[2016] UKUT 408 (TCC)

Appeal number: UT/2015/0114

CUSTOMS DUTIES– classification – Combined Nomenclature – whether "Beyblades" should be classified as "articles for… table or parlour games" within Heading 9504 or as "other toys" within Heading 9503 – GIR 3 tie-breaker – appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

HASBRO EUROPEAN TRADING BV **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: Judge Timothy Herrington
Judge Ashley Greenbank

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 14 June 2016

Laurent Sykes QC, for the Appellant

John Brinsmead-Stockham, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Hasbro European Trading BV ("Hasbro") against a decision of the First-tier Tribunal ("FTT") (Judge Brannan and Ms Elizabeth Bridge) released on 8 July 2015 (the "Decision").

2. The FTT decided that Hasbro's product, known as a "Beyblade", was correctly classified as "other toys" under Heading 9503 of the Combined Nomenclature ("CN") and not, as Hasbro contended should be the case, as "articles for… table or parlour games" under Heading 9504.

3. The basis of the Decision was that Heading 9503, as interpreted by the relevant Harmonised System Explanatory Note ("HSEN") (in this case HSEN 9503 D (xix)) provided a more specific description of a Beyblade than Heading 9504. The key issue for determination on this appeal is whether the FTT were right to take into account the HSEN in applying the tie-breaker provisions of Rule 3 (a) of the General Rules for the Interpretation of the CN ("GIRs"). That provision requires that when goods are prima facie classifiable under two or more Headings (it being common ground that was the position in this case) they should be classified by preferring the Heading which provides the most specific description.

4. Permission to appeal against the Decision was granted by Judge Brannan on 8 July 2015.

The facts

5. The relevant facts, which are set out in detail at [11] to [25] of the Decision, can be summarised as follows.

6. Beyblades are a form of spinning top. The tops are intended to be used for "head-to-head battling". They are set spinning by using a rip-cord powered launcher and are intended to be launched into a bowl-shaped arena, called a Beystadium. Although Beyblades are sold separately from the Beystadiums, their packaging typically contains the legend "only use Beyblades tops with a Beystadium (sold separately)."

7. The FTT accepted that Hasbro intended that Beyblades should only be used in Beystadiums. The design of the Beystadiums was such that it was intended to bring two Beyblades into contact with each other so that they could engage in "battle". The winner of the game was whoever's Beyblade was the last one still spinning, either because the other Beyblade had run out of energy and toppled over or had been toppled by its opponent's Beyblade in a collision or because the other Beyblade had been knocked into a pocket in the Beystadium.

8. Despite Hasbro's intentions, it was accepted that a Beyblade could be used without a Beystadium, such as on a desk or table, but the FTT found that this would limit their amusement value as their use in a Beystadium induced the Beyblades to come into contact with each other.

9. This appeal is only concerned with Beyblades which are sold separately from Beystadiums.

The Law

Legislation and principles of interpretation

10. The FTT relied at [26] of the Decision upon the summary of the legislative framework for the classification of goods for the purpose of EU customs duty set out by Henderson J in *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) at [7] to [14]. Neither party took issue with that summary and there is no need to repeat it here, although it is helpful to emphasise the following points from it:

(1) the tariffs and nomenclatures used by the EU in the CN conform to the Harmonised System administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as "HSENs";

(2) apart from the HSENs the European Commission also issues explanatory notes of its own to the CN which are known as "CNENs";

(3) the decisive criterion for the tariff classification of goods must be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and of the notes to the sections or chapters of the CN. The HSENs and the CNENs are an important aid to the interpretation of the scope of the various tariff headings, but do not themselves have legally binding force. The content of the HSENs and CNENs must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions;

(4) the CN contains General Rules for the Interpretation of the CN, known as "GIRs". Unlike the HSENs and the CNENs, they have the force of law.

11. So far as material to this decision, the GIRs provide as follows:

> "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) . . .
>
> (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) …

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

12. As regards the relationship between the CNENs and the HSENs, the Court of Justice of the European Union ("CJEU") stated in Case C-524/11 *Lowlands Design Holding BV v Minister van Financien* at [33]:

> "It must be borne in mind that the context of the Explanatory Notes to the CN, which do not take the place of those of the HS but should be regarded as complementary to them, and consulted jointly with them, must be consistent with the provisions of the CN and may not alter their scope…"

Relevant classification provisions and explanatory notes

13. It was common ground that Beyblades fell to be classified within CN Section XX ("Miscellaneous manufactured articles"), Chapter 95 ("Toys, games and sports requisites; parts and accessories thereof").

14. As explained above, the issue is whether Beyblades should be classified under Heading 9503 or Heading 9504.

15. CN Heading 9503 includes:

> "Tricycles, scooters, pedal cars and similar wheeled toys; dolls' carriages; dolls; other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds"

16. CN Heading 9504 includes:

> "Video game consoles and machines, articles for funfair, table or parlour games, including pintables, billiards, special tables for casino games and automatic bowling alley equipment."

17. Note 3 to CN Chapter 95 ("Note 3") provides that:

> "… parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles."

18. The introductory wording to the HSENs for Chapter 95 states that it covers:

> "toys of all kinds whether designed for the amusement of children or adults. It also includes equipment for indoor or outdoor games,…"

and:

> "identifiable parts and accessories of articles of this Chapter which are suitable for use solely or principally therewith."

19. HSEN 9503 D (xix) provides that Heading 9503 includes:

> "Hoops, skipping ropes, diablo spools and sticks, spinning and humming tops, balls (other than those of heading 95.04 or 95.06)."

20. Finally, there is an HSEN in relation to GIR 3 (a) which provides:

> "(III) The first method of classification is provided in Rule 3 (a), under which the heading which provides the most specific description of the goods is to be preferred to a heading which provides a more general description.
>
> (IV) It is not practicable to lay down hard and fast rules by which to determine whether one heading more specifically describes the goods than another, but in general it may be said that:
>
> (a) A description by name is more specific than a description by class (e.g., shavers and hair clippers, with self-contained electric motor, are classified in heading 85.10 and not in heading 84.67 as tools for working in the hand with self-contained electric motor or in heading 85.09 as electro-mechanical domestic appliances with self-contained electric motor).
>
> (b) If the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete.
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> Examples of the latter category of goods are:
>
> (1) Tufted textile carpets, identifiable for use in motor cars, which are to be classified not as accessories of motor cars in heading 87.08 but in heading 57.03, where they are more specifically described as carpets.
>
> (2) Unframed safety glass consisting of toughened or laminated glass, shaped and identifiable for use in aeroplanes, which is to be classified not in heading 88.03 as parts of goods of heading 88.01 or

88.02 but in heading 70.07, where it is more specifically described as safety glass.

(V) 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 than the others. In such cases, the classification of the goods shall be determined by Rule 3 (b) or 3 (c)."

The Decision

21. The FTT directed itself at [78] of the Decision that the starting point in any CN classification exercise must be the actual wording of the relevant heading, as interpreted by HSENs and CNENs (recognising that those interpretations are not legally binding but are persuasive). It then found at [78] and [79] that Beyblades were intended to be used in a "battling" and competitive game. Since Beyblades could be used in a game played on a table or indoors the FTT found that the game was a table or "parlour" game.

22. At [80] the FTT also found that a Beyblade, although intended by Hasbro to be used in a game, could also be regarded as a "toy" because it could be independently used as a spinning top and can be accurately so described either when used alone (outside the context of the game) or when used in a game, for example in a Beystadium.

23. It was clear that the FTT's finding that a Beyblade was a spinning top was central to its decision. It said at [82]:

"There seems to us little doubt that a Beyblade was intended as an item for amusement, albeit that Hasbro intended it to be used in the context of the game. Moreover, we thought there was considerable force in Mr Brinsmead-Stockham's submission that a Beyblade was essentially a spinning top and that HSEN 9503 D(xix) specifically provided that Heading 9503 included "spinning… tops." We further agreed with Mr Brinsmead-Stockham's submission that a Beyblade had an independent character as a spinning top in its own right whether or not it was part of the game."

24. Consequently, the FTT concluded at [84] that a Beyblade fell within both Heading 9503 and Heading 9504 and that it was obliged to apply the tie-breaker rules in GIR 3. Specifically, it applied GIR 3 (a) and concluded at [86] as follows:

"… Heading 9503 provides a more specific description of a Beyblade than Heading 9504. Heading 9503 specifically refers to "spinning… tops." There is no doubt in our view that a Beyblade is a spinning top. We agree with the submission that, in contrast, Heading 9504 gives a more general description of a broad class of items defined by reference to their function or intended use. This seems to us to be inherently a more general and less specific description. It is not necessary, therefore, to consider the application of GIR 3(c) since GIR 3(a) applies in priority."

25. Consequently, the FTT concluded that in accordance with GIR 3 (a), Beyblades are correctly classified under Heading 9503 "Other toys."

26. The Decision was originally released on 30 April 2015. On 9 June 2015 Hasbro applied to the FTT for permission to appeal against the Decision. The sole ground of appeal was that the FTT at [86] mistakenly considered that the application of GIR 3 (a) required a comparison between the term "spinning tops" (referred to as examples of toys in HSEN 9503 D(xix) and "articles for… table or parlour games" (the relevant wording of Heading 9504) whereas the correct comparison was between "other toys" (being the relevant actual wording of Heading 9503) and "articles for… table or parlour games" (the relevant wording of Heading 9504).

27. Hasbro invited the FTT to set aside its decision on the basis that it had erred in its application of GIR 3 (a).

28. In his decision on the application for permission to appeal, Judge Brannan accepted that the FTT had been incorrect to state in the first sentence of [86] of the Decision that Heading 9503 specifically refers to spinning tops. He went on to say:

> "… The Tribunal should have stated that "other toys" in Heading 9503 was interpreted by the relevant HSEN as including "spinning tops." It seems to me, however, that even if the Appellant is correct in its argument that GIR 3 (a) can only be applied by reference to the words of the headings, rather than by reference to those words as interpreted by the relevant HSEN, it is not clear that "other toys" should not be regarded as a more specific description of a Beyblades than "articles for funfair table or parlour games." For example, heading 9503 describes the class of articles falling within it by reference to the nature of the articles themselves rather than, as does Heading 9504, to their function. Moreover, it does not inevitably follow that if GIR 3 (c) were to be applied that Headings 9503 and 9504 "equally merit consideration"."

29. Accordingly, Judge Brannan declined to set aside the Decision and it was reissued on 8 July 2015 after various corrections to typographical errors had been made, alongside his decision granting permission to appeal.

Grounds of appeal and issues to be determined

30. Hasbro did not alter its grounds of appeal when, on 14 September 2015, it filed its Notice of Appeal in the Upper Tribunal, notwithstanding Judge Brannan's clarification of the reasoning in the Decision as made in his decision granting permission to appeal.

31. Nevertheless, from the manner in which the arguments were put to us in both parties' skeleton arguments, it is clear that the parties have proceeded on the basis that Hasbro is appealing against the conclusions at [86] of the Decision, as clarified by Judge Brannan's decision on the application for permission to appeal, as set out at [28] above. In essence, the arguments put to us by Hasbro as to why it contended that the FTT erred in those conclusions were as follows:

(1) the FTT was wrong in its application of GIR 3(a) to interpret "other toys" in Heading 9503 in the light of the HSENs, and in particular HSEN 9503 D (xix), as specifically including "spinning tops" as to do so would alter the scope of Heading 9503 and, accordingly, contrary to principle. In any event, the HSEN on the facts does not even purport to do so but merely provides an example of something falling within one of the headings;

(2) the FTT was wrong to conclude that even if GIR 3(a) must be applied without regard to the HSEN, then Heading 9503 provides, in any event, a more specific description of Beyblades than Heading 9504; and

(3) the FTT was wrong to conclude that, even if it was necessary to apply GIR 3(c) in order to determine the correct classification of Beyblades, it does not inevitably follow that Headings 9503 and 9504 "equally merit consideration" with the result that the goods should be classified under the heading which occurs last in numerical order.

32. We have therefore proceeded on the basis that the contentions set out at [31] above represent Hasbro's grounds of appeal and the issues that we need to determine on this appeal and we did not take HMRC to contend otherwise.

33. Hasbro applied for permission to adduce new materials that were not before the FTT as follows:

(1) various Binding Tariff Informations issued by Belgium, Germany and the UK relation to Beyblades;

(2) a decision of the Valencia Special Local Office in relation to the classification of Beyblades; and

(3) a decision of the French Customs Appraisal and Conciliation Commission in relation to the classification of Beyblades.

HMRC did not object to the new material being produced and accordingly we granted the application.

Discussion

34. We shall deal with each of the three grounds of appeal in turn.

Ground 1: the correct approach to the interpretation of GIR 3(a)

35. Mr Sykes submits as follows. GIR 3(a) refers to the language of the Headings, not the language of the relevant HSEN. To take into account the HSEN in the manner which the FTT did in the Decision would be to alter the language of heading 9503. GIR 3(a) must be applied without treating the HSEN as modifying the heading which is sought to be compared with the different heading. In other words, Mr Sykes submits that the exercise to be undertaken in the application of GIR 3(a) is a purely textual analysis of the wording of the two Headings, without reference to the HSENs.

36. Once that exercise has been undertaken, Mr Sykes submits, it is then permissible to undertake a "sense check" of the conclusion by reference to the

relevant HSEN and ask the question as to whether anything in the HSEN causes a reappraisal of the conclusion arrived at by the textual analysis. So, applying the principle in this case, having ascertained from the comparison of the two Headings alone that "articles for……table or parlour games" is a more specific description than "other toys", the question is whether that conclusion is affected by the fact that the HSEN relevant to "other toys" states that spinning tops are included within that description. Mr Sykes submits that, in this case, the "sense check" would lead to the conclusion that what is referred to in the HSEN is a traditional spinning top rather than the more modern Beyblade, an object to be used in a competitive game. That, he submits, would lead to the conclusion that the HSEN was not intending to include such an item. Consequently, the result arrived at by the textual analysis of the two Headings, namely that "other toys" is a broader category, is not affected by the "sense check".

37. Mr Sykes submits that HSENs may explain what the words of a Heading mean but in this case the relevant HSEN merely provides an example of what falls within the scope of the Heading; it does not explain what a toy is. The authorities show that it is impermissible to read the HSEN as if it were contained in the Heading because to do so would rewrite the Heading and narrow its scope.

38. In any event, Mr Sykes submits, the wording of HSEN 9503 D(xix) itself demonstrates that Heading 9504 is to take priority over Heading 9503 because of the words in parentheses at the end of the Note which exclude from its scope any of the items mentioned in it which fall within Heading 9504.

Relevant authorities

39. We were referred to a number of authorities which are relevant to Mr Sykes's submissions as follows.

40. In *Develop Dr Eisbein GmbH & Co v Hauptzollamt Stuttgart-West* (C-35/93) [1994] ECR I-2655 an importer sought to rely on the terms of paragraph VI of HSEN GIR 2 (a) which purported to limit the scope of the words "unassembled or disassembled" in GIR 2 (a) so that they only included imported components if "simple assembly operations are involved".

41. The CJEU emphasised at [18] of its judgment the fundamental principle of customs classification that the preference is, in the interests of legal certainty and ease of verification, to have recourse to criteria for classification based on the objective characteristics and properties of products, as defined in the wording of the headings of the Common Customs Tariff and of the notes to the sections or chapters, which can be ascertained on the occasion of customs clearance. In the light of this principle, it held at [19] that GIR 2 (a) must be interpreted to mean that an article is to be considered to be imported unassembled or disassembled where the component parts (the parts intended to make up the finished product) are all presented for customs clearance at the same time and no account is to be taken in that regard of the assembly technique or the complexity of the assembly method.

42. The CJEU therefore held that the HSEN could not affect that interpretation. Its reasoning was set out at [21] and [22] as follows:

> "21. The Court has stated on many occasions that the Explanatory Notes to the nomenclature of the Customs Cooperation Council constitute an important means of ensuring the uniform application of the Common Customs Tariff by the customs authorities of the Member States and as such may be considered a valid aid to the interpretation of the tariff. However, those notes do not have legally binding force, so that, where appropriate, it is necessary to consider whether their content is in accordance with the actual provisions of the Common Customs Tariff and whether they alter the meaning of such provisions…
>
> 22. The meaning of the second sentence of Rule 2(a), as apparent from its wording, would be considerably altered if, in applying it, account had to be taken of the assembly technique or the complexity of the assembly method. Consequently, if paragraph VI of the Explanatory Notes did bear the interpretation attributed to it by Develop Eisbein, it could not be taken into consideration."

43. Mr Sykes submitted that this reasoning supported his contention that GIR 3 (a) must be applied without treating the HSEN as modifying the heading which is sought to be compared with a different heading. However, in our view *Eisbein* does not go so far as Mr Sykes contends. The case is authority for the proposition that there is a limit on the relevance of HSENs because they are not legally binding and that limit is that they must be consistent with the headings of the CN and not, as the CJEU said in *Eisbein,* alter the scope of those headings. That does not necessarily mean that the HSEN must be disregarded in all circumstances when applying GIR 3(a).

44. That conclusion is consistent with the judgment of the CJEU in *JVC France SAS v Administration des douanes* (Case C-312/07) [2008] ECR I - 10661 where the court held at [34]:

> "The Court has also held that the explanatory notes to the CN and those to the HS are an important aid for interpreting the scope of the various tariff headings but do not have legally binding force. The wording of those notes must therefore be consistent with the provisions of the CN and cannot alter their scope… Where it is apparent that they are contrary to the wording of the headings of the CN and the section or chapter notes, the explanatory notes to the CN must be disregarded…"

45. In *HMRC v GE Ion Track Ltd* [2006] EWHC 2294 (Ch) Briggs J considered the application of the HSENs in applying the tie-break provisions of GIR 3(a). He said at [19]:

> "(1) The unanimous jurisprudence of the European Court of Justice is that the HSENs are not of legal force, but only a guide to construction to the terms of the headings, the section and chapter notes, and the GIRs, all of which are the legally binding structure for classification purposes.
>
> (2) Nothing in the *Vtech* case could or even purports to require a contrary conclusion.

> (3) It cannot be right, as the Commissioners seek to do, to treat the exclusionary notes in HSENs as a separate self-standing code for the resolution of apparent ties between headings, independent of and to be used before any reference is made to GIR 3, so that GIR 3 is excluded in any case where an HSEN exclusion breaks the tie."

46. In that extract Briggs J refers to the judgment of Lawrence Collins J in *VTech Electronics (UK) Ltd v CCE* [2003] EWHC 59 (Ch). He also referred to that judgment in the following terms at [23] of his judgment:

> "No doubt Lawrence Collins J was correct to say that a careful reading of the relevant terms of the relevant headings of any relevant chapter and section headings, assisted, but not governed, by the HSENs, while using them as a guide to interpretation, will often identify only one appropriate heading, rather than calling for a Rule 3 tie-break as it did in that case. Often the positive rather than the exclusionary provisions of the relevant HSENs will shed brighter light on the appropriate heading to be adopted."

47. In our view, the first of the passages quoted above merely confirms the CJEU jurisprudence that it is not permissible to use the HSENs so as to narrow the scope of the relevant Heading. Thus Briggs J concluded that the exclusionary provisions of the relevant HSENs could not be used in that case because they would have had the effect of narrowing the scope of the Heading. The second passage quoted demonstrates that the relevant HSENs can more often be used where they are expressed in positive form. In our view, that supports the proposition that the HSENs can be used as an aid to interpretation when they explain what is covered by a particular Heading provided that they are not incompatible with the Heading.

48. In *A-Dec Dental UK Limited v HMRC* [2014] UKFTT 351 the FTT said this at [33] seeking to apply GIR 3(a) in relation to a dental lamp which it found fell within the scope of two Headings:

> "Our starting point must be the wording of the two relevant sub-headings (which, of necessity, includes the wording of the associated headings and sub-headings within which they fall). It is clear that the law requires us to interpret these headings, applying the GIRs. Any reference to the HSENs can only have effect to the extent they are compatible with the provisions of the CN and we must resist any temptation to approach our task as a composite exercise of interpreting the provisions of the CN and the HSENs together, as if they were of equal authority."

49. Again, we see nothing in this passage which specifically rules out the use of the HSENs as an aid to interpretation of a Heading when applying GIR 3(a). The passage merely cautions against treating the provisions of the CN and the HSENs as if they were of equal authority, which is, of course, consistent with the European jurisprudence.

50. In *Xerox Limited v HMRC* [2015] UKUT 631 the Upper Tribunal (Nugee J) found that the FTT had made an error of law when deciding whether engineered solid "ink sticks" were classifiable as "printing ink" rather than "parts of printers". Nugee J

remade the decision, applying GIR 3(a). He accepted HMRC's submission that the exercise was in essence a textual comparison of the two competing Headings at [62] of the decision but in so doing he applied the HSENs relating to the GIR rather than any other HSENs that were specific to the two competing Headings: see [66] of the Decision. Having followed that approach, he concluded that the goods in question were to be classified as inks, being a more specific description than parts of printers.

51. Mr Sykes relies on *Xerox* to support his submission that the HSENs are not be used as an aid to interpretation when applying GIR 3(a), but that there should be merely a textual comparison of the two competing headings. We reject that submission. At no point in his decision does Nugee J say that there should be no recourse to the HSENs. He simply did not go to them in this particular case and the reason he did not is clear from [33] of the decision where he records the FTT as having found that the relevant HSEN left matters unclear. Nugee J agreed with that assessment and accordingly it is no surprise that he did not refer to it when remaking the decision. Indeed, he said at [33] that if the HSEN had directly answered the question whether solid ink such as the goods in question were within the relevant heading there would have been little room for argument on the question.

52. Mr Brinsmead-Stockham referred us to a number of cases where the CJEU has clearly applied an HSEN so as to conclude that a specific product mentioned in the HSEN is to be regarded as falling within the scope of a Heading, as an example of the type of product covered by the Heading. The cases in question were *Daiber* (Case C-200/84) [1985] ECR 3377, *Kawasaki Motors Europe NV* (Case C-15/05) [2006] ECR I-3659, and *Delphi Deutschland GmbH* (Case C-423/10) [2011] ECR 4003. We found these cases to be of limited assistance in that, as Mr Sykes correctly submitted, none of them dealt with the application of GIR 3(a) and all were concerned with the necessarily prior exercise of assessing whether the goods concerned fell within the scope of a particular Heading. The cases do, however, confirm the underlying principle that HSENs can be used as an aid to interpretation as long as they do not alter the scope of the Heading. They do not assist us materially with the question as to whether that principle applies in the context of the application of GIR 3(a).

53. We were referred to one case by Mr Brinsmead-Stockham where it was clear that reference had been made to an explanatory note in the context of the application of GIR 3(a). In *Lowlands Design Holding BV v Minister van Financien* (Case C-524/11) [2012] All ER 154, the question to be determined was whether the CN must be interpreted as meaning that romper bags of certain size intended for babies or young children must be classified as babies' garments or as sleeping bags. The CJEU held that the former was the case. Its reasoning was set out at [28] to [30] as follows:

> "28. It is apparent, moreover, from the CN explanatory note applicable to heading 6209 that, as is similarly stated in the explanatory note relating to the interpretation of heading 6209 of the HS, heading 6209 covers a certain number of articles intended for young children, including pixie suits and playsuits. Such products have characteristics which, while not identical to those of the products at issue in the main proceedings, are nevertheless similar to them. The products thus covered by the explanatory note relating to heading 6209 of the CN

> expressly include certain types of sleeping bags with sleeves and arm-holes, which in general are intended for infants of not less than 18 months.
>
> 29. Lowlands Design submits in that regard that the CN explanatory note relating to heading 6209 is incompatible with Note 1 (s) of Section XI of the CN, since that note expressly excludes from the scope of that section the products listed in chapter 94 of Section XX of the CN, which include, under subheading 9404 30 00, sleeping bags. However, it should be noted that that section note must be understood as merely stating that the articles classified in Chapter 94 do not fall within Section XI.
>
> 30. In the light of general rule 3 (a) for the interpretation of the CN, from which it is apparent that the heading which provides the most specific description is preferred to headings providing a more general description, the products at issue in the main proceedings do not fall under subheading 9404 30, but must be classified, in principle, under subheading 6209 20 00."

54. Mr Sykes submits that *Lowlands Design* is an example of where reference to the HSEN was made simply to confirm that the wording of a Heading applied. He therefore sees it as an example of the use of the HSEN as a "sense-check" after having decided that the product came within the scope of a particular Heading.

55. We do not see that two-stage approach as being apparent from the wording of [28] of the CJEU's judgment. In our view, the CJEU has carried out an exercise of interpreting the Headings in the light of the relevant explanatory notes. In other words, the Court has concluded that by reference to the examples contained in the explanatory notes, the product in question falls within the scope of the relevant Heading and that the explanatory note does not alter the scope of the Heading.

56. Mr Sykes also relies on two decisions made in respect of the customs classification of Beyblades in two other member states. These are the two decisions referred to at [33] above.

57. The first decision is that made by the Valencia Special Local Office of the Regional Unit of Customs and Special Taxes on 26 June 2013 (the "Spanish Decision").

58. The Spanish Decision appears to be an administrative rather than judicial decision and accordingly in our view it has no precedent value. The penultimate paragraph of the decision contains the finding on the classification of Beyblades as follows:

> "The spinning tops imported (made of plastic) considered individually are regarded as toys and their tariff classification would, as reasoned by the inspectorate in the body of the memorandum, be code 9503 0095. However, having found that they are intended exclusively or principally to form part of a parlour game, in accordance with the provisions of Note 3 to Chapter 95, they have to be classified as that parlour game."

59. It is clear that the Spanish Decision was not arrived at by any consideration of GIR 3(a). The basis of the decision was that the Beyblades had to be classified as parts and accessories for use solely or principally with parlour games by application of Note 3 to Chapter 95 and accordingly had to be classified under heading 9504. Hasbro has made it clear in its grounds of appeal that it does not seek to rely on Note 3 to Chapter 95 and accordingly, in our view, the Spanish Decision has no relevance to the issues that we have to decide in relation to Ground 1 of Hasbro's grounds of appeal.

60. The second decision is that made by the Customs Appraisal and Conciliation Commission of France, a body which we were told is a judicial tribunal having equivalent jurisdiction to that of the FTT. On that basis, this decision (the "French Decision") will have little precedent value.

61. The final paragraph of the French Decision contains the finding on the classification of Beyblades as follows:

> "Examination of the objects at issue shows that they constitute the various parts of a game in which several players, each using one or more spinning tops, have to confront one another on a sort of mat (stadium) even if, as the customs administration emphasises, each of the spinning tops can be disassociated from the remainder and be used independently of the stadium. By application of general interpretation rule 3 a and note 3 of chapter 95, these games fall under heading 9504, which expressly mentions board games and is more specific than heading 9503, which covers "other toys". The fact that spinning tops are referred to by name in note D) 19) of the Explanatory Notes of the Harmonised System (NESH) pertaining to heading 9503 has no effect, since that note indicates expressly that it does not apply to spinning tops that come under heading 9504. It is therefore appropriate to classify these objects under heading 9504 90 80."

62. It is clear that the French Decision is based partly on the application of Note 3 to CN Chapter 95 and, for the reasons given above in relation to the Spanish Decision, to that extent the decision is of no assistance to us in this case.

63. In relation to its very short analysis of the application of GIR 3 (a), in our view, the decision provides no assistance on the question as to whether it is permissible to use the HSEN as an aid to interpretation when applying that rule. The decision does not, as Mr Sykes appeared to submit that it did, indicate that the French tribunal applied the two-stage approach that he submits is the correct approach to be followed. On the contrary, the decision seems to indicate that reference to the HSEN is appropriate but, in this particular case, the tribunal held that the HSEN was not applicable.

64. The basis of the finding that HSEN 9503 D (xix) was not applicable was that the words in parentheses at the end of the provision applied so as to exclude all the items mentioned in so far as those items fell within heading 9504.

65. Mr Brinsmead-Stockham submits that this interpretation was incorrect in that it was clear that the words in parentheses only operated so as to exclude from the scope of Heading 9504 "balls" that fell within that heading and not any of the other items.

66. In our view, Mr Brinsmead-Stockham must be right on this point; the only item included in the HSENs to Heading 9504 as an example of items covered by that Heading which could possibly be an example of the matters specified in HSEN 9503 D (xix) is billiard balls and the only items included in the HSENs to Heading 9506 which could possibly be examples of the matters specified in HSEN 9503 D (xix) are the various types of balls referred to, such as golf and tennis balls. In any event, Mr Brinsmead-Stockham referred us to a number of other lists of items in the various HSENs to Chapter 95 where the punctuation is clearly consistent with an approach which only applies exclusionary or explanatory wording in parentheses to the item immediately before the parenthesis rather than all of the items in the list and we have no reason to believe that the draftsman intended anything different in relation to HSEN 9503 D (xix).

67. Consequently, in our view, the reasoning in the French Decision discloses an error of law in relation to its interpretation of HSEN 9503 D (xix) and we can place no reliance on it.

68. Mr Sykes' submission that what is referred to in HSEN 9503 D (xix) is a traditional spinning top rather than the more modern Beyblade, which is an object to be used in a competitive game, requires us to consider whether the question as to whether a Beyblade is a spinning top is a question of law or a question of fact. If it is a question of fact there is no basis on which we should interfere with the FTT's finding that a Beyblade was a spinning top in the absence of any challenge on *Edwards v Bairstow* grounds which does not feature in any respect in Hasbro's grounds of appeal.

69. Mr Sykes referred us to the decision of the Upper Tribunal in *HMRC v Cooneen Watts & Stone Limited* [2014] UKUT 0031 in this context. In that case, the question for determination was whether a jacket which had a specialist protective function was correctly classified as an "other garment". Nugee J, sitting in the Upper Tribunal, held that whether "other garment" means a garment other than the garments specified elsewhere in the relevant chapter, and whether "jacket" means a jacket however specialised were questions of law. He said this at [71] and [72] of the decision:

> "71. Both seem to me to be points of law. The first is a question of interpretation. It is akin to the question what "trade" means which Lord Radcliffe referred to in *Edwards v Bairstow*. The answer may be a very wide one, and if it is, it is a matter for the person making the factual evaluation to say whether it falls within that wide field; the permissible limits of the meaning are a matter of law. See also the decision of Briggs J in *HMRC v GE Ion Track Ltd* [2006] EWHC 2294 (Ch) at [30] which records a submission that there is a distinction between construction (in that case of GIR 3), which is a question of law; and applying the construction to the facts, which is not. Briggs J did not need to decide if that submission was right, but in my judgment the distinction was rightly drawn and applies equally to the interpretation of the CN headings themselves, so long as

> what the appellate tribunal is really being asked to do is answer a question of construction rather than a disguised factual question.
>
> 72. The second issue is even more clearly a matter of law. It is a question of legal principle whether it is permissible for a person making a tariff classification to take account of the functions of the goods in question when that function is not referred to in the heading in question. There is a clear issue between the parties on this but I do not see how that can possibly be characterised as a factual issue. It is an issue of law, to be decided by reference to the European jurisprudence, and both counsel have referred me to a number of the decisions of the Court of Justice in the course of their submissions on the issue."

70. In our view, the situation in this case is quite different to that in *Cooneen Watts.* Whether or not a Beyblade is a spinning top appears to us to be a primary fact to be determined by the FTT. We can see that in *Cooneen Watts* the tribunal had to decide whether the word "jacket" when used in the context of the CN had to be given a specialised meaning and that was a question of law. There is nothing in the context in which the term "spinning top" is used in HSEN 9503 D (xix) that suggests it was intended that it be given a specialised meaning and accordingly, in our view, whether or not a Beyblade is correctly described as a spinning top is to be determined by the FTT as a primary fact.

71. We were referred by Mr Brinsmead-Stockham to *Brutus v Cozens* [1973] AC 854 where the question for the House of Lords in relation to section 5 of the Public Order Act 1936, which made it an offence for a person in a public place or at a public meeting to use, inter-alia, "insulting" words or behaviour with intent to provoke a breach of the peace, was whether the meaning of the word "insulting" was a matter of law. Lord Reid said at page 861C to E:

> "The meaning of an ordinary word of the English language is not a question of law. The proper construction of a statute is a question of law. If the context shows that a word is used in an unusual sense the court will determine in other words what that unusual sense is. But here there is in my opinion no question of the word "insulting" being used in any unusual sense. It appears to me, for reasons which I will shall give later, to be intended to have its ordinary meaning. It is for the tribunal which decides the case to consider, not as law but as fact, whether in the whole circumstances the words of the statute do or do not as a matter of ordinary usage of the English language cover or apply to the facts which have been proved. If it is alleged that the tribunal has reached a wrong decision there can be a question of law but only of a limited character. The question would normally be whether their decision was unreasonable in the sense that no tribunal acquainted with the ordinary use of language could reasonably reach that decision."

72. It is clear to us that the phrase "spinning top" involves the ordinary use of the English language. There is nothing in the context in which it is used that suggests it should be given anything other than its ordinary meaning or that it should be confined to what Mr Sykes describes as a "traditional spinning top". On that basis, it was the task of the FTT to examine the Beyblade (and indeed it had extensive witness evidence and a demonstration of the article to assist it) and then conclude whether, on

the basis of what they saw, it was correctly described as a "spinning top" applying the ordinary meaning of those words. As we have also said, it is no part of Hasbro's grounds of appeal that no reasonable tribunal could have come to that conclusion on the basis of the evidence before it.

Conclusion on Ground 1

73. In our view, there is nothing in the relevant authorities which precludes a tribunal considering the application of GIR 3 (a) from taking into account the content of the relevant HSENs when comparing the two Headings under consideration. Indeed, we would go further and, in agreement with Mr Brinsmead-Stockham's submissions, say that the tribunal is required to take that approach. In our view to do so does not alter the scope of the relevant Heading unless the content of the relevant HSENs are incompatible with the Heading in question.

74. In our view in this case HSEN 9503 D (xix) is an example of a note in positive rather than negative form in that it is an aid to interpretation of what is included in the term "other toy" as that term is used in Heading 9503. To use the HSEN in that manner so as to explain what is covered by the Heading does not in our view alter the scope of the Heading or modify its wording. HSEN 9503 D (xix) is therefore not incompatible with Heading 9503. The exercise to be carried out is one of comparison of what is covered by the two Headings, not a comparison of the wording of the two Headings.

75. We are reinforced in our view by the wording of GIR 1 that requires classification to be determined according to the "terms of the headings and any relative section or chapter notes"; that provision does not refer to the "wording" of the headings. In our view the reference in GIR 3 (a) to "the heading which provides the most specific description" must be read in a manner which is consistent with the requirements of GIR 1 and on that basis the reference must be as if it required an exercise involving an examination of what was covered by the heading rather than merely the words of the heading itself. In carrying out that exercise, the tribunal is required to use the HSENs as an aid to interpretation. None of the authorities relied on by Mr Sykes suggests otherwise.

76. Nor do we find any support in the authorities for Mr Sykes's submission that the exercise involves a two-stage approach, with the reference to the HSEN being made as a "sense check".

77. Even if Mr Sykes is right on that, application of the approach in this case will not help him. We have concluded that the question as to whether a "Beyblade" is a spinning top is a pure question of fact to be determined by the FTT. Thus a reference when carrying out the the "sense check" to HSEN 9503 D (xix) could not lead to the conclusion that "spinning top" as used there meant only a traditional spinning top and not the rather more modern version in the form of a Beyblade. The FTT made a clear finding of fact that a Beyblade was a form of spinning top, no more and no less. On that basis this "sense check" would lead to the clear conclusion that the term "other toy" included a Beyblade because it was a "spinning top".

78. As regards Mr Sykes's submission that the words in parentheses at the end of HSEN 9503 D (xix) demonstrate that Heading 9504 is to take priority over Heading 9503, in the light of our finding at [66] above as to the correct construction of that provision, we must also reject that submission.

79. It follows from this analysis that we can find no error of law in the Decision in relation to Ground 1. The FTT, having found that Beyblades were a "form of spinning top" and that Heading 9503, interpreted in accordance with HSEN 9503 D (xix), specifically includes "spinning tops" correctly found that Heading 9503 provided a more specific description of a Beyblade than Heading 9504 for the purposes of GIR 3 (a). This is because such description is clearly more specific than "articles…… for table or parlour games". As a consequence, the FTT correctly in our view concluded that Beyblades must be classified under Heading 9503.

80. Our conclusions on Ground 1 are sufficient to dispose of this appeal in favour of HMRC. Grounds 2 and 3 can only be of relevance if we are wrong in our conclusions on Ground 1. Moreover, as far as Ground 2 is concerned, since Mr Sykes said during his submissions in respect of Ground 1 that it is permissible to refer to the HSENs as a "sense-check" having undertaken the exercise of comparing the two Headings alone to obtain the answer as to which gives a more specific description of the goods, then in view of our findings at [77] above, even if we had accepted Mr Sykes's submissions on that point it was inevitable that Hasbro would fail on Ground 2 in any event. However, since we heard arguments on the other grounds we will deal with them briefly.

Ground 2: whether the wording of Heading 9503 provides a more specific description of Beyblades than Heading 9504

81. For the purpose of this discussion, we are assuming that the exercise to be undertaken by the tribunal when applying GIR 3 (a) is a comparison of the wording of the two Headings from which the tribunal must decide which of the two Headings provides a more specific description of Beyblades.

82. It was common ground that where a heading contains a number of descriptions, the correct approach is to compare the part of the one heading which includes the relevant description with the part of the other heading which includes the relevant description rather than comparing the headings in their entirety. So in this case, the comparison to be made should be between (paraphrasing Heading 9503) "toys (other than tricycles, scooters, pedal cars and similar wheeled toys, doll's carriages and dolls)" and (paraphrasing Heading 9504) "articles for table or parlour games including pintables."

83. There is clear authority for the proposition that a heading is more specific, and less general, if it encompasses a narrower range of items. In ***Ruma GmbH v Oberfinanzdirecktion Nurnberg*** [2007] EUECJ C -183/06 the ECJ said the following at [35] and [36] of its judgment:

> "35. According to the wording of point 3 (a) of the general rules for the interpretation of the CN in Part One, Section I, A, of the CN, which specifically

> covers the situation where goods are prima facie classifiable under two or more headings, "the heading which provides the most specific description shall be preferred to headings providing a more general description". In the present case, it must be pointed out that, as regards the objective characteristics and properties of the keypad membrane at issue in the main proceedings, and in particular given the fact that it refers expressly to "[p] arts of apparatus of sub- headings… 8525 20 91", namely to parts of mobile telephones, subheading 8529 90 40 provides a more specific description than subheading 8538 90 99 which covers a much wider and more varied range of goods, as shown by its title read in conjunction with that of heading 8537.
>
> 36. The intended use of a product may also constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties…"

84. We therefore accept Mr Sykes's submission that the exercise requires identification of how broad is the range of products encompassed by each relevant description. It is also important to note that the question is not which heading is a wider in general, but which heading is a more specific description of the goods in question: see *GE ION Track Ltd* at [29] and [32] where Briggs J approved the findings of the lower tribunal in this regard.

85. It is also clear from the authorities that regard may be had to the intended function or use of the goods in question because very many of the headings do refer, expressly or impliedly, to the function or use of goods: see *Cooneen Watts* at [90] where in the same paragraph Nugee J said, as an example that the objective characteristics of pyjamas, which distinguish them from other ensembles, could be sought only in the use for which pyjamas are intended, that is to say to be worn in bed as nightwear. This function, namely to be worn in bed, was the characteristic that distinguished pyjamas from other sets of garments.

86. However, it does not follow that intended use is always going to be relevant to the classification of goods. This is apparent from the judgment of the CJEU in *Uroplasty BV* (Case C- 514/04) [2006] ECR I-67219 where the court said at [42]:

> "For the purposes of classification under the appropriate heading, it is important, finally to recall that the intended use of a product may constitute an objective criterion in relation to tariff classification if it is inherent in the product, and such inherent character must be capable of being assessed on the basis of the product's objective characteristics and properties…"

87. It is important to note that the Court indicated that intended use "may" rather than "will" constitute an objective criterion. This approach was followed in *Cooneen Watts* where Nugee J said at [92]:

> "Having looked at all the cases which Mr Beal cited to me, I remain unpersuaded that there is any general principle that the function or intended use of goods is always relevant to tariff classification. Rather in my judgment the position is that the function or intended use of goods can be an objective characteristic of goods,

> and is relevant to tariff classification if referred to, expressly or impliedly, in the wording of the relevant heading of the CN."

88. Thus Nugee J was able to say that was the case in relation to pyjamas, the description indicating clearly what the function of the product was.

89. Mr Sykes referred us to the VAT and Duties Tribunal's decision in *Vtech* (1996 Decision number C00019) which he submits is an example of a finding that "articles for table or parlour games" is more specific and less general than "other toys". The case involved the classification of a "Learning Pad", an electronic keyboard programmed with activities for young children for use with a television receiver. The Tribunal held at [44]:

> "In our view the Learning Pad could come within the definition of both a toy and a game and so could be classified both under heading 95.03 and under heading 95.04. Accordingly, we pass on to Rule 3 (a) which provides that, where goods are classifiable under two or more headings, the heading providing the most specific description is to be preferred to a heading providing a more generalised description. In our view, although a general description of the Learning Pad might be a toy, its most specific description is an article for a table or parlour game. It meets all the criteria of an article for a game. Each activity is a diversion which has the nature of a contest. The player plays either with the machine or with another player. The contest is played according to rules. And the result depends upon the skill of the player."

90. In our view *Vtech* brings into clear relief the question we need to answer in this case: which is the more specific description of something which is both a "toy" and an "article" for an indoor game?

91. Mr Sykes submits that describing Beyblades as articles for table or parlour games is more specific for the following reasons.

92. A "toy" is an object to play with, as found by the FTT at [81] of the Decision. It includes something which was to be used in a competitive activity, as well as something which was not intended to be used competitively, as found by the FTT at [83] of the Decision. It can also be used by any person, whether adult or child and in any place, whether indoors or outside, and it can be either big or small. The description therefore covers a very broad range of goods.

93. On the other hand, the term "article for table or parlour games" connotes that the object will be relatively small so as to be used indoors. As to use, to say that something is an article for table or parlour games means that it is something to be used for amusement but in the context of a game with rules, and indoors. In his submission therefore the description "toy" has a wider range than an article for a table or parlour game and therefore the latter is a more specific description of a Beyblade.

94. There is considerable force in Mr Sykes's submissions and in our view the arguments are finely balanced. However, we have concluded that in this case the description of a Beyblade as a "toy" is more specific for the following reasons.

95. We find that although many articles fall within the description of a "toy" that term is more specific than something described as an "article" performing a particular function, in this case something used in a table or parlour game. HSEN GIR 3 (a) (IV) (a) provides that a description by name is more specific than a description by class and we accept Mr Brinsmead-Stockham's submission that the word "toy" is a description by name whereas "articles for funfair, table or parlour games" is a description by class. We also accept his submission that Beyblades are "toys" both in terms of their intended use and their other objective characteristics and properties whereas they can only be viewed as "articles… for a parlour game" by reference to their intended use. Consequently, Heading 9503 provides a more complete description of Beyblades. Therefore, in accordance with HSEN GIR 3 (a) (IV) (b), a Beyblade is more clearly identified by answering to its description as a "toy" which is a more complete identification than that afforded by its description as an "article for… table or parlour games".

96. It follows from this analysis that we can find no error of law in the Decision in relation to Ground 2 so that if we are wrong in our conclusions in respect of Ground 1 then our conclusions on Ground 2 are sufficient to dispose of this appeal in favour of HMRC.

Ground 3: whether in applying GIR 3 (c) goods should be classified under the heading which occurs last in numerical order

97. GIR 3 (c) was described by Briggs J at [22] of *GE Ion Track* as "truly a last resort". We have been able to resolve the classification issue in this case without recourse to that rule and consequently in our view a detailed analysis of it and a definitive view should await a case in which the rule is of direct relevance. Such limited domestic authority as there is on the point seems to suggest that where the rule applies it is mandatory to classify the goods under the heading which occurs last in numerical order: see the observations of Henderson J at [33] of *Flir Systems AB.* Mr Sykes submitted that the requirement under the rule to classify under the heading which occurs last in numerical order "among those which equally merit consideration" did not call for a further assessment as to which of the two competing headings had greater merit and that those words merely referred to those headings that had been under consideration during the prior application of GIR 3 (a) and GIR 3 (b). In our view it is implicit in Henderson J's observations that he did not consider that any further assessment was necessary beyond identifying which heading occurs last in numerical order.

98. However, Mr Brinsmead-Stockham referred us to Advocate General Fenelly's opinion in *Rose Elektrotechnik GmbH & Co. KG v Oberfinanzdirektion Koln* [1999] ECR I−691 where at [34] the Advocate General appeared to take a different view, taking the view that classifying the goods under one of the competing headings would not constitute an appropriate classification.

99. Therefore, the point cannot be regarded as clear and it may be necessary in a case where the point is of more relevance for a reference to the CJEU to be made. We

do not believe that it would be appropriate to do so in this case where it is not necessary in order for us to dispose of this appeal.

Disposition

100. The appeal is dismissed. We direct that any application for costs be made within 28 days of the release of this decision in accordance with the requirements of the Tribunal Procedure (Upper Tribunal) Rules 2008.

TIMOTHY HERRINGTON **ASHLEY GREENBANK**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 3 October 2016