 18 March 2016 | Paragraph [45], second sentence – Substitute the word “excise” with the word “duty”. |

ORDERS

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|  | NSD 56 of 2015 |
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| BETWEEN: | PRIMAPLAS PTY LTD ACN 003 720 474Appellant |
| AND: | CHIEF EXECUTIVE OFFICER OF CUSTOMS Respondent |

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| JUDGES: | SIOPIS, DAVIES AND WIGNEY JJ |
| DATE OF ORDER: | 15 March 2016 |

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The appellant to pay the respondent’s costs as agreed or taxed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. This appeal concerns the tariff classification of goods under the *Customs Tariff Act 1995* (Cth) (**Tariff Act**). The goods were imported into Australia from Thailand by the appellant, Primaplas Pty Ltd (**Primaplas**). The goods consisted of a granular substance, the predominant component of which was polyethylene (**the products**). The respondent, the Chief Executive Officer of Customs (**Customs**), assigned classifications to the products which resulted in the imposition of duty on the products under the *Customs Tariff (Anti-Dumping) Act 1975* (Cth) (**Anti-Dumping Act**). Primaplas challenged the tariff classification and the imposition of duty in respect of the products in proceedings commenced under s 39B of the *Judiciary Act 1903* (Cth). The primary judge dismissed Primaplas’ application and upheld the tariff classifications in respect of the products. This is an appeal from that decision.
2. The issue raised by this appeal primarily involves the construction of provisions of the Tariff Act pursuant to which tariff classifications are worked out, specifically in respect of goods comprised predominantly of polyethylene. In simple terms, the issue arises because the tariff classification of polyethylene depends on an assessment of its density or “specific gravity”. Many polyethylene goods, however, include additives, such as colourants. The issue is whether polyethylene goods that include additives are to be classified on the basis of the specific gravity of the polyethylene component of the goods alone, or on the basis of the specific gravity of the goods in their entirety, including any additives.
3. The simplicity with which the issue can be defined tends to belie the complexity of the task of construing the relevant provisions of the Tariff Act. The structure and scheme of the Tariff Act in relation to the working out of tariff classifications is complex, involving as it does the application of general interpretive rules, chapter and subchapter notes and language that, in some instances at least, is opaque if not intractable. The task is particularly difficult where, as in this case, the relevant tariff classification headings and subheadings refer to materials or substances and the goods to be classified consist of more than one material or component.

# Relevant facts and background

1. The facts are not in dispute. The matter proceeded before the primary judge on the basis of a statement of agreed facts supplemented by some additional affidavit evidence. The primary judge rejected some of the affidavit evidence that Primaplas sought to adduce. Primaplas does not contend that the primary judge erred in rejecting that evidence. Customs tendered a report prepared by the decision-maker, though ultimately nothing much appeared to turn on the contents of that report.
2. The following recitation of the relevant facts is taken from the agreed statement of facts, as supplemented by the affidavit evidence.
3. In the period from 30 December 2009 to 10 November 2013, Primaplas imported the products into Australia from Thailand.
4. The products were composed of, or consisted of, more than one component. The predominant component of all the products was linear low density polyethylene. The specific gravity of the linear low density polyethylene in all of the products was less than 0.94 g/cm3.
5. All of the products also contained non-polymer additives, including antioxidants, mould releases, UV stabilizers and colour pigments (**the additives**). The overall specific gravity of the products, including both the linear low density polyethylene and the non-polymer additives, was 0.94 g/cm3 or more. All of the products had an overall specific gravity of 0.94 g/cm3 or more.
6. The products could not be, and are not, disintegrated or broken down into their constituent parts after importation. Rather, they are used in their existing form in the manufacture of various polyethylene products.
7. On 8 April 2014, Customs assigned Tariff Act classifications to the products. The products were assigned to one of two classifications depending on whether or not 95% or more of the polymer content by weight consisted of polymers of ethylene.
8. The products in respect of which 95% or more of the polymer content by weight consisted of polymers of ethylene were classified under subheading 3901.10.00 in Schedule 3 to the Tariff Act, being “Polyethylene having a specific gravity of less than 0.94”. The basis of that classification was that the specific gravity of the linear low density polyethylene in those products was less than 0.94 g/cm3.
9. The critical point to emphasise is that the specific gravity assessment or calculation that founded that classification was of the polyethylene component of the products alone. The additives were disregarded for the purposes of the calculation or assessment.
10. The products in respect of which less than 95% of their polymer content by weight consisted of polymers of ethylene were classified under subheading “3901.90.00 – Other”. That classification did not depend on the calculation of the specific gravity of the polyethylene component of those products. Rather, it flowed from the fact that polymers of ethylene did not contribute 95% or more by weight of the total polymer content of the products.
11. It should be noted that Customs decided that the products were properly characterised under either subheading 3901.10.00 or 3901.90.00. No analysis was conducted to determine exactly which, if any, of the products were properly classified under subheading 3901.10.00 and which, if any, were properly characterised under subheading 3901.90.00. That analysis, which would involve ascertaining the particular monomer content of the polyethylene component of the products, was considered unnecessary given that the duty imposed on goods classified under both of those subheadings was the same.
12. The matter was argued both below and on appeal essentially on the basis that at least some of the products were such that 95% or more by weight of their total polymer content consisted of polymers of ethylene. The classification issue effectively arose only in relation to those products (**the relevant products**).
13. The classification issue was, and is, whether the relevant products were properly classified under subheading 3901.10.00, or some other classification. It was common ground that the only other potentially available classification for the relevant products was under subheading “3901.20.00 – Polyethylene having a specific gravity of 0.94 or more”. Goods assigned to that classification at the relevant time were not subject to duty under the Anti-Dumping Act. Primaplas contended that the relevant products should have been classified under subheading 3901.20.00, not under subheading 3901.10.00, and that it therefore should not have been liable to pay any duty under the
Anti-Dumping Act in respect of the relevant products.
14. Primaplas’ detailed argument in support of that contention is addressed in full later. In short terms, however, Primaplas contended that the specific gravity of polyethylene goods that also include additives should not be calculated, for the purpose of classification under either subheading 3901.10.00 or 3901.20.00, on an additive free basis, as it had been by Customs. Primaplas argued that the calculation should take the additives into account. The specific gravity of the goods calculated on that basis would have resulted in them being classified under subheading 3901.20.00.

# Relevant provision in the Tariff Act

1. The starting point in respect of tariff classification under the Tariff Act is s 6, which provides as follows:

A reference in this Act to the tariff classification under which particular goods are classified is a reference to the heading or subheading:

(a) in whose third column a rate of duty is set out; and

(b) under which the goods are classified.

1. The word “heading” is defined in s 3 to mean a heading in Schedule 3 to the Tariff Act. The word “subheading” is defined in s 3 (perhaps unnecessarily) as meaning a subheading of a heading.
2. Section 4 of the Tariff Act sheds some more light on the identification of headings and subheadings in Schedule 3. It provides as follows:
3. In Schedule 3:
4. either:

(i) 4 digits in the first column; or

(ii) 8 digits in the first column not opposite to a dash or dashes in the second column;

indicate the beginning of a heading; and

1. 5, 6, 7 or 8 digits in the first column opposite to a dash or dashes in the second column indicate the beginning of a subheading of the heading in which the digits appear.
2. In this Act or in any Act that amends, or in any Tariff instrument that relates to, this Act:
3. a heading may be referred to by the digits with which the heading begins; and
4. a subheading of a heading may be referred to by the digits with which the subheading begins.
5. Section 7 of the Tariff Act provides that the “Interpretation Rules must be used for working out the tariff classification under which goods are classified”. The expression “Interpretation Rules” is defined in s 3 as meaning the “General Rules for the Interpretation of the Harmonized System provided for by the Convention, as set out in Schedule 2”. The “Convention” is defined in s 3 as meaning the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1993.
6. The Interpretation Rules in Schedule 2 provide that the classification of goods in Schedule 3 shall be governed by a number of principles. The principles relevant to the resolution of the classification issue in this matter are as follows:

Classification of goods in Schedule 3 shall be governed by the following principles:

1. The titles of Sections, Chapters and sub‑Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions:

2. (a) Any reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as presented, the incomplete or unfinished article has the essential character of the complete or finished article. It shall also be taken to include a reference to that article complete or finished (or falling to be classified as complete or finished by virtue of this Rule), presented unassembled or disassembled.

(b) Any reference in a heading to a material or substance shall be taken to include a reference to mixtures or combinations of that material or substance with other materials or substances. Any reference to goods of a given material or substance shall be taken to include a reference to goods consisting wholly or partly of such material or substance. The classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3.

3. When by application of Rule 2(b) or for any other reason, goods are, *prima facie*, classifiable under two or more headings, classification shall be effected as follows:

(a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods or to part only of the items in a set put up for retail sale, those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.

(b) Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

(c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

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

…

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

1. As is apparent from the relevant principles in the Interpretation Rules, Schedule 3 is divided into a number of Sections, Chapters and Sub-Chapters. It is common ground that the relevant section of Schedule 3 in relation to the relevant products is Section VII (“Plastics and articles thereof; rubber and articles thereof”), the relevant Chapter is Chapter 39 (“Plastics and articles thereof”) and the relevant Sub-Chapter (of Chapter 39) is Sub-Chapter I (“Primary forms”).
2. Note 1 of the Chapter Notes for Chapter 39 provides that “plastics” means “those materials of 3901 to 3914.00.00 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the external influence”. The reference to 3901 to 3914.00.00 in this note is a reference to the headings and subheadings in Sub-Chapter I of Chapter 39.
3. Note 6 of the Chapter Notes for Chapter 39 provides that in 3901 to 3914.00.00 “primary forms” applies to a number of different “forms”, including “granules”. It is common ground that the relevant products were in the form of granules and therefore were in a primary form.
4. It is also common ground that the relevant heading in Sub-Chapter I of Chapter 39 is subheading 3901. The question is which of the subheadings in heading 3901 were applicable. Heading 3901 and its subheadings are in the following terms:

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| 3901  | POLYMERS OF ETHYLENE, IN PRIMARY FORMS: |
| 3901.10.00 | ‑Polyethylene having a specific gravity of less than 0.94  | 5% |
|  |  | CA:Free |
| 3901.20.00 | ‑Polyethylene having a specific gravity of 0.94 or more | 5% |
|  |  | CA: Free |
| 3901.30.00 | ‑Ethylene‑vinyl acetate copolymers | 5% |
|  |  | CA: Free |
| 3901.90.00 | ‑Other | 5% |
|  |  | CA: Free  |

1. In accordance with Rule 6 of the Interpretation Rules, the classification of goods at the subheading level of heading 3901 is to be determined having regard to the “terms of those subheadings and any related Subheading Notes”. Chapter 39 contains Subheading Notes. The relevant paragraphs of those Subheading Notes are as follows:

1. ‑ Within any one heading of this Chapter, polymers (including copolymers) and chemically modified polymers are to be classified according to the following provisions:

(a) Where there is a subheading named “Other” in the same series:

(1) The designation in a subheading of a polymer by the prefix “poly” (for example, polyethylene and polyamide‑6,6) means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95% or more by weight of the total polymer content.

(2) The copolymers named in 3901.30.00, 3903.20.00, 3903.30.00 and 3904.30.00 are to be classified in those subheadings, provided that the comonomer units of the named copolymers contribute 95% or more by weight of the total polymer content.

(3) Chemically modified polymers are to be classified in the subheading named “Other”, provided that the chemically modified polymers are not more specifically covered by another subheading.

(4) Polymers not meeting (1), (2) or (3) above, are to be classified in the subheading, among the remaining subheadings in the series, covering polymers of that monomer unit which predominates by weight over every other single comonomer unit. For this purpose, constituent monomer units of polymers falling in the same subheading shall be taken together. Only the constituent comonomer units of the polymers in the series of subheadings under consideration are to be compared.

1. As adverted to earlier, the question is whether the relevant products (which, as explained earlier, do not include such of the products that may have fallen within subheading 3901.90.00) fall within subheading 3901.10.00 or subheading 3901.20.00. It is common ground that subheading 3901.30.00 was inapplicable. Customs classified the relevant products under 3901.10.00 on the basis that the polyethylene component of the products had a specific gravity of less than 0.94.

# The judgment of the primary judge

1. Before the primary judge, Primaplas contended that Customs was wrong to classify the relevant products under subheading 3901.10.00. It contended that the products should have been classified under subheading 3901.20.00. The basis of that contention was, in simple terms, that the word “Polyethylene”, when used in subheadings 3901.10.00 and 3901.20.00, referred to the relevant polyethylene goods, including any additives.
2. The primary judge rejected Primaplas’ challenge to the Customs’ classification of the relevant products under subheading 3901.10.00. His Honour concluded (at Judgment [40]) that he was satisfied that the legislative intention was that the specific gravity of polyethylene products in Sub-Chapter 39 should be measured free of additives.
3. It is unnecessary to rehearse the primary judge’s findings and reasons in any great detail. It is sufficient to refer to two aspects of his Honour’s reasoning that were the subject of some criticism in the submissions of Primaplas on appeal.
4. First, the primary judge reasoned that, on the construction of the relevant provisions advanced by Primaplas, the classification of polyethylene products was open to abuse. In that regard, his Honour said (at Judgment [35]);

The circumstances of the present case illustrate that if the applicant’s arguments are accepted it would be possible (by adding colorants, for example, in Thailand) to alter the classification of polyethylene goods so that duty was not payable. That circumstance does not determine the question of construction but it reinforces a perception which is conveyed by the terms of Sch 3 itself that it is concerned with identification of essential or predominant components or characteristics, rather than less essential matters. In part, that perception stems from Rule 6 of the Interpretation Rules in Sch 2, which requires attention to the terms of subheadings. In the present case, the term is “Polyethylene“, a specific term for a compound having particular characteristics.

1. It is readily apparent, however, that his Honour did not regard that consideration as determinative.
2. The second aspect of the primary judge’s reasoning that was the subject of some criticism by Primaplas was his Honour’s reliance on extrinsic material as an aid to construing the relevant provisions. The particular extrinsic material referred to by his Honour was the Explanatory Notes to the Harmonized System prepared in accordance with Article 7 of the Convention (Third Edition (2002), Volume 2) (**the Explanatory Notes**). The primary judge noted (at Judgment [38]) that the Explanatory Notes included the following passage in relation to polyethylene:

Polyethylene is a translucent material having a very wide range of applications.
Low-density polyethylene (LDPE), i.e., polyethylene having a specific gravity at 20 °C of less than 0.94 (calculated on an additive-free polymer basis), is used largely as a packaging film especially for food products, as coating for paper, fibreboard, aluminium foil, etc., as an electric insulator, and for the manufacture of various household articles, toys, etc. The heading also includes linear low-density polyethylene (LLDPE). High-density polyethylene (HDPE) is polyethylene having a specific gravity at 20 °C of 0.94 or more (calculated on an additive-free polymer basis). It is used in the manufacture of a variety of blow-moulded and injection-moulded articles, woven sacks, gasoline and oil containers, for the extrusion of pipes, etc. Applications of ethylene-vinyl acetate copolymers includes snap-on caps, the lining of bag-in-box containers and stretch wrapping.

1. The primary judge concluded (at Judgment [39]) that both subheadings 3901.10.00 and 3901.20.00 “as adopted from the Harmonized System, refer to polyethylene whose specific gravity is calculated on an additive free basis”. His Honour reasoned that Primaplas’ argument, which suggested primary attention to the notion of “goods” in a “compound state”, depended on an approach to the text in the Tariff Act which would, if accepted, “produce an interpretation contrary to the interpretation intended to be given to the provisions in question”.

# Appeal Grounds and submissions

1. The notice of appeal filed by Primaplas contained the following single ground of appeal:
2. The Court below erred
3. in concluding that in respect of goods engaging the operation of item 3901 in Schedule 3 to the Customs Tariff Act each of sub-items
* 3901.10.00,
* 3901.20.00,

on its true construction, identified the goods with which it is concerned as polyethylene exclusive any other substance therein,

1. not concluding that on its true construction each of those sub-items identified the goods with which it is concerned as polyethylene inclusive any other substance therein.
2. In its submissions in support of this ground of appeal, Primaplas emphasised that tariff classification under the Tariff Act was concerned with “goods” that had been imported. Section 7 of the Tariff Act, for example, refers to working out the tariff classification under which “goods” are classified. It does not refer to working out the tariff classification under which a part or parts of goods are classified.
3. Primaplas pointed out that it was common ground that the relevant products in this matter were to be classified, at the heading level, under heading 3901 “POLYMERS OF ETHYLENE, IN PRIMARY FORMS”. There was no other alternative classification at the heading level. Primaplas submitted that the goods described at the heading level must be the same as the goods described at the subheading level. It followed, so it was submitted, that because the relevant products were polymers of ethylene for the purposes of heading 3901, they were also polymers of ethylene for the purposes of each subheading of 3901.
4. Primaplas contended that the significance of that point lay in the application of Rules 2(b) and 6 of the Interpretation Rules to the terms of the relevant subheadings. Rule 6 provides that the classification of goods in the subheadings of a heading is to be determined, amongst other things, by the “terms of those subheadings”. Rule 2(b) of the Interpretation Rules relevantly provides that a 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”. It was common ground that Rule 2(b) applied because the relevant products were a mixture or combination of polymers of ethylene and other materials or substances (the additives).
5. Primaplas submitted that the effect of applying Rule 2(b) of the Interpretation Rules to the relevant subheadings was that the reference to “polyethylene” in both subheadings 3901.10.00 and 3901.20.00 was required to be read as “[p]olyethylene, with or including other materials or substances”. The “terms” of those subheadings, for the purposes of Rule 6, were therefore to be taken to be “[p]olyethylene, with or including other materials or substances, having a specific gravity of less than 0.94” (in the case of subheading 3901.10.00) or “[p]olyethylene with or including other materials or substances, having a specific gravity of 0.94 or more” (in the case of subheading 3901.20.00).
6. Primaplas contended that when the terms of subheadings 3901.10.00 and 3901.20.00 were read in that way, Rule 6 compelled the relevant products to be classified under subheading 3901.20.00, not subheading 3901.10.00. That was because the agreed facts were that the specific gravity of the relevant products, including both the polyethylene and the additives (that is, the “other materials or substances”), was 0.94 g/cm3 or more. In Primaplas’ submission neither the “related Subheading Notes” or the “relative Section and Chapter Notes” (being the other matters referred to in Rules 1 and 6) compelled a different classification.
7. Primaplas submitted that it was unnecessary to proceed from Rule 2(b) to Rule 3 of the Interpretation Rules, despite the directive in the last sentence of Rule 2(b) that the “classification of goods consisting of more than one material or substance shall be according to the principles of Rule 3”. That was because Rule 3 only applies where, by reason of application of Rule 2(b) or otherwise, “goods are *prima facie* classifiable under two or more headings”. Primaplas contended that it was effectively common ground that there was no other applicable heading under which the relevant products were classifiable.
8. In relation to the reasons of the primary judge, Primaplas submitted that, whilst it was open to his Honour to have regard to the Explanatory Notes, those notes did not resolve or engage with the issue concerning the classification of the relevant products. The classification of the relevant products was to be approached having regard to the Tariff Act. The particular passage relied on by the primary judge was, in Primaplas’ submission, no more than a description or explanation of polyethylene and the distinction between high and low density polyethylene. It did not directly engage with the question of classification. Primaplas also submitted, somewhat more boldly, that there was no textual equivocality in the relevant provisions of the Tariff Act, and that it was therefore unnecessary to have resort to the Explanatory Notes.
9. It is unnecessary to rehearse the appeal submissions advanced by Customs in any great detail. A number of the arguments put forward by Customs in defence of the tariff classification and the judgment of the primary judge are addressed in substance later in the context of the consideration of the merits of the appeal.

# Resolution of appeal

1. Customs was correct to classify the relevant products under subparagraph 3901.10.00 in Schedule 3 to the Tariff Act. The primary judge did not err in dismissing the challenge by Primaplas to that classification and its liability for duty under the Anti-Dumping Act arising from that classification.
2. Whilst it is correct, as Primaplas submitted, that the Tariff Act is concerned with the classification of “goods”, that itself says nothing about how the classification of goods is worked out under the Tariff Act. The particular goods in question here were a granular substance, the predominant component of which was linear low density polyethylene. The fact that there were other materials or substances present in the chemical makeup of the particular goods does not itself mean, as Primaplas effectively contended, that the goods cannot or should not be classified by reference to their predominant component. Whether they are or not depends on how the scheme for working out tariff classifications under the Tariff Act applies to the particular goods in question.
3. The scheme in the Tariff Act for working out the correct tariff classification indicates that where a heading in Schedule 3 describes goods by reference to a particular material or substance, goods which are mixtures, or consist of different materials, or are made up of different components, are generally to be classified by reference to the material or component which gives them their essential character. That is clear not only from the Interpretation Rules, in particular Rules 2 and 3, but also, relevantly, from the terms of Chapter 39, including the Chapter and Subheading Notes, insofar as they apply to Sub-Chapter 1 of Chapter 39.
4. As already indicated, it was common ground that the relevant products were properly classified, at the heading level, under heading 3901. It is instructive, however, to work through the relevant provisions of the Tariff Act that result in heading 3901 being the applicable heading. That process sheds light on how the subheadings in heading 3901 should be construed and properly applied.
5. It was an agreed fact that the relevant products comprised more than one component, but that the predominant component was linear low density polyethylene. Interpretation Rule 1 provides that the classification of goods shall be determined according to, inter alia, the “terms of the headings”. The terms of heading 3901 are “POLYMERS OF ETHYLENE, IN PRIMARY FORMS”. It is immediately apparent that heading 3901 refers to a material or substance, being polymers of ethylene. Paragraph 6 of the Chapter Notes to Chapter 39 provides that the reference to “primary forms” in heading 3901 includes polymers of ethylene in the form of granules. The relevant products were in granular form.
6. The complication presented by the fact that the relevant products consisted of a mixture or combination of polymers of ethylene with other materials or substances (the additives) is largely resolved, at the heading level, by Interpretation Rules 2(b) and 3(b).
7. In the particular circumstances of this matter, Rule 2(b) operates so that the reference in heading 3901 to polymers of ethylene is taken to include a reference to mixtures or combinations of polymers of ethylene with other materials or substances. The terms of heading 3901 are thus applicable to the relevant products, even though they include additives.
8. Rule 2(b) of the Interpretation Rules then goes on to provide that the classification of goods consisting of more than one material or substances shall be according to the principles of Rule 3. Thus, the relevant goods, which it was agreed consisted of more than one material or substance, were to be classified in accordance with the principles of Rule 3. It is important to stress that, at this stage, the working out of the classification is still at the heading level.
9. The chapeau to Rule 3 provides, relevantly, that where, by application of Rule 2(b), goods are *prima facie* classifiable under two or more headings, classification shall be effected according to the subparagraphs of Rule 3. A complicating factor in the case of the relevant products was that there had been no chemical or other analysis of the additives for the purpose of identifying what, if any, heading, other than heading 3901, the relevant products might be classifiable under by reason of the fact that they included the additives. Customs was therefore unable to point to any other potentially applicable heading.
10. It is clear, however, that whatever the composition of the additives might be, the relevant goods would not be properly classifiable under any heading other than 3901. That is because Rule 3(b) of the Interpretation Rules would relevantly operate to provide that the relevant products were to be classified as if they consisted of the material or component which gave them “their essential character”. It was effectively common ground that, in the case of the relevant products, the material or component which gave them their essential character was polymers of ethylene. That material or component was the predominant component. The additives, such as colourants, did not give the products their essential character. Thus, under Rule 3(b) the relevant goods were properly classified under heading 3901 even if there was another heading that may have been applicable to the additives.
11. That, of course, does not resolve the critical question of whether the goods were properly classifiable, at the subheading level, under subheading 3901.10.00 or subheading 3901.20.00. It does, however provide an important textual and contextual clue to the proper construction and application of the subheadings of headings, such as 3901, which refer to materials or substances. The operation of Rules 2(b) and 3(b) of the Interpretation Rules indicates that generally, in working out the correct classification of goods consisting of more than one material or substance, the material or substance that gives the goods their essential character is taken to be the defining material or substance. The other materials or substances are essentially disregarded for classification purposes.
12. Critically, that important consideration in relation to the classification of such goods must sensibly also flow through to the subheading level. Thus, if goods fall under a particular heading because the terms of that heading apply to the material or substance that gives the goods their essential character, the statutory scheme would indicate that the features, characteristics or qualities of that substance would also define or determine which is the applicable subheading.
13. In relation to the relevant products, as previously indicated, the material or substance which gave the relevant products their essential character was polymers of ethylene. That was why the relevant products fell under heading 3901. It follows that it was the features, characteristics or qualities of that component of the relevant products, the polymers of ethylene or the polyethylene component, that was to be assessed in determining which was the applicable subheading of heading 3901, not the features, characteristics or qualities of the products in their entirety, including the additives.
14. Another way of putting this construction of subheadings 3901.10.00 and 3901.20.00 is that the word “polyethylene” should be read as referring to the polyethylene component of the goods in question that resulted in the goods falling under heading 3901. Of course, where the goods in question consist only of polyethylene, and are not mixed or combined with any other substance or material, there would be no issue. Where the goods in question consist of more than one material or substance, however, the reference to “polyethylene” in subheadings 3901.10.00 and 3901.20.00 must sensibly be read as a reference to the polyethylene component of the goods which (in terms of Rules 2(b) and 3(b) of the Interpretation Rules) gives the goods their essential character. Therefore, it is the specific gravity of the polyethylene component of the goods that is relevant to determining which is the applicable subheading, not the specific gravity of the goods including such other materials or substances that may be present.
15. It follows that the submission by Primaplas that the reference to “polyethylene” in subheadings 3901.10.00 and 3901.20.00 should be read as “[p]olyethylene with or including other materials or substances” must be rejected. That suggested construction of those subheading flows from a misapplication of Rule 2(b) of the Interpretation Rules. For the reasons already given, if Rule 2(b) is correctly applied at the subheading level the terms of that subheading, in the case of subheading 3901.10.00, would read: “[p]olyethylene having a specific gravity of less than 0.94, including mixtures or combinations of that polyethylene with other materials or substances”. The same paraphrase would apply to subheading 3901.20.00, so that it would read as “[p]olyethylene having a specific gravity of 0.94 or more, including mixtures or combinations of that polyethylene with any other materials or substances”.
16. This reading of subheadings 3901.10.00 and 3901.20.00 is also supported, to an extent, by the Chapter Notes and Subheading Notes to Chapter 39. Before addressing the terms of the Subheading Notes, it is necessary to say something briefly about polymers and copolymers.
17. Polymers consist of molecules which are characterised by the repetition of one or more monomer unit or units. Many polymers are known by abbreviations referable to their constituent monomer unit or monomer units. Polyethylene, for example, is the abbreviation of polymers of ethylene. As noted in the Explanatory Notes (at page 721) commercial polymers sometimes contain more monomer units than those represented by their abbreviations. The example given in the Explanatory Notes is the commercial polymer at issue in these proceedings, linear low density polyethylene, which is a polymer of ethylene that also contains small amounts (though sometimes more than 5%) of alpha olefin monomer units.
18. Copolymers are polymers in which no single monomer unit contributes 95% or more by weight to the total polymer content. Note 4 of the Chapter 39 Notes provides, in general terms, that copolymers are to be classified in the heading covering polymers of the comonomer unit which predominates by weight over every other single comonomer unit.
19. Note 1 of the Chapter 39 Subheading Notes governs the classification of polymers (including copolymers), chemically modified polymers and polymer blends at the subheading level. Paragraph (a) of Note 1 relevantly deals with the situation where there is a subheading “Other”, as is the case with heading 3901. Subparagraph (a)(1) of Note 1 provides that the designation in a subheading of a polymer by the prefix “poly” means that the constituent monomer unit or monomer units of the named polymer taken together must contribute 95% or more by weight of the total polymer content.
20. If Subheading Note 1(a)(1) is applied to the subheadings to heading 3901, to be classified as “polyethylene” for the purposes of either subheading 3901.10.00 or subheading 3901.20.00, it is necessary for the constituent monomer unit or monomer units of the named polymer (polymers of ethylene) to contribute 95% or more by weight of the total polymer content. If that requirement is not met, the relevant polymer cannot be classified under either subheading 3901.10.00 or subheading 3901.20.00 and must be classified according to the remaining subparagraphs of Note 1(a).
21. Subparagraph (a)(2) of the Subheading Notes concerns certain named copolymers. None of those named copolymers are relevant to the facts of this matter. Subparagraph (a)(3) concerns chemically modified polymers. It is also not relevant to the facts of this matter. Both subparagraphs (a)(2) and (a)(3) may accordingly be put to one side. The effect of subparagraph (a)(4) is that polymers which cannot be classified according to the provisions of subparagraphs (a)(1), (2) or (3) are to be classified in the subheading “Other”, unless there is a more specific subheading in the series which covers polymers of the monomer unit which predominates by weight over every other comonomer unit.
22. In relation to the products in question in this case, if polymers of ethylene did not contribute 95% or more of the polymer content by weight, the products were properly classified under subheading 3901.90.00 “Other”. That is because they could not be classified as polyethylene for the purposes of either subheading 3901.10.00 or subheading 3901.20.00, and there was no more specific subheading in 3901 covering polymers of any monomer unit which predominated by weight over every other monomer unit.
23. As outlined earlier, Customs did not seek to determine which, if any, of the products could not be classified as polyethylene in accordance with subparagraph (a)(1) of Subheading Note 1. No analysis was undertaken to determine whether polymers of ethylene contributed 95% or more by weight of the total polymer content of the products. That was because it was determined that such of the products that satisfied subparagraph (a)(1), and could therefore be classified as polyethylene, were properly classified under subheading 3901.10.00, and that such of those that did not were properly classified under subheading 3901.90.00. As the duty imposed was the same if the goods were classified under 3901.90.00 as it would be if classified 3901.10.00, it was decided by Customs that it was unnecessary to determine which was the appropriate classification. It should be noted, however, that if the construction of the relevant provisions advanced by Primaplas had been correct, it would have been necessary to remit the question of the classification of the products back to Customs for further analysis.
24. The point of this somewhat tortuous excursion through the Subheading Notes of Chapter 39 was not to simply deal with the potential classification of the products, or some of them, under subheading 3901.90.00. The broader point is that the terms of the Subheading Notes, when read in the context of the statutory scheme, including the Interpretation Rules, suggests that where subheadings, such as 3901.10.00 and 3901.20.00, refer to particular polymers, the focus for classification purposes is on the makeup or constitution of the polymers in question (which will generally be the polymers of that monomer unit which contributes most by weight of the total polymer content). That in turn suggests that where the terms of the relevant subheadings refer to the specific gravity of a named polymer, the specific gravity being referred to is the specific gravity of the predominant polymer component of the goods in question, not the specific gravity of the goods in their entirety, including any non-polymer additives.
25. It follows that Customs was correct to classify the relevant products by reference to the specific gravity of the polyethylene component of the products, not the specific gravity of the polyethylene component together with the additives. It follows that the primary judge was correct to dismiss Primaplas’ challenge to the classification of the products by Customs.
26. It is true, as Primaplas submitted, that the primary judge’s reasoning hinged, to a fairly significant extent, on the passage from the Explanatory Notes extracted earlier. That passage described low density polyethylene as having a specific gravity of less than 0.94 “calculated on an additive free polymer basis”. The primary judge appears to have given some significant weight to that passage as an indication of the legislative intention. Having considered the passage, his Honour concluded (at Judgment [40]) that the “legislative intention is that the specific gravity of polyethylene products in Sub-Ch 39 should be measured free of additives”.
27. It is, to say the least, somewhat doubtful that the passage from the Explanatory Notes was deserving of the weight the primary judge appears to have given it, particularly as an indicator of legislative intention. It is true that the passage is located in that part of the Explanatory Notes that describes the operation of heading 3901 and each of the four subheadings to that heading. Nevertheless, the passages itself does not appear to be anything more than a general description of polyethylene, and an explanation of the differences between low density polyethylene and high density polyethylene. It does not purport to be an explanation of how polymers are to be classified. Indeed, the passage is preceded by the sentence “[f]or the classification of polymers (including copolymers), chemically modified polymers and polymer blends, see the General Explanatory Note to this Chapter”. The Tariff Act, including Schedule 3 and the Interpretation Rules, does not refer in terms to low density and high density polyethylene. It also does not include the words “calculated on an additive free basis”. It is doubtful that the inclusion of those words in the passage provided a reliable guide to the legislative intention in relation to the classification of polyethylene goods.
28. Nevertheless, his Honour did not err in having regard to the Explanatory Notes. The primary judge noted (at Judgment [37]) that Primaplas did not oppose or object to the Explanatory Notes being used as an aid to interpretation. The language of the relevant subheadings and Subheading Notes was somewhat ambiguous or susceptible to different interpretations. In those circumstances, the Explanatory Notes were an appropriate extrinsic aid to interpretation: *Chief Executive Officer of Customs v Biocontrol Ltd* (2006) 150 FCR 64 at 77[39]; see also *Gardner Smith Pty Ltd v Collector of Customs (Vic)* (1986) 66 ALR 377 at 383-384; *Barry R Liggins Pty Ltd v Comptroller-General of Customs* (1991) 32 FCR 112 at 118-20; and, *Toyota Tsusho Australia Pty Ltd v Collector of Customs* [1992] FCA 282 at [22]-[30]. That is so even if ultimately the Explanatory Notes did not in fact provide much assistance.
29. In any event, the primary judge’s reliance on the Explanatory Notes was not the subject of a ground of appeal. Nor did Primaplas go so far as to submit that the primary judge erred in using the Explanatory Notes as an aid to interpretation.
30. Much the same can be said in relation to the primary judge’s reasoning (at Judgment [35]) to the effect that, if Primaplas’ arguments were to be accepted, the classification of polyethylene products would be open to manipulation or abuse. His Honour did not appear to give any significant weight to that consideration. Certainly, his Honour found that it did not “determine the question of construction”; at most it “reinforce[d] a perception which is conveyed by the terms of Sch 3 itself that it is concerned with identification of essential or predominant components or characteristics”. For the reasons already given, his Honour was correct to detect that “perception” and construe the provisions accordingly. His Honour’s observations concerning the possibility of manipulation were ultimately of little moment and were not indicative of any error.

# Conclusion and disposition

1. The primary judge’s construction of the relevant provisions of the Tariff Act was correct. His Honour did not err in dismissing the challenge by Primaplas to the classification of the relevant goods. The appeal is dismissed with costs.

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| I certify that the preceding seventy-five (75) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Siopis, Davies and Wigney. |

Associate:

Dated: 14 March 2016