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TRIBUNAL OVERTURNS CUSTOMS: A VAGUE “CATCH-ALL” TARIFF CODE CANNOT REPLACE A SPECIFIC ONE

by Jason Tan Jia Xin & Jesslyn Teo Yi En

The Customs Appeal Tribunal (“**CAT**”) has unanimously allowed all three of a taxpayer’s appeals and set aside the rulings of the Royal Malaysian Customs Department (“**Customs**”). Jason Tan Jia Xin and Jesslyn Teo Yi En of Lee Hishammuddin Allen & Gledhill’s Tax, Customs & Trade Practice successfully acted for the taxpayer. At the heart of the case was a fundamental question of tariff classification: can Customs move a product out of the specific tariff code that describes it and into a residual, “catch-all” code? In this case, the CAT allowed the taxpayer’s appeals and set the reclassification aside.

The Essentials

- **A specific heading beats a residual one.** A residual “not elsewhere specified or included” heading is a last resort. It should not be used where a specific heading already describes the goods.

KEY LAWYERS

DATO' NITIN NADKARNI
Consultant
nn@lh-ag.com



JASON TAN JIA XIN
Partner
tjx@lh-ag.com



IVY LING YIENG PING
Partner
il@lh-ag.com



CHRIS TOH PEI ROO
Partner
tpr@lh-ag.com



JESSLYN TEO YI EN
Associate
tye@lh-ag.com



- **The General Interpretative Rules apply in order.** Rule 1 comes first, and the Rule 3(c) tie-breaker is reached only after Rules 3(a) and 3(b). Skipping the earlier rules to land on a preferred code invites challenge.
- **Multi-component products may be classified as a whole.** Where a product is supplied as parts to be combined before use, the parts may fall to be classified together rather than separately. This depends on the particular goods and headings.
- **Evidence matters more than assumption.** The taxpayer's case was that Customs had classified the goods on its officer's own reasoning, without a site visit or end-user data, while its own witnesses conceded key elements of the specific heading under cross-examination.

Background

The taxpayer manufactures and sells adhesive and construction-chemical products. The dispute concerned the classification, under the Customs Duties Order 2022 (“**CDO 2022**”), of three of its two-component cementitious waterproofing products (collectively, “**Products**”). Each product has a liquid component that is mixed on site with a cement-based component to form a coating, which is applied onto concrete and other building surfaces to make them waterproof.

Customs gave the same component three different tariff codes in the space of about 14 months. It was first classified under sub-heading 3906.90.2000 (acrylic polymers), then under sub-heading 3824.50.0000 (non-refractory mortars and concretes), and finally, after the taxpayer applied for a review, under sub-heading 3824.99.9900 (other chemical preparations not elsewhere specified or included). Throughout, the composition, function and use of the component stayed the same. The taxpayer appealed to the CAT.

The Dispute

The single question was whether the Products fell under one of two headings:

- **Heading 32.14**, which covers “non-refractory surfacing preparations for facades, indoor walls, floors, ceilings or the like” (sub-heading 3214.90.0000), as the taxpayer contended;
- or
- **Heading 38.24**, a residual heading for “chemical products and preparations ... not elsewhere specified or included” (sub-heading 3824.99.9900), as Customs contended.

The Taxpayer's Case

The taxpayer's position was that a residual heading cannot be used where a specific heading already covers the goods, and that the Products fell squarely within Heading 32.14. It advanced several grounds, each sufficient on its own:

- **A residual heading is a heading of last resort.** Heading 38.24 applies only to chemical preparations “not elsewhere specified or included”. By its own words it cannot be used where another heading describes the goods. Courts applying the same Harmonized System in other jurisdictions have said the same.
- **Rule 1 already places the goods within Heading 32.14.** Classification starts with Rule 1 and ends there if Rule 1 settles the matter. The Products met every element of Heading 32.14: they are non-refractory, they are surfacing preparations, they are applied to walls, floors and similar surfaces, and they are used for waterproofing. Customs’ own witnesses accepted each of these elements under cross-examination.
- **Rule 3(c) was the wrong tool.** Rule 3(c) selects the heading that appears last in numerical order. It is reached only when Rule 3(a) (the most specific description) and Rule 3(b) (essential character) cannot resolve the question. A Customs officer accepted that Heading 32.14 is the more specific heading for waterproofing products. Once that is accepted, Rule 3(a) decides the matter in favour of Heading 32.14 and Rule 3(c) never arises.
- **Two components, but one classification.** The Products are supplied as a liquid component and a cement-based component that are mixed on site. The goods in dispute were the liquid components. Customs placed them in the residual chemical heading (Heading 38.24), while it had classified two of the three corresponding cement-based components under Heading 32.14. The WCO Explanatory Note to Heading 32.14 deals expressly with preparations whose constituents are mixed at the time of use, and keeps them within Heading 32.14 where the constituents are “intended to be used together”, are presented together, and are complementary to one another. The Products meet each limb, so the liquid should be classified together with its cement-based component under Heading 32.14, not separated into the residual heading.
- **The “visibility” objection does not hold.** Customs’ main objection was that the coating is often tiled over and so does not remain visible as a finished surface, which it said took the Products outside Heading 32.14. But the Explanatory Note states only that such preparations “generally” remain visible, not that they always do. In many common applications the Products do remain visible, for example in water tanks, lift pits and planter boxes, and Customs’ own officer accepted, when shown the evidence, that on that use the Products could be classified under Heading 32.14. In any event, the Explanatory Notes are an aid to interpretation and do not have binding force.
- **Assumption is not evidence.** Customs reached its view on its own reasoning rather than on evidence. Its officer confirmed under cross-examination that she carried out no site visit, gathered no contractor or end-user data, held no statistics on actual use, and had no working background in the waterproofing industry.

Customs' Position

Customs maintained that sub-heading 3824.99.9900 was correct. By the composition of the liquid component on its own, Customs accepted that the most specific heading would be Heading 39.06 (acrylic polymers). But because the liquid is meant to be used with its cement-based component, Customs assessed the goods as the combined mixture of cement, silica and acrylic polymer, and found that two headings could apply to that mixture: Heading 32.14 and Heading 38.24.

Applying the General Interpretative Rules, Customs argued that, although Heading 32.14 gave a more complete description of the mixture, the components were sold and marketed together as a retail set, so the two headings were to be treated as “equally specific” under Rule 3(a). Customs added that the mixture could be left visible as a finishing layer or be tiled over, and that the two uses were of equal merit, so the classification could not be resolved under Rule 3(a). Under Rule 3(b), Customs said the essential character of the mixture was waterproofing, which the Explanatory Notes to both headings could cover. As neither Rule 3(a) nor Rule 3(b) resolved the matter, Customs turned to Rule 3(c) and selected Heading 38.24 as the heading appearing last in numerical order. Under Rule 6, Customs had first chosen sub-heading 3824.50.0000 (non-refractory mortars and concretes) but, on review, considered the mixture was not a mortar or concrete and reclassified it under sub-heading 3824.99.9900 as an “other” chemical preparation.

The CAT's Decision

The CAT unanimously allowed all three appeals and set aside Customs' rulings. The effect is that Customs' reclassification of the Products under the residual Heading 38.24 no longer stands, and the taxpayer's appeals succeeded in full.

The CAT's written grounds are anticipated to provide further clarity on the legal position. In the meantime, our key takeaways from the decision are set out below.

What This Means for Your Business

Although this appeal concerned waterproofing products, the principles it raises are relevant to any business that imports, exports or manufactures goods classified under the CDO 2022.

- **Watch the catch-all.** If your goods are being moved into a residual “not elsewhere specified” heading, ask first whether a specific heading already describes them.
- **Insist on the right order.** The General Interpretative Rules are applied in sequence. A classification that skips Rule 1 or Rule 3(a) and jumps to Rule 3(c) is open to challenge.
- **Consider how multi-component products are assessed.** Where a product is supplied as separate parts that are intended to be combined before use, there may be a question whether the parts should be classified together rather than separately. How they are described, presented and intended to be used can be relevant. The correct treatment depends on the specific goods and headings.

Authors



JASON TAN JIA XIN
Partner
tjx@lh-ag.com



JESSLYN TEO YI EN
Associate
tye@lh-ag.com

Head Office

Level 6, Menara 1 Dutamas
Solaris Dutamas
No. 1, Jalan Dutamas 1
50480 Kuala Lumpur
Malaysia
Tel: +603 6208 5888
Fax: +603 6201 0122

Johor Office

Suite 21.01
21st Floor, Public Bank Tower
No.19, Jalan Wong Ah Fook
80000 Johor Bahru, Johor
Tel: +607 278 3833
Fax: +607 278 2833

Penang Office

51-12-E, Menara BHL Bank,
Jalan Sultan Ahmad Shah,
10050 Penang
Tel: +604 299 9668
Fax: +604 299 9628

Email

enquiry@lh-ag.com

Website

www.lh-ag.com

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- **Function over form.** Essential character is judged by what the goods do and how they are used, not by their composition or paperwork alone. Concessions from the authority's own technical witnesses can decide a case.
- **Treat shifting classifications as a red flag.** If the same unchanged product has been placed under different tariff codes over time, that inconsistency is worth examining closely. It does not, by itself, decide the correct code, but it is a sign that the classification should be reviewed.

Conclusion

This is a welcome outcome for businesses. While the CAT's full grounds are awaited, the result is a reminder that tariff classification should follow the established approach: a specific heading takes priority over a general one, the Interpretative Rules are applied in order, and the correct code turns on what the goods actually do rather than on the convenience of a residual heading. Any business facing a reclassification, an unfavourable Customs Ruling, or a change in Customs' position should check carefully whether the correct heading and the correct method have been applied.

*This alert is prepared for general informational purposes only and does not constitute legal advice. Specific legal advice should be sought for any particular circumstances. If your business is facing a tariff classification dispute, an adverse Customs Ruling, or any other tax or customs dispute, please contact **Jason Tan Jia Xin** (tjx@lh-ag.com) or Jesslyn Teo Yi En (tye@lh-ag.com).*