Neutral Citation Number: [2018] EWCA Civ 1221

Case No: A3/2016/4733

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)
Judge Timothy Herrington and Judge Ashley Greenbank
[2016] UKUT 408 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2018

Before :

LORD JUSTICE PATTEN
LORD JUSTICE LEWISON
and
LORD JUSTICE NEWEY

- -

Between :

HASBRO EUROPEAN TRADING BV	**Appellant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents**

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- -

Mr Laurent Sykes QC (instructed by **Hasbro Legal Department**) for the **Appellant**
Mr John Brinsmead-Stockham (instructed by the **General Counsel and Solicitor to HM Revenue and Customs**) for the **Respondents**

Hearing date: 9 May 2018

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Judgment Approved

Lord Justice Newey:

1. This case concerns the classification of products known as "Beyblades". The appellant, Hasbro European Trading BV ("Hasbro"), contends that Beyblades are correctly classified as "articles for … table or parlour games" under heading 9504 of the Combined Nomenclature ("CN"). In contrast, HM Revenue and Customs ("HMRC") maintain that Beyblades should be classified as "other toys" under heading 9503, and the First-tier Tribunal ("the FTT") (Judge Guy Brannan and Ms Elizabeth Bridge) and the Upper Tribunal ("the UT") (Judge Timothy Herrington and Judge Ashley Greenbank) each agreed. However, Hasbro now challenges that view in this Court.

2. The issue matters because, if Beyblades fall within heading 9504, they can be imported into the European Union ("the EU") free of customs duties. If, on the other hand, heading 9503 applies, Beyblades are liable to ad valorem customs duties of 4.7%.

Beyblades

3. A Beyblade is a form of spinning top set in motion by means of a rip-cord powered launcher. They are designed to be used for "head-to-head" battling in which the winner of a game is the person whose Beyblade is the last one spinning.

4. Beyblades are intended to be launched into a bowl-shaped arena called a "Beystadium" and, while they are sold on their own, their packaging typically states, "only use Beyblades with a Beystadium (sold separately)". Beyblades can potentially be used without a stadium (for example, in a cardboard box or on a desk or table), but the FTT thought that such use would have "limited amusement value compared with their use in a Beystadium which induced the Beyblades to come into contact with each other" (paragraph 25 of the decision).

5. This appeal is concerned only with Beyblades sold alone. There is no dispute that Beystadiums are appropriately classified under heading 9504.

The framework

6. The legal background was helpfully summarised by Henderson J in *Commissioners of Revenue & Customs v Flir Systems AB* [2009] EWHC 82 (Ch), drawing on the judgment of Lawrence Collins J in *VTech Electronics (UK) plc v Commissioners of Customs & Excise* [2003] EWHC 59 (Ch). Henderson J said this:

> "7 The EU is a contracting party to the International Convention on the Harmonised Commodity Description and Coding System, generally known as 'the Harmonised System'. The Convention requires that the tariffs and nomenclatures of contracting states conform to the Harmonised System, and all contracting states therefore use the headings and sub-headings of the Harmonised System. The system is administered by the World Customs Organisation in Brussels, which publishes explanatory notes to the Harmonised System known as 'HSENs'.

> 8 At Community level, the amount of customs duties on goods imported from outside the EU is determined on the basis of the Combined Nomenclature ('CN') established by Article 1 of Council Regulation 2658/87 and Article 20.3 of Regulation 2913/92. The CN is re-issued annually. It comprises three elements:
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> (a) the nomenclature of the Harmonised System;
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> (b) Community sub-divisions to that nomenclature; and
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> (c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.
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> 9 The CN uses an eight-digit numerical system to identify a product, the first six digits of which are those of the Harmonised System, while the two following digits identify the CN sub-headings, of which there are about ten thousand. Where there is no Community sub-heading, these two digits are '00'. There may also be ninth and tenth digits which identify further Community (TARIC) sub-headings, of which there about eighteen thousand.
>
> 10 Apart from the HSENs to which I have already referred, the European Commission also issues Explanatory Notes of its own to the CN which are known as 'CNENs'.
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> 11 The Court of Justice of the European Communities … has repeatedly stated that 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 two categories of Explanatory Notes, that is to say 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 Explanatory Notes must therefore be compatible with the provisions of the CN, and cannot alter the meaning of those provisions. See, for example, Case C-495/03 *Intermodal Transports BV v Staatssecretaris van Financien*, [2005] ECR I-8151, at paragraphs 47 and 48.
>
> 12 Part 1 of the CN contains at Section 1A the General Rules for the Interpretation of the CN. These General Rules are known as 'GIRs'. Unlike the Explanatory Notes, they have the force of law (see *Vtech* at paragraph 16)."

7. So far as relevant, the GIRs provide as follows:

> "Classification of goods in the Combined Nomenclature 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;

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

> (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."

8. At the relevant time, HSENs in respect of the GIRs said this as regards GIR 3(a):

> "(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).
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> (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 motorcars, 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…."

9. The particular headings of the CN that are of importance in the present case are both to be found in chapter 95, "Toys, games and sports requisites; parts and accessories thereof". Heading 9503 reads:

> "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".

Heading 9504 is in these terms:

> "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".

10. The HSENs relating to heading 9503 said this during the material period:

> "(D) **Other toys**.
>
> This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes:
>
> All toys **not included** in **(A) to (C)**. Many of the toys are mechanically or electrically operated.
>
> These include:
>
> …
>
> (xix) Hoops, skipping ropes, diabolo spools and sticks, spinning and humming tops, balls (**other than** those of **heading 95.04 or 95.06**) …."

The Tribunal proceedings

11. Hasbro argued before the FTT that Beyblades fell only under heading 9504 and were not covered by heading 9503. The FTT decided otherwise, concluding that Beyblades "fall within both Heading 9503 'Other toys' and Heading 9504 'articles for … table or parlour games" and, hence, that it had to "apply the tie-breaker rules in GIR 3". It went on (in paragraph 86 of its decision):

> "In our view, GIR 3(a) provides a solution. We agree with [counsel for HMRC's] submission that 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."

The FTT accordingly held that Beyblades are correctly classified under heading 9503.

12. Hasbro sought permission to appeal on the basis that the FTT had incorrectly proceeded on the basis that heading 9503 includes "spinning … tops" when "spinning … tops" were in fact mentioned only in the relevant HSEN. Judge Brannan addressed this point in his decision on permission to appeal. He said (in paragraph 2):

> "I accept that the Tribunal was incorrect to state in the third sentence of [86] that Heading 9503 specifically refers to spinning tops. Instead 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 Beyblade than 'articles for funfair table to 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'."

Nonetheless, Judge Brannan considered that Hasbro had an arguable case and so granted permission to appeal.

13. The UT dismissed the appeal. By this stage, it was common ground that Beyblades were prima facie classifiable under both heading 9503 and heading 9504, with the result that GIR 3 was in point. Hasbro submitted, first, that the FTT had been wrong to interpret heading 9503 by reference to the HSENs (in particular, HSEN 9503 (D) (xix), in which "spinning and humming tops" feature) when deciding which heading provided the more specific description for the purposes of GIR 3(a) and, secondly, that, once the HSENs were put on one side (as, on its case, they had to be), heading 9504 should be seen as providing a more specific description than heading 9503.

14. The UT did not accept either argument. With regard to the first point, the UT concluded (in paragraph 79 of its decision):

> "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."

A little earlier, the UT had said (in paragraph 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 [counsel for HMRC's] submissions, say that the tribunal is required to take that approach."

In the UT's view, "[t]he 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" (paragraph 74). The UT went on (in paragraph 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."

15. Turning to the second point, the UT recognised that its conclusions on the previous issue were sufficient to dispose of the case but said that it would nonetheless deal with the other grounds of appeal briefly (see paragraph 80 of the decision). It found the arguments as to which heading provided the more specific description, leaving aside the HSENs, "finely balanced", but it ultimately concluded that the description of a Beyblade as a "toy" was the more specific (paragraph 94). It explained (in paragraph 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 [counsel for HMRC'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'."

16. A third issue before the UT related to the correct interpretation of GIR 3(c). As to this, the UT said that 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" (paragraph 99 of the decision).

The issues

17. The issues to which the appeal gives rise can be summarised as follows:

    i) Did the FTT and UT attach excessive importance to the HSEN in respect of heading 9503 when applying GIR 3(a) ("Issue 1")?

    ii) If the answer to Issue 1 is "Yes", does heading 9503 nonetheless provide a more specific description of Beyblades than heading 9504 ("Issue 2")?

    iii) What is the significance of the words "which equally merit consideration" in GIR 3(c) ("Issue 3")?

Issue 1: The significance of explanatory notes

18. There is no doubt but that explanatory notes can and should be taken into account when deciding whether an item is capable of being classified under a particular heading. That point is borne out by numerous decisions of the Court of Justice of the European Union ("the CJEU"). In Case C-15/05 *Kawasaki Motors Europe NV v Inspecteur van de Belastingdienst* [2006] ECR I-3659, for instance, the CJEU explained (at paragraph 37 of its judgment):

> "Likewise, the explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various tariff headings but do not have legally binding force (see, in particular, Case C-396/02 *DFDS* [2004] ECR I-8439, paragraph 28). The content of those notes must therefore be compatible with the provisions of the CN and may not alter the meaning of those provisions (see, in particular, Case C-280/97 *ROSE Elektrotechnik* [1999] ECR I-689, paragraph 23; Case C-42/99 *Eru Portuguesa* [2000] ECR I-7691, paragraph 20; and Case C-495/03 *Intermodal Transports* [2005] ECR I-8151, paragraph 48)."

While, therefore, explanatory notes (unlike the section and chapter notes to be found in the CN itself) do not have "legally binding force" and cannot prevail over the CN, regard should be had to them when construing the headings. They are, as the CJEU said, "an important aid to the interpretation of the scope of the various tariff headings".

19. Where the parties differ is as to the significance of explanatory notes in the context of GIR 3(a). Mr Laurent Sykes QC, who appeared for Hasbro, submitted that explanatory notes are, at most, of very limited usefulness at that stage. GIR 3(a), he said, requires comparison between the "headings" under which the relevant goods are

prima facie classifiable. In the context of the present case, that means that heading 9503's "other toys" must be compared with heading 9504's "articles for … table or parlour games". Heading 9503 cannot properly (so Mr Sykes said) be treated as if it referred to "spinning … tops" when it does not. The fact that the words "spinning and humming tops" feature in the HSENs would be relevant were there any doubt as to whether heading 9503 is capable of encompassing such items, but it is not important in relation to a GIR 3(a) exercise. Both the FTT and UT were thus, Mr Sykes submitted, wrong in their approach to GIR 3(a). They effectively read the HSEN into the heading when (according to Mr Sykes) there was no warrant for doing so.

20. Mr Sykes referred us to decisions of the Spanish Customs and Special Taxes Office (in 2013) and the French Customs Appraisal and Conciliation Commission (in 2016) classifying Beyblades under heading 9504. As, however, the UT pointed out, the Spanish decision appears to have been based on note 3 to chapter 95, on which Hasbro does not place any reliance in the present proceedings. The French decision was also founded in part on note 3 to chapter 95, and it arguably depended as well on a misinterpretation of the brackets at the end of HSEN 9503 (D) (xix). It is noteworthy, too, that the French decision is thought to be the subject of an appeal. All in all, I do not find these decisions of any real help.

21. For his part, Mr John Brinsmead-Stockham, who appeared for HMRC, supported the decisions of the FTT and UT. In the light of the HSEN relating to heading 9503, Mr Brinsmead-Stockham submitted, GIR 3(a) had to be applied on the footing that the heading specifically referred to "spinning … tops". The HSEN fell to be taken into account in relation to classification in accordance with GIR 1 and it would make no sense, Mr Brinsmead-Stockham said, to jettison it at the GIR 3(a) stage. That regard should be had to explanatory notes for the purposes of GIR 3(a) is, moreover, desirable from a policy perspective, Mr Brinsmead-Stockham argued, since that promotes certainty and ease of verification in classification.

22. One of the authorities to which Mr Brinsmead-Stockham took us in support of his submissions was the opinion of Advocate General Jacobs in Case C-339/98 *Peacock AG v Hauptzollamt Paderborn* [2000] ECR I-8949. At paragraph 90 of his opinion, Advocate General Jacobs said:

> "First, however, it is necessary to look at the relevant HSENs which, in accordance with the Court's case-law, should be taken as providing authoritative guidance as to the correct classification of network cards. It is, in any event, appropriate that the Community should apply, whenever possible, the classification which flows from the HSENs, both pursuant to its commitments under the HS Convention and because those notes are drawn up by the committee which has the most detailed responsibility for determining the interpretation of the HS, on which the CN is based, the Community and its Member States being represented on that committee and taking part in its deliberations."

23. I do not think, however, that this passage is of significant assistance in the present case. While it confirms the potential importance of explanatory notes, the Advocate

General was not considering a GIR 3(a) case. Moreover, the Court did not express approval of the passage in its judgment.

24. As already mentioned, the UT took the view that what was required was "comparison of what is covered by the two Headings, not a comparison of the wording of the two Headings". It seems to me, however, that there is more than one problem with this thesis. In the first place, GIR 3(a) calls for the heading providing the most specific "description" to be preferred. That invites reference to the wording of the heading. "Description" can be aptly defined as, for example, "portrayal in words". On the face of it, therefore, a heading can supply a "description" only through what it says, not because it in fact covers something. A second point arises from the fact that GIR 3(a) will not be in point unless the goods in question are "prima facie classifiable under two or more headings". Each relevant heading could thus be said to cover the items so that "comparison of what is covered by the headings" would not be fruitful.

25. Briggs J had to consider a comparable issue in *Commissioners for Revenue & Customs v GE Ion Track Ltd* [2006] EWHC 2294 (Ch). That case involved an HSEN which stated that certain apparatus was excluded from a particular heading and HMRC argued that that was of decisive importance. Briggs J, however, did not agree. He said (in paragraph 19 of his judgment):

> "(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 GIR, all of which are the legally binding structure for classification purposes.
> ...
> (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."

26. The present case differs from *GE Ion Track Ltd* because it does not concern an exclusion in an HSEN. In effect, however, HMRC are again seeking to treat HSENs as "a separate self-standing code for the resolution of apparent ties between headings". On HMRC's case, the fact that an HSEN refers to something being included under a heading is essentially determinative: it does not matter that the actual terms of the heading do not provide the most specific description of the item.

27. Such an approach could, as it seems to me, make sense only if the contents of HSENs could effectively be read into headings. Take the present case. If it is legitimate to treat the terms of heading 9503 as incorporating the HSEN dealing with it, the heading will be deemed to refer expressly to "spinning and humming tops" and will then provide a more specific description of Beyblades than heading 9504.

28. It is difficult, however, to see how it could be legitimate to proceed on this basis. As I say, GIR 3(a) appears to direct attention to the wording of the rival headings, and the GIRs nowhere state that that wording should be treated as encompassing the contents of HSENs. HSENs plainly fall to be taken into account when considering the scope of a heading and, hence, whether goods are "prima facie classifiable under [it]" for the

purposes of GIR 3(a), but that by no means implies that HSENs should be read into a heading. I agree with Mr Sykes that there is, on the face of it, no warrant for doing so.

29. Mr Brinsmead-Stockham, however, argued that there is CJEU authority that unequivocally supports HMRC's case. He relied here on Case C-524/11 *Lowlands Design Holding BV v Minister van Financiën* ECLI:EU:C:2012:558 and Case C-288/15 *Medical Imaging Systems GmbH v Hauptzollamt München* ECLI:EU:C:2016:424.

30. The *Lowlands Design* case concerned the classification of romper bags for babies or small children which resembled "a garment, as to the upper part, and a sleeping bag as to the lower part". The CJEU was asked whether the romper bags were to be classified under subheading 9404 30 00 ("Sleeping bags") or, rather, under subheadings 6209 20 00 ("Babies' garments and clothing accessories … of cotton") and 6211 42 90 ("Tracksuits, ski suits and swimwear; other garments … of cotton") (according to the size of the romper bag). It decided that subheadings 6209 20 00 and 6211 42 90 applied, explaining:

> "25 It must be noted that, according to the explanations given by the referring court, the products concerned are, given their size and nature, exclusively designed for use by babies and young children. They have a number of the particular characteristics of garments. Thus, the cut of the upper part of those products fits the shape of the body. They have a neckline, sleeves, a zipped opening at the front and an elasticated waist. The lower part of those products is completely closed, like a sleeping bag.
>
> 26 As regards that last characteristic, it must be noted that heading 9404 falls within Chapter 94 of the CN, entitled 'Furniture; bedding, mattresses, mattress supports, cushions and similar stuffed furnishings; lamps and lighting fittings, not elsewhere specified or included; illuminated signs, illuminated nameplates and the like; prefabricated buildings'. It covers 'mattress supports; articles of bedding and similar furnishing ... fitted with springs or stuffed or internally fitted with any material ...'. Subheading 9404 30 00 covers 'sleeping bags' generally, and does not, in relation to that category, identify other sub-products on the basis of their characteristics.
>
> 27 By contrast, Chapter 62 of the CN, relating to 'articles of apparel and clothing accessories, not knitted or crocheted', refers under heading 6209 to 'babies' garments and clothing accessories', and subheading 6209 20 00 relates more specifically to those of cotton. On the basis of the characteristics of the upper part of the products at issue in the main proceedings, those products must be regarded as articles of apparel falling within Section XI of the CN, and not as articles of bedding under Chapter 94 of Section XX of the CN.

> 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 less than 18 months.
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> …
>
> 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."

31. Mr Brinsmead-Stockham argued that the CJEU could be seen to have attached importance to explanatory notes in the context of GIR 3(a). He accepted, however, that paragraph 30 of the judgment, in which the Court referred to GIR 3(a), is somewhat Delphic. It does not itself contain any mention of explanatory notes, let alone any account of the extent (if any) to which they are significant in the context of a GIR 3(a) exercise. Given, in particular, the last sentence of paragraph 27 of the judgment and the first sentence of the next paragraph, there is a compelling argument that the CJEU saw the explanatory notes as doing no more than confirming that chapter 94 did not extend to the romper bags at all. Support for that view is perhaps to be found in the references to the terms of subheadings, since it was common ground before us that subheadings cannot be taken into account when considering which "heading" provides the most specific description for the purposes of GIR 3(a).

32. With regard to the *Medical Imaging Systems* case, that related to radiation protective apron-coats whose internal layer consisted primarily of antinomy. The question referred to the CJEU was:

> "Does classification under subheading 6211 33 10 00 0 'Industrial and occupational clothing' of the [CN] depend solely on external appearance or intended use, or does General Rule 3(b) require that consideration be given to those components of the goods which give them their essential character?"

33. Citing relevant explanatory notes, the CJEU stated (in paragraph 26 of its judgment):

> "goods such as those at issue in the main proceedings, consisting of man-made fibres and designed to be worn solely or mainly in order to provide protection to persons exposed to

> radiation during their professional activities, must be classified as 'industrial and occupational clothing' for the purposes of subheading 6211 33 10 00 0, in the light of their characteristics and objective properties, and in particular their external appearance."

Turning then (in paragraph 28) to "the question whether it is necessary to also take into consideration, for the purposes of the classification of goods such as those at issue in the main proceedings, the components which give them their essential character", it observed that where "goods are prima facie classifiable under two or more headings":

> "it is necessary to apply general rule 3(a) for the interpretation of the CN, according to which 'the heading which provides the most specific description shall be preferred to headings providing a more general description'. It is only where the application of that rule does not allow an appropriate classification of certain goods, … that it is necessary to apply general rule 3(b) for the interpretation of the CN and to classify such goods 'as if they consisted of the material or component which gives them their essential character'."

The Court went on:

> "30 As is apparent from paragraph 26 of the present judgment, there is a specific heading for the classification of goods such as those at issue in the main proceedings, in this case heading 6211 of the CN, which includes subheading 6211 33 10 00 0 thereof.
>
> 31 Although the referring court raises the possibility of the goods at issue being classified in another heading of the CN, in particular heading 8110 thereof, it is nevertheless apparent from the wording of the latter that it concerns 'antimony' and 'antimony articles, including waste and scrap' and not clothing such as the goods at issue in the main proceedings.
>
> 32 The fact that those goods contain an internal layer consisting principally of antimony, which gives them their anti-radiation protection character, does not suffice for them to be classified as an antimony article, covered by heading 8110 of the CN.
>
> 33 As has already been noted, it appears that subheading 6211 33 10 00 0 of the CN is 'the heading which provides the most specific description', within the meaning of general rule 3(a) for the interpretation of the CN and must be preferred over others. It is therefore not necessary, in order to determine the tariff classification of the goods at issue in the main proceedings, to rely on general rule 3(b) for the interpretation

> of the CN, which refers to the 'material or component' giving goods their 'essential character'."

34. Once again, the CJEU's reasoning is a little opaque. As I read the judgment, however, the Court concluded that the apron-coats fell specifically within heading 6211 and simply could not be classified under heading 8110. That being so, GIR 3(b) was necessarily irrelevant, but so in fact was GIR 3(a), because the apron-coats were not "prima facie classifiable under two or more headings". So interpreted, the judgment is of no assistance to Mr Brinsmead-Stockham.

35. In all the circumstances, it seems to me that the FTT and UT were not entitled to attach the importance they did to the HSENs. While explanatory notes may not be wholly irrelevant when applying GIR 3(a), the rival headings cannot be treated as if they incorporated words found in explanatory notes but not in the headings themselves. Contrary to the view of the UT, the focus must be on the wording of the rival headings, not on "what is covered by the two Headings" nor on parts of explanatory notes that are not replicated in the actual headings.

36. That means that it is necessary to address the second issue: whether, even apart from HSEN 9503 (D) (xix), heading 9503 provides a more specific description than heading 9504.

Issue 2: The more specific description

37. As already noted, GIR 3(a) states that "the heading which provides the most specific description shall be preferred to headings providing a more general description" and the HSENs in respect of the rule explained that, while it was "not practicable to lay down hard and fast rules", in general it could be said that "[a] description by name is more specific than a description by class" and that, "[i]f the goods answer to a description which more clearly identifies them, that description is more specific than one where identification is less complete".

38. As also noted, the HSENs gave this illustration of their name/class distinction:

> "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".

Something appropriately called a "shaver" was thus considered to be more specifically described in the heading referring to "shavers".

39. The mere fact that a particular noun applies to goods cannot necessarily mean, however, that they are being described by name rather than class. Suppose, to take a fanciful example, that one heading included "organisms" and another "quadrupeds used for agricultural purposes". The latter heading would plainly provide the more specific description in the case of a cow, even though a cow could of course be termed an "organism". While it would surely be fair to regard "cow" as a name, the word "organisms" is, I should have thought, to be seen as referring to a "class".

"Class" suggests a group of persons or things sharing a characteristic, and "organisms" are such a group.

40. Turning to a different point, Mr Sykes submitted that GIR 3(a) requires a textual exercise rather than an article-specific one. Whether a heading is specific or general is, he said, a matter that can be determined by consideration of its wording alone, independently of the article at issue. In this connection, he sought support from *Xerox Ltd v Commissioners for Revenue & Customs* [2015] UKUT 631 (TCC), where Nugee J, sitting in the UT, found persuasive an argument to the following effect (see paragraphs 54 and 61 of his decision):

> "GIR 3(a) requires an examination of the competing tariff provisions. This exercise does not call for any further comparison of the objective characteristics and properties of the goods. It is in essence a textual exercise requiring a comparison of the language of the competing headings, to see which, if any, more specifically describes the goods."

41. For my part, I would agree that textual analysis must be of prime importance in a GIR 3(a) case. The fact, however, that the HSENs in respect of the GIRs direct attention to which description "more completely identifies" the goods indicates, however, that the "objective characteristics and properties of the goods" can also be significant. GIR 3(a) seems to me to call for an evaluation of which heading provides the most specific description *of the relevant goods*. Often, it may not in practice be necessary to look beyond the wording of the rival headings to determine this. The particular characteristics of the goods can potentially be material, however.

42. A certain amount of guidance as to how GIR 3(a) should be applied can be gleaned from Case C-183/06 *RUMA GmbH v Oberfinanzdirektion Nürnberg* [2007] ECR I-1561. In that case, the CJEU said (in paragraph 35 of its judgment):

> "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 subheadings … 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" (emphasis added).

The heading covering a "much wider and more varied range of goods" was thus rejected.

43. This makes obvious sense. The ultimate question is which heading provides the most specific description. In general, the heading encompassing the most limited range of goods can be expected to be the most specific. A heading covering a broader range is likely to be seen as more generic and less specific.

44. In the present case, it can be seen from paragraph 95 of its decision (quoted in paragraph 15 above) that the UT gave these reasons for considering heading 9503 to provide a more specific description than heading 9504:

    i) "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";

    ii) "'toy' is a description by name whereas 'articles for funfair, table or parlour games' is a description by class";

    iii) "'Beyblades' are 'toys' both in terms of their intended use and their 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".

45. With respect, I do not find these points persuasive. In the first place, I cannot see why the fact that a heading speaks of an "'article' performing a particular function" need make it less specific. The width of the heading must surely depend on what the specified function is. Secondly, the word "toys" appears to me to describe a class even if it can also be said to function as a name. There are, after all, numerous kinds of toy. To my mind, they represent a genus, not a species. Thirdly, I cannot see how "toys" can provide "a more complete description" of Beyblades than "articles for … parlour games". If Beyblades are "toys" in terms of "their intended use and their other objective characteristics and properties", so must "articles for … parlour games" be. "Toys" may suggest something quite small, but so does "articles for … parlour games"; neither term implies all that much by way of "objective characteristics". Moreover, "articles for … parlour games", unlike "toys", captures the important feature that Beyblades are designed to be used competitively, in games. That being so, Beyblades must, I think, be "more clearly identif[ied]" by "articles for … parlour games" than by "toys".

46. Mr Brinsmead-Stockham reminded us of the limited circumstances in which this Court will interfere with a finding of fact made by an expert Tribunal. I do not think these principles are in point, however. The FTT did not express any concluded view on whether, leaving aside the HSEN in respect of heading 9503, it is "toys" or "articles for … parlour games" that provides the more specific description. As for the UT, it would have been entitled to make a finding of fact only if it had set aside the FTT's decision, which it did not (see section 12 of the Tribunals, Courts and Enforcement Act 2007). In fact, the UT expressly noted that the conclusions it had arrived at on Issue 1 sufficed to dispose of the case and that it was therefore dealing with other points briefly.

47. In the circumstances, it seems to me to fall to us to decide which of the alternative headings provides the more specific description. In my view, it is heading 9504. As I see it, "articles for … parlour games" encompasses a more limited range of goods

than "toys" and "more clearly identifies Beyblades", particularly since, as I say, "articles for … parlour games" reflects the fact that Beyblades are meant to be used in games.

48. I would accordingly set aside the UT decision and re-make it on the basis that heading 9504 provides the more specific description.

Issue 3: GIR 3(c)

49. The conclusions I have already arrived at mean that this issue does not arise.

Conclusion

50. I would allow the appeal. In my view, Beyblades are appropriately classified under heading 9504 rather than heading 9503.

Lord Justice Lewison:

51. I agree.

Lord Justice Patten:

52. I also agree.