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Administrative Appeals Tribunal of Australia

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Roger Armstrong Agency and Anor and Chief Executive Officer of Customs [2013] AATA 399 (14 June 2013)

Last Updated: 28 June 2013

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL)
) No: 2013/1286
GENERAL ADMINISTRATIVE DIVISION)

Re: BAMBINI PTY LTD
Applicant

And: CHIEF EXECUTIVE OFFICER OF CUSTOMS
Respondent

TRIBUNAL: Deputy President J W Constance

DATE: 26 June 2013

PLACE: Melbourne

CORRIGENDUM TO DECISION [2013] AATA 399

In accordance with [section 43AA](#) of the [Administrative Appeals Tribunal Act 1975](#) (Cth), decision dated 14 June 2013 is amended as follows:

In paragraphs 3, 55 (including subheading) and 56 replace the words *Tariff Classification Order* with *Tariff Concession Order*.

.....[sgd].....

Deputy President

Administrative Appeals Tribunal

ADMINISTRATIVE APPEALS TRIBUNAL) Nos: 2012/0914, 2012/1307,

) 2012/1892, 2012/1976,

GENERAL ADMINISTRATIVE DIVISION) 2012/2369, 2012/2813,

2012/3387, 2012/3498,

2012/3899, 2012/4925, 2012/5592, 2013/0612

2013/1739, 2013/2664

Re: ROGER ARMSTRONG AGENCY
Applicant

And: CHIEF EXECUTIVE OFFICER OF CUSTOMS
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Deputy President
[\[2013\] AATA 399](#)

Division	GENERAL ADMINISTRATIVE DIVISION
File Number(s)	2012/0914, 2012/1307, 2012/1892, 2012/1976, 2012/2369, 2012/2813, 2012/3387, 2012/3498, 2012/3899, 2012/4925, 2012/5592, 2013/0612, 2013/1739, 2013/2664
Re	Roger Armstrong Agency APPLICANT
And	Chief Executive Officer of Customs RESPONDENT

File Number **2013/1286**

Re **Bambini Pty Ltd**

APPLICANT
And **Chief Executive Officer of Customs**
RESPONDENT

DECISION

Tribunal	Deputy President J W Constance
Date	14 June 2013
Place	Melbourne

2012/0914, 2012/1307, 2012/1892, 2012/1976, 2012/2369, 2012/2813, 2012/3387, 2012/3498, 2012/3899, 2012/4925, 2012/5592, 2013/0612, 2013/1739, 2013/2664 Applications by Roger Armstrong Agency

1. The reviewable decision of the Respondent made 7 February 2012 is set aside.
2. In substitution for the decision set aside it is decided that:

(1) the goods the subject of Tariff Advice Number 20343100 and being Grobag Baby Sleep Bags with a tog rating of 2.5 are classified under Heading **9404.30.00** Sleeping bags.

(2) the goods classified under Heading **9404.30.00** Sleeping bags are eligible for tariff concession under Tariff Concession Order **0814551**.

(3) the goods the subject of Tariff Advice Number 20343100 and being Grobag Baby Sleep Bags with tog ratings of 1 and .5 are classified under Heading **6307.90.29** Other.

2013/1286 Application by Bambini Pty Ltd

1. The reviewable decision of the Respondent made 14 September 2012 is set aside.
2. In substitution for the decision set aside it is decided that:

(1) the goods the subject of Tariff Advice Number 20480900 are classified under Heading **9404.30.00** Sleeping bags.

(2) the goods are eligible for tariff concession under Tariff Concession Order **0814551**.

.....[sgd J W Constance].....

Deputy President J W Constance

CATCHWORDS

CUSTOMS – Classification of goods – entitlement to Tariff Concession Order 0814551 – sleep bags for young children – bags fitted with internal material classified as bedding, items not so fitted classified as other made up articles – classification as babies' garments rejected – decision set aside.

LEGISLATION

[Customs Act 1901](#) (Cth)

[Customs Tariff Act 1995](#) (Cth) s 7(1)

CASES

Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic) [\(1987\) 72 ALR 591](#), 599

Re Sussan (Wholesale) Pty Ltd and Bureau of Customs [\(1977\) 1 ALD 89](#), 91

Re Tridon Pty Ltd and Collector of Customs [\[1982\] AATA 119](#); [\(1982\) 4 ALD 615](#), 620-621

REASONS FOR DECISION

INTRODUCTION

1. Under the [Customs Act 1901](#) (Cth) the rate of duty payable on goods imported into Australia varies according to their classification.
2. Both Applicants have imported articles described as “sleep bags” suitable for babies. The Chief Executive Officer has classified these items as “Other Babies Garments” which attract duty of 10%. The Applicants argue that the correct classification should be “Sleeping Bags” which attract duty of 5%.

ISSUES FOR DETERMINATION

3. There are two issues for determination.
 1. What is the correct classification of the goods?
 2. In the case of one of the items, if it is classified as a sleeping bag, is it entitled to the benefit of Tariff Classification Order **0814551** and therefore entitled to be imported duty free?
4. For the reasons which follow I have decided that the goods are correctly classified as “Sleeping Bags”.

DESCRIPTION OF THE GOODS

Exhibit A1 tendered by Roger Armstrong Agency, referred to in these reasons as Armstrong 1.

5. A photograph of this item is reproduced:



6. Armstrong 1 is a textile article comprised of two layers of cotton fabric assembled with polyester lining by stitching. The item is 112cm long, 33cm wide at one end gradually widening to 54 cm at the other. There is a zipper down one side and two flaps on either side at the narrow end. With the zipper closed and the flaps open the item is in the form of a bag open at the narrow end. With the flaps closed (by the use of press-studs) the item has a hole on each side of the top and a hole in the middle of the top, resembling the upper section of an article of clothing which does not have sleeves.

Exhibit B1 tendered by Bambini Pty Ltd, referred to in these reasons as Bambini 1.

7. A photograph of this item is reproduced:



8. Bambini 1 also is a textile article comprised of two layers of cotton fabric assembled with polyester lining by stitching. This item is 84cm long, 28cm wide at one end, gradually widening to 50cm at the other. There is a zipper in the front of the item which extends from 7cm from the top to 15cm from the bottom. There is a hole on each side of the top of the item and when the zipper is closed there is a hole in the middle of the top of the item, resembling the top of an article of clothing which does not have sleeves. In the back of the item is an opening 19cm long which can be closed with a velcro flap.

Exhibit A2 tendered by Roger Armstrong Agency, referred to in these reasons as Armstrong 2.

Exhibit A3 tendered by Roger Armstrong Agency, referred to in these reasons as Armstrong 3.

9. For the purposes of this application these two items are the same as Bambini 1 except that they do not have the polyester lining.

THE COMPETING CLASSIFICATIONS

10. The classification of Armstrong 1 and Bambini 1 contended for by the Applicants is:
 9404. *MATTRESS SUPPORTS; ARTICLES OF BEDDING AND SIMILAR FURNISHINGS (FOR EXAMPLE, MATTRESSES, QUILTS, EIDERDOWNS, CUSHIONS, POUFFES AND PILLOWS) FITTED WITH SPRINGS OR STUFFED OR*

INTERNALLY FITTED WITH ANY MATERIAL OR OF A CELLULAR RUBBER OR PLASTICS, WHETHER OR NOT COVERED.

.....
9404 .30.00 *Sleeping bags*

11. Roger Armstrong Agency argues that the correct classification of Armstrong 2 & 3 is:
6307. *OTHER MADE UP ARTICLES, INCLUDING DRESS PATTERNS*

.....
6307.90.29 *-Other*

12. The Chief Executive Officer contends that Armstrong 1 and Bambini 1 are correctly classified under one of the following classifications:

6209 BABIES' GARMENTS AND CLOTHING ACCESSORIES:

.....
6209.20.90 *---Other*

OR

6111 BABIES' GARMENTS AND CLOTHING ACCESSORIES, KNITTED OR CROCHETED:

6111.20 *-Of cotton:*

.....
6111.20.90 *---Other*

13. The classification of Armstrong 2 & 3 contended for by the Chief Executive Officer is **6209.20.90** set out above.

THE ACT AND RULES

14. The various classifications, including those set out above, are contained in Schedule 3 of the [Customs Tariff Act 1995](#) (Cth).
15. [Subsection 7\(1\)](#) of the Act provides :

The Interpretation Rules must be used for working out the tariff classification under which goods are classified.

16. The *Interpretation Rules* are set out in Schedule 2 of the Act. They relevantly provide:

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:*

...
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.*

...
 - (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.*

APPLICABLE PRINCIPLES

17. The following principles are applicable in determining the issues in dispute in this application.
- (i) Classification under Schedule 3 of the Act is to be determined in accordance with the Rules set out in Schedule 2.^[1]
 - (ii) As a first step the subject goods should be objectively identified in the condition in which they are imported;

identification is not determined by the intention of the importer in importing the goods or of the manufacturer in producing them.^[2]

(iii) Visual inspection will not necessarily be sufficient to identify the goods; further evidence may be required “to ascertain the relevant characteristics of the goods.”^[3]

(iv) Identification of the goods “cannot be controlled by the descriptions of goods adopted in the nomenclature of the Tariff.”^[4]

(v) Evidence of how goods are described by those who trade in or use the goods may be relevant, but not conclusive, in identifying the goods.^[5]

(vi) In identifying the goods reference may be had to their design features.^[6]

(vii) Once the goods have been identified it is then necessary to match the goods as identified to the correct classification in Schedule 3.

(viii) “All the descriptive terms, both specific and generic, by which the goods may fairly be identified may be relevant to the classification of the goods within the Tariff”^[7]

(ix) In classifying the goods evidence of the characteristics of the goods and/or the use to which the goods are to be put after importation may be relevant, depending upon the wording of the classification heading.^[8]

EVIDENCE AND FINDINGS OF FACT

Evidence of Ms Green

18. Ms Green is the National Co-ordinator of Health Promotion and Bereavement Support for *SIDS and Kids Australia*. She provided a statement dated 11 April 2013^[9] and gave evidence.
19. Ms Green’s duties include collaboration with key researchers and professional networks to develop evidence-based resources to support the *SIDS and Kids* Safe Sleeping program.
20. *SIDS and Kids* make six key recommendations for the safe sleeping of a baby and to reduce the risk of sudden unexpected death in infancy (SUDI), which includes sudden infant death syndrome. Included in these recommendations are:
 - (a) sleep baby on the back from birth, not on the tummy side;
 - (b) sleep baby with head and face uncovered.
21. Ms Green stated, in part:
 11. *SIDS and Kids* considers a safe baby sleeping bag to be one which is constructed in such a way that the baby cannot slip inside the bag and become covered. The sleeping bag should be the correct size for the baby with a fitted neck, armholes (or sleeves) and no hood. Advantages of safe baby sleeping bag use include but are not limited to:
 - (a) the prevention of the baby’s head and face becoming covered by bedclothes during sleep. Babies control their temperature through the large surface area comprising face and head. Sleeping baby on the back and ensuring that the face and head remain uncovered during sleep is the best way to protect baby from overheating and suffocation. The fact that the safe baby sleeping bag has a fitted neck hole and no hood ensures baby’s head remains uncovered during sleep.
 - (b) the postponement of the ability of the majority of babies to roll over during sleep until they are at an age where they are no longer at peak risk of SUDI.
 - (c) the enabling of the minority of babies that manage to roll over at an age when they are at peak risk of SUDI to push themselves up and clear their airway and/or roll back over into the back. The fitted armholes of the safe baby sleeping bag enable the baby to have their arms free to support this vital movement.
 - (d) sleeping bags prevent baby’s legs from dangling out of the cot rails.
 12. *Older babies* are able to roll over and move around in the cot. This movement can result in a loose blanket or sheet being pulled up over the baby’s head and face thereby increasing the baby’s risk of SUDI. This accidental head covering is prevented from occurring in a safe baby sleeping bag owing to its safe design.^[10]
 22. It is recommended by *SIDS and Kids* that all loose bedding be removed from the cot in which the baby is sleeping and that a safe sleeping bag be used as an alternative. The baby should wear appropriate clothing under the sleeping bag depending on the temperature of the room. The sleeping bag takes the place of a blanket, sheet or similar item.

Evidence of Mr Robinson, Industrial Designer

23. For the past two years Mr Robinson has been employed as a Product Designer by a company selling outdoor equipment. In that role he has designed sleeping bags for adults, but not children. Since he was a child Mr Robinson has used sleeping bags when sleeping in a tent.
24. Mr Robinson has a daughter aged two years. He describes the manner in which he and his wife use a Grobag (Armstrong 1) for their daughter as follows:

We put [our daughter] in her pyjamas and put her into the bag for sleeping. In the past when she would wake up at night we would go to her and comfort her and sometimes take her out of her crib. It wasn’t always necessary to take [our daughter] out of her bag and so we didn’t. It’s also a good way of making sure she is secure and can’t climb out of her crib.^[11]
25. Mr Robinson said that he does not refer to the Grobag as a “sleeping bag” although his wife sometimes does so. He is unaware of his friends using this description. There are children’s sleeping bags which are identical to adult sleeping bags apart from their size. Sleeping bags do not have openings for arms and commonly are fitted with hoods.

Evidence of Mr Montgomery, Managing Director

26. Mr Montgomery is the Managing Director of the company which employs Mr Robinson. The company designs, manufactures and imports sleeping bags. It does not design or sell sleeping bags for infants. He has provided sleeping bags for the use of his children (including when they were infants) which, apart from their size, were the same as adult sleeping bags.
27. In the opinion of Mr Montgomery almost all sleeping bags are designed with a hood and a cord to pull the hood tight, the emphasis in all designs being on warmth at night. Further in his opinion the inclusion of arm holes would not be acceptable in any design of a sleeping bag.

Documentary evidence

28. A number of documents are in evidence. I will refer to these documents in detail when considering the issues.

REASONING

Issue 1: What is the correct classification of the goods?

29. I have identified each of the goods earlier in these reasons.

Armstrong 1 and Bambini 1 – items constructed with two layers of cotton fabric with polyester lining.

30. I have decided that both these items are articles of bedding internally fitted with any material and therefore are properly classified under classification **9404**.
31. The Chief Executive Officer argued that the items are babies' garments. In summary the reasons advanced^[12] were:
 - o the goods are worn in the same manner as any other garment;
 - o they are worn while the baby sleeps, spends time in a bassinette, sits on the floor, is carried and when travelling in a pram or car;
 - o the goods are referred to by the generic name "Grobag" and have the same essential features, are used for the same purposes and are "one family" of goods;
 - o the essential nature of the goods is that of a garment;
 - o the goods are designed for use while a baby is sleeping and for other uses while not sleeping;
 - o the packaging of the goods refers to guidelines for what the baby should "wear";
 - o the packaging for Item 1 refers to the item as a "garment" in the washing instructions;
 - o the design of armholes and the "underarm air vents"(in the case of Bambini 1) are in the nature of the design of a garment;
 - o photographs (exhibit R8) and packaging show the items being "worn";
 - o the fact that the goods are worn over clothing does not distinguish them from garments;
 - o a garment may have more than one use, including uses not associated with sleep;
 - o the goods are designed to make it easy for a baby to fall asleep whilst wearing one of the items;
 - o various Australian Government organizations variously describe the goods as "nightwear";
 - o the goods are designed with consideration to style which in some instances is gender specific;
 - o the goods may be used as travel garments and in the case of Bambini 1, has a feature specifically designed for travelling;
 - o the items do not come within the ordinary meaning of "sleeping bags";
 - o the goods are not constructed in the manner of sleeping bags;
 - o the goods are not designed for outdoor use;
 - o the suppliers of the goods refer to them as "sleep bags", not "sleeping bags";
 - o the suppliers of the goods have attached to them fire warning labels required to be attached to garments; sleeping bags are not required to comply with regulations mandating the attachment of fire warning labels;
 - o the goods are commonly known in the community as "sleep bags" or "sleep sacks", not "sleeping bags";
 - o the goods have the indicia of a garment;
 - o the goods are not "stuffed or internally fitted";
 - o the ordinary meaning of "bedding" does not include the goods.

The design of the goods

32. On the basis of the evidence of Ms Green I am satisfied that the use of blankets or similar bedding items for a young child increases the risk of suffocation by reason of the child's head becoming covered. As a matter of common knowledge I am satisfied that a young child may move around sufficiently while sleeping to become uncovered and does not have the awareness or ability to cover himself or herself, thus increasing the risk of becoming cold whilst sleeping. The use of items such as the goods in question minimizes these risks, both of which are associated with the use of blankets.
33. I accept the evidence of Ms Green that the design of the goods with armholes and a neck opening prevents a young child from slipping down into the bag and experiencing the risk of suffocation from the child's face becoming covered by a blanket or the like. The armholes also keep the child contained within the item, preventing him or her becoming uncovered. Although this design feature is normally associated with a garment, in this case the reason for the design is to remove the risks of suffocation associated with the use of a blanket or a scaled-down version of an adult sleeping bag and to ensure the child is kept warm.

The description of the goods by the suppliers

34. The Chief Executive Officer has argued that the goods are referred to by the generic name “Grobag”. This is not correct. The item supplied by Roger Armstrong Agency^[13], which is called a “grobag” has packaging which claims “grobag” to be a registered trademark. The packaging of Armstrong 1 describes the item as a “baby sleep bag” (emphasis added).
35. The packaging of Bambini 1 describes it as an “airflow sleep bag” (emphasis added).
36. Although, as the Chief Executive Officer points out, there are references on the packaging to the goods as a “garment” and to the goods being “worn”, the over-all impression from the description of the goods on the packaging is that they are for use by a baby as an alternative to other forms of bedding.

Armstrong 1:

- “... we are very proud to have changed the way mums and dads put their babies to bed”;
- “... we are constantly improving and evolving your favourite nursery product”;
- “Grobag is FSID’s only recommended Baby Sleep Bag specialist – the UK cot death research charity which promotes and raises awareness of safer sleep for babies”;
- a nursery thermometer is included with the product;
- “This Baby Sleep Bag is for use in a cot or crib without additional bedding”;
- “A Grobag Baby Sleep Bag is a wearable blanket that will keep your baby at a comfortable temperature all night long”;
- a table of suggested clothing to be worn in conjunction with various grobags; the information is said to be “for guidance only based upon research using sheets and blankets”;
- “Never use a Baby Sleep Bag with a duvet”;
- “This product is not intended for use as a dressing gown”.

Bambini 1 :

- “Mesh underarm vents help baby sleep in comfort”;
- “Use over regular sleepwear”;
- “Not to be used with blankets or other coverings”;
- “... please consider factors such as the clothing the baby is wearing, the temperature the baby is wearing, the temperature of the infant’s room, the baby’s health, and the amount of bedding necessary to keep an individual infant warm”;
- “Included: free nursery thermometer door hanger to help you select which tog Skip Hop Sleep Bag to use and what sleepwear to put on your baby” (emphasis added);
- a guide for clothing to be worn in conjunction with the sleep bag is provided;
- “A Sleep Bag should not be used with any additional bedding such as a duvet”;
- “... for use in a cot or crib without additional bedding”;
- “This product is not intended for use as a dressing gown”.

37. The Chief Executive Officer correctly refers to both suppliers intentionally describing their goods as “sleep bags”, not “sleeping bags”. All of the goods have been manufactured in the United Kingdom where BSI British Standards use the term “sleep bag” to differentiate from “sleeping bag”. The Standards refer to the latter as being designed for use in leisure activities^[14]. There is no similar standard providing this differentiation in Australia and it should not determine the interpretation of Australian Customs classifications. I note the following definition of “sleep bag” in the Standards:

full length fabric bag with a neck opening and armholes but without sleeves, hood or specific areas for feet and legs, designed to contain a child and to provide sufficient warmth so as to remove the need for additional bedding when sleeping in a cot or similar product in which a child is contained.^[15]

Common description of the goods in the community

38. There is insufficient evidence to determine how the goods are referred to in the community in general. On the evidence available I am satisfied that the descriptions “sleep bag”, “sleeping bag” and “sleep sack” are used interchangeably.
39. Mr Robinson and Mr Montgomery gave evidence of the design, production and description of sleeping bags, although their evidence related principally to the nature of sleeping bags designed for adults. Both gave evidence that miniature versions of an adult sleeping bag are available for small children and that these items do not have arm holes and may be fitted with a hood and a drawstring. Undoubtedly such items would be properly classified as “sleeping bags”. Whilst I am satisfied on their evidence that copies of adult sleeping bags (without the safety features described by Ms Green) are available for children, the evidence of Mr Robinson and Mr Montgomery does not provide any reason to exclude the subject goods from the classification proposed by the Applicants. I am satisfied that there is more than one design of a sleeping bag suitable for small children available in the market.

Description of the goods by Australian Government organizations

40. The Chief Executive Officer argued that both *Standards Australia* and *Product Safety Australia* refer to infant sleep bags as nightwear for children when prescribing the mandatory fire safety warning to be attached to children’s nightwear.^[16] Such warning labels are attached to the goods in question.
41. The standards are expressed to apply to “infant sleep bags with sleeves or arm openings”. It is this feature which encloses the infant within the item and which attracts the requirement for a fire warning. The fact that an infant is enclosed within the item makes it logical that the same warning label be attached as is attached to clothing. However, as I have already referred to, this is a design requirement which arises from the use of the item as an alternative to bedding such as blankets and sheets.
42. Not all government agencies refer to similar items as clothing. An Australian website *ABC Parents*^[17] (published by the *Australian Broadcasting Commission*) refers to “an infant sleeping bag” as an alternative to wrapping a baby. The accompanying illustration shows an item similar to the subject goods except it has fitted sleeves.

Use and purpose of the goods

43. It was argued that the goods have multiple uses which indicate that they are something other than a sleeping bag. Exhibits R5 and R8 show photographs of babies awake and seated on the floor in the items. Reference was made also to the design feature of Exhibit B1 which allows a baby to be strapped into a pram or car seat.
44. There is no doubt that a baby may be enclosed in the goods at times other than when he or she is asleep and that this may include times spent travelling, whatever the form of conveyance. However it is usual for a child to be travelling in the goods when a child has been transferred from a sleeping environment or is expected to be placed in such an environment at the end of a period of travel. A child is unable to walk or crawl freely whilst enclosed in the goods. To carry a child whilst so enclosed is akin to carrying a child wrapped in a blanket rather than carrying a child in nightwear.
45. The photographs in evidence do show children engaged in activities other than sleep. However these photographs are for marketing purposes and do not of themselves indicate the true nature of the goods. In any event, it is not in issue that the goods may be used at times when a child is not asleep.
46. On the evidence available I am satisfied that the normal use of the goods is to cover a child while the child is sleeping. It does not matter that the goods may have other uses.

In *Re Sussan (Wholesale) Pty Ltd and Bureau of Customs* [18] the Tribunal said:

In seeking to establish whether goods fall within any specified category of goods at the time of importation, regard may be had to what may be their normal use or uses. It is not necessary to examine all the uses to which the goods might conceivably be put or to which they may actually be put. It is necessary only to look at what are the normal uses of the goods. It is possible, as is contended in this case, that an article may have more than one normal use. It is not necessary to speculate on the exact proportions of those uses nor whether one use is predominant over the other or others. All that is needed is that a use must be sufficiently substantial to constitute a normal use.

The style of the goods

47. The goods are designed with consideration as to style, including styling which may be gender specific in colour and/or pattern. Whilst the Chief Executive Officer argues that this is similar to clothing for which style and attributes are important, the same can be said of bedding. Babys' bedding, like clothing, commonly has decoration based on night-time themes (such as moons and stars) and may be gender specific. The style of the goods does not indicate that the goods should be classified as either bedding or garments.

Dictionary definitions

48. Counsel for the Chief Executive Officer referred me to the following dictionary definitions of "sleeping bag":

a large bag, usually waterproof and warmly lined, for sleeping in, especially for use out of doors.

- Macquarie Online Dictionary

a warm lined padded bag to sleep in, especially when camping.

- Oxford Online Dictionary.

49. These definitions both emphasise that the items are lined and especially are used out of doors. Both of the subject items are lined to provide the user with added warmth. There is nothing in the design of either to make it unsuitable for use out of doors in an appropriate environment.
50. Counsel for the Chief Executive Officer referred me to the examples of sleeping bags for infants depicted in Exhibit R14. These are miniatures of usual adult sleeping bags without neck and arm holes. However I have accepted the evidence of Ms Green that the reason for these additional features is the need for increased infant safety, rather than a change in the identity of the item itself. I have taken into account that Exhibit A1 when unzipped and Exhibit B1 when unbuttoned at the top resemble bags.

The construction of the goods

51. Each of Armstrong 1 and Bambini 1 has a lining within an outer shell. The lining is not sufficiently thick to enable the items to be described as "stuffed". However the heading of classification **9404** refers to items "internally fitted" as well as "stuffed" with any material. As the Chief Executive Officer argued, some sleeping bags are stitched to create a means of containing the stuffing. By reason of the thickness of the lining such construction is unnecessary in relation to the items in question.

Are the goods "worn"?

52. The Chief Executive Officer argues that the goods are worn and that it follows that the goods are garments. Counsel for the Chief Executive Officer referred to the definition of the verb "to wear" from the *Macquarie Online Dictionary*:

to carry or have on the body or about the person as a covering, equipment, ornament, or the like: to wear a coat, to wear a watch; to wear a disguise.

This definition indicates that the concept of wearing an item encompasses several different situations, one of which is

to have a covering on the body. This definition makes it clear that a covering, such as a sleeping bag, can be “worn”, just as a garment can be “worn”.

Are the goods an alternative to clothing?

53. The Chief Executive Officer argues that the tables on the packaging of each item show that the items are promoted as an alternative to clothing at the higher temperature ranges. This is an incorrect reading of the information provided. Rather than indicating that the item should be used as an alternative to clothing, a fair reading of the tables indicates that the item should not be used if the room temperature exceeds a specified level. Both items have a tog rating of 2.5. This indicates that they have a high warmth rating.

Armstrong 2 & 3 – items without a lining

54. For the reasons stated above, I am satisfied that these items are articles of bedding rather than garments. However as they do not have a lining and are not stuffed, they do not come within classification **9404**. I accept the argument of the Applicants that the correct classification is that set out in **6307**, namely “*OTHER MADE UP ARTICLES, INCLUDING DRESS PATTERNS*”. The relevant sub-paragraph is **6307.90.29** ---*Other*.

Issue 2: Are the goods, or any of them, entitled to the benefit of Tariff Classification Order 0814551?

55. Tariff Classification Order **0814551** applies to “9404.30.00 sleeping bags”. To be eligible the subject goods must fall precisely within the description of goods in the Tariff Classification Order.
56. As I have decided that Armstrong 1 and Bambini 1 are properly classified as sleeping bags and are therefore within classification **9404.30.00**, it follows that both these items come within Tariff Classification Order **0814551**.

CONCLUSION

2012/0914, 2012/1307, 2012/1892, 2012/1976, 2012/2369, 2012/2813, 2012/3387, 2012/3498, 2012/3899, 2012/4925, 2012/5592, 2013/0612, 2013/1739, 2013/2664 Applications by Roger Armstrong Agency

57. The reviewable decision of the Respondent made 7 February 2012 will be set aside.
58. In substitution for the decision set aside it will be decided that:
- (1) the goods the subject of Tariff Advice Number 20343100 and being Grobag Baby Sleep Bags with a tog rating of 2.5 are classified under Heading **9404.30.00** *Sleeping bags*.
 - (2) the goods classified under Heading **9404.30.00** *Sleeping bags* are eligible for tariff concession under Tariff Concession Order **0814551**.
 - (3) the goods the subject of Tariff Advice Number 20343100 and being Grobag Baby Sleep Bags with tog ratings of 1 and .5 are classified under Heading **6307.90.29** *Other*.

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59. The reviewable decision of the Respondent made 14 September 2012 will be set aside.
60. In substitution for the decision set aside it will be decided that:
- (1) the goods the subject of Tariff Advice Number 20480900 are classified under Heading **9404.30.00** *Sleeping bags*.
 - (2) the goods are eligible for tariff concession under Tariff Concession Order **0814551**.

I certify that the preceding 60 (sixty) paragraphs are a true copy of the reasons for the decision herein of Deputy President J W Constance.

.....[sgd].....
Administrative Assistant

Dated 14 June 2013

Dates of hearing	6 and 8 May 2013
Solicitor for the Applicant (Roger Armstrong Agency)	Mr Louis Gross Gross & Becroft Lawyers
Counsel for the Respondent	Mr James Millea Customs Legal Services Branch
Counsel for the Applicant (Bambini Pty Ltd)	Ms Caroline Kirton SC
Solicitor for the Applicant (Bambini Pty Ltd)	Ms Lyn Grant Hunt & Hunt

[\[1\]](#) *Customs Tariff Act 1995* (Cth) s 7(1).

[\[2\]](#) *Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic)* [\(1987\) 72 ALR 591](#), 599.

[\[3\]](#) *Chinese Food and Wine Supplies Pty Ltd v Collector of Customs (Vic)* supra.

[\[4\]](#) *Re Tridon Pty Ltd and Collector of Customs* [\[1982\] AATA 119](#); [\(1982\) 4 ALD 615](#), 620.

[\[5\]](#) *Re Tridon Pty Ltd and Collector of Customs* (1982) supra at 620.

[\[6\]](#) *Re Tridon Pty Ltd and Collector of Customs* (1982) supra at 621.

[\[7\]](#) *Re Tridon Pty Ltd and Collector of Customs* (1982) supra at 620.

[\[8\]](#) *Re Tridon Pty Ltd and Collector of Customs*(1982) supra at 621.

[\[9\]](#) Exhibit B2.

[\[10\]](#) Exhibit B2 pp.3-4.

[\[11\]](#) Exhibit R1 para.7.

[\[12\]](#) These reasons are set out in detail in the Respondent's written submissions dated 8 May 2013 and filed in the Tribunal.

[\[13\]](#) Exhibit A1.

[\[14\]](#) Exhibit A10 p.2.

[\[15\]](#) Exhibit A10 p.2.

[\[16\]](#) Exhibits R10 and R11.

[\[17\]](#) Exhibit A11.

[\[18\]](#) [\(1977\) 1 ALD 89](#), 91.
