TC04521

Appeal number: TC/2014/00969

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

FIRST-TIER TRIBUNAL
TAX CHAMBER

HASBRO EUROPEAN TRADING BV **Appellant**

- and -

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

TRIBUNAL: JUDGE GUY BRANNAN
MS ELIZABETH BRIDGE

Sitting in public at The Royal Courts of Justice, Strand, London on 16 February 2015

Rebecca Murray, counsel, 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 brought by Hasbro European Trading BV ("Hasbro"), a leading manufacturer of toys and games. The issue before us in this appeal is whether Hasbro's product, known as a "Beyblade", is correctly classified as "other toys" under Heading 9503 of the Combined Nomenclature ("CN"), as HMRC contend, or as "articles for…table or parlour games" under Heading 9504, as Hasbro contends.

2. If Beyblades are properly classified under Heading 9503, as HMRC contend, ad valorem customs duties of 4.7% are chargeable on importation into the EU. If, however, Beyblades are classified under Heading 9504, as Hasbro maintains, they may be imported into the EU free of customs duties.

Preliminary issues

3. A few days before the hearing, on 12 February 2015, Hasbro served a second witness statement of Mr Foster (see below) notwithstanding an existing direction of the Tribunal that all witness evidence should be filed and served no later than 15 August 2014. Ms Murray (who appeared for Hasbro) sought to explain the late service of her client's witness statement by reference to earlier correspondence relating to samples of Beyblades. We were not persuaded by Ms Murray's argument.

4. In the event, at the hearing, Mr Brinsmead-Stockham (who appeared for HMRC) did not maintain HMRC's objection to the admission of the additional witness statement, considering that the new evidence did not support Hasbro's case in any event, leaving it for the Tribunal to decide whether to admit the evidence.

5. It seemed to us, however, that the additional witness statement mainly served to elaborate on the manner in which Beyblades were used and the marketing material and packaging by which they were sold. In the circumstances, we decided to admit the evidence. There seemed to us to be no real prejudice to HMRC. In our view, however, the late filing of witness evidence in this manner is greatly to be deprecated. Had HMRC maintained its objection and had we been persuaded that there was prejudice to HMRC, we would have refused to admit evidence lodged at such a late stage.

The disputed decisions

6. Hasbro appeals against two decisions of HMRC concerning the classification of Beyblades:

(1) HMRC's decision of 22 July 2013 to revoke 33 binding tariff informations ("BTIs") in respect of a number of different types of Beyblades; and

(2) HMRC's decision of 30 August 2013 to classify the "A 2471 Bey Bahamoote Orochi" (a type of Beyblade) under Heading 9503.

7. After a formal review by HMRC, the decisions were upheld in a letter dated 21 January 2014.

8. Hasbro's Notice of Appeal to this Tribunal was dated 17 February 2014.

Evidence

9. Mr Mark Foster, European Marketing Director of Hasbro, produced two witness statements for Hasbro and was cross-examined. In addition, we were provided with two ring binders of documents and correspondence.

10. Mr Foster also helpfully demonstrated how Beyblades and the Beystadium worked.

The facts

11. In describing Beyblades and their use, it is impossible to avoid using the words "top", "spinning" or "game". Indeed, in Hasbro's evidence and in both parties' submissions the words were frequently used. We use them as well, but without in any sense prejudging the issues raised by the use of those words in the CN or the HSENs.

12. Beyblades are a form of spinning top. They were first launched by Hasbro in 2002 and, since then, over 10 million Beyblades have been sold. The tops are intended to be used for "head-to-head battling", as we shall see. Each Beyblade is made up of modular component parts designed to be interchangeable and customisable.

13. Beyblades are set spinning by using a rip-cord powered launcher and are intended to be launched into a bowl-shaped arena, called a Beystadium.

14. Exhibited to Mr Foster's evidence were examples of Beyblades and their packaging. The Beyblades were sold separately from the Beystadiums. The packaging typically contained the legend: "Only use Beyblade tops with a Beystadium (sold separately)."

15. Mr Foster explained, and we accept, that Hasbro intended that Beyblades should only be used in Beystadiums. This was because of safety concerns if Beyblades were set spinning outside the confines of a Beystadium. As Mr Foster noted, setting a Beyblade spinning on a tabletop could risk injury to a child if the Beyblade came off the table at a young child's head height.

16. Apart from the safety issue noted above, 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". It was intended that one player's Beyblade should collide with that of the other player. 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.

17. Although Beyblades were designed to be played with competitively between two players, more than two players could play simultaneously.

18. Mr Foster's evidence, which we again accept, was that players sought to improve their "battling" techniques, by collecting and customising different types of Beyblades.

19. There were many different types of Beyblades which had different spinning or "battling" characteristics. Essentially, however, the normal Beyblade was made up of several components, consisting of plastic and metal rings, a "performance tip" (the point on which the top would spin) and a "spin track" (which lifted the rings up and locked the other components together). As noted, the various parts of a Beyblade are interchangeable between different types of Beyblade. For example, the metal rings could be swapped to create a customised version of a Beyblade, giving it different spinning and "battling" characteristics.

20. Consumers (the product was predominantly aimed at eight-year-old children), would collect different types of Beyblade in order to personalise their fighting or "battling" style.

21. Also exhibited to Mr Foster's witness statement was a rulebook which was available to all players on a website, although he said that with declining sales of Beyblades the website was now mainly used to facilitate online games. Furthermore, many "house" rules were also agreed between opponents playing the game.

22. Mr Foster helpfully gave the Tribunal a demonstration of Beyblades in a Beystadium and also brought along examples of traditional spinning tops.

23. In cross-examination, Mr Foster accepted that a Beyblade could be used without a Beystadium, although this was not Hasbro's intention. For example, Beyblades could be used in a cardboard box, although as Mr Foster pointed out, the Beyblades would not be so likely to come into contact with each other and therefore do "battle" and, without a hard surface, the Beyblades would spin for a shorter time. Indeed, Mr Foster demonstrated Beyblades spinning in an ordinary box and we observed that Mr Foster's comments were correct.

24. Mr Foster also accepted that a Beyblade could be used on a desk or table. However, the safety concerns, noted above, existed and the Beyblades would not necessarily come into contact and could not therefore do "battle".

25. The use of Beyblades in a cardboard box or on a tabletop seemed to us to have limited amusement value compared with their use in a Beystadium which induced the Beyblades to come into contact with each other.

The relevant legislative framework and principles of interpretation

26. The legislative framework relevant to this appeal was not, save as set out later in this decision, materially in dispute between the parties. This legislative framework was helpfully summarised by Henderson J in *HMRC v Flir Systems AB* [2009] EWHC 82 (Ch) at [7] to [14] as follows:

‘[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 art 1 of Council reg 2658/87 and art 20.3 of reg 2913/92. The CN is re-issued annually. It comprises three elements:

(a) the nomenclature of the Harmonised System;

(b) Community sub-divisions to that nomenclature; and

(c) the preliminary provisions, additional section or chapter notes and footnotes relating to CN sub-headings.

[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”.

[11] The Court of Justice of the European Communities (“the ECJ”) 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 paras 47 and 48.

[12] Part 1 of the CN contains at s 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 Electronics (UK) plc v Customs & Excise Commissioners* [2003] EWHC 59 (Ch)] at para 16).

[13] So far as material, 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.

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) 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.

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

5. . . .

6. For legal purposes, the classification of goods in the sub-headings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section and chapter notes also apply, unless the context requires otherwise."

[14] It can be seen that the General Rules quoted above provide a hierarchical set of principles, and if the correct classification can be ascertained at a given stage it is unnecessary to proceed any further.'

27. A further summary of the relevant principles to be applied in deciding whether a product falls within a particular code is found in Case C-486/06 *BVBA Van Landeghem* [2007] ECR I-10661, at paragraphs 23-25:

> "23. First, it is settled case-law that, in the interests of legal certainty and ease of verification, the decisive criterion for the classification of goods for customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant heading of the CN and in the section or chapter notes (see Case C-15/05 *Kawasaki Motors Europe* [2006] ECR I-3657, paragraph 38, and Case C-310/06 *FTS International* [2007] ECR I-0000, paragraph 27).
>
> 24. Second, the intended use of a product may 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 (see C-400/05 *BAS Trucks* [2007] ECR I-311, paragraph 29; Case C-183/06 RUMA [2007] ECR I-1559, paragraph 36; and Case C-142/06 *Olicom* [2007] ECR I-0000, paragraph 18).
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> 25. Lastly, according to the Court's case-law, the Explanatory Notes drawn up, as regards the CN, by the Commission and, as regards the HS, by the WCO are an important aid to the interpretation of the scope of the various headings but do not have legally binding force (BAS Trucks, paragraph 28). Moreover, although the WCO opinions classifying goods in the HS do not have legally binding force, they amount, as regards the classification of those goods in the CN, to indications which are an important aid to the interpretation of the scope of the various tariff headings of the CN (see *KawasakiMotors Europe*, paragraph 36)."

28. As regards the relationship between the Explanatory Notes drawn up in relation to the CN (the "CNENs") and those drawn up in relation to the HS the 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 content 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 (Joined Cases C-288/09 and C-289/09 *British Sky Broadcasting Group and Pace* [2011] ECR I-2851, paragraph 64).

29. Under Regulation 2913/92, the customs authorities of Member States are entitled to issue Binding Tariff Informations ("BTIs"). A BTI classifies particular goods for the purposes of customs duties in respect of that Member State. BTIs are valid throughout the EU as regards the particular goods in question, irrespective of which Member State issued them. Broadly speaking, a member state is entitled to revoke a BTI if it changes its view as to the correct classification of the goods in respect of which a BTI has been issued (Community Customs Code Articles 9 and 12.5 (a)(iii)).

The relevant classification provisions and explanatory notes

30. Both parties accepted that Beyblades fell to be classified within CN Section XX ("Miscellaneous manufactured articles", Chapter 95 ("Toys, games and sports requisites; parts and accessories thereof"). As already explained, the question before the tribunal is whether Beyblades are correctly classified under Heading 9503 or Heading 9504.

31. 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:"

32. 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."

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

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

34. 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."

35. HSEN 95 provides that this Note applies in respect of:

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

Jurisdiction

36. It was common ground that the Tribunal has full appellate jurisdiction in relation to the correct classification of Beyblades under the CN (SI 1997/534 regulations 3(1)(a) and 4 and section 16(5) Finance Act 1994). It was also common ground that the Tribunal had only a supervisory jurisdiction to review a decision of HMRC whether to revoke a BTI (SI 1997/534 regulations 3(1)(c) and 4 and section 16(4) Finance Act 1994).

37. In practice, both parties accepted that our decision in respect of the correct classification of Beyblades would determine the issue whether the BTIs in this case had been correctly revoked.

Burden and standard of proof

38. It was also common ground that the burden of proof in this appeal lies on Hasbro (section 16(6)(c) Finance Act 1994). The standard of proof is the normal civil standard of the balance of probabilities.

Arguments of the parties

Arguments for Hasbro

39. Ms Murray argued that Beyblades fell within heading 9504 as "…articles for… table or parlour games.…" and that they did not fall within heading 9503 as "... other toys."

40. Ms Murray argued that the following objective features (which included intended use), made it clear that Beyblades were part of a competitive game and not a toy:

(1) the game was one in which two Beyblades fought against each other in a tournament;

(2) the Beyblades were specifically designed with different specialist functions for this purpose; and

(3) the game came with rules and accessories including, for example, a Beystadium. A Beystadium was essential to the game and Beyblades presented a safety hazard if used on their own outside a Beystadium. The stadium was designed to cause the Beyblades to collide and "battle" – which was the intended use of Beyblades.

(4) "Battling" (i.e. the collision of Beyblades) was the sole purpose of Beyblades and not some other form of use.

41. Ms Murray noted that some of the Beyblade accessories and components were classified as a game (or part of the game) by HMRC under various (valid) BTIs e.g. the various types of Beystadiums. She submitted that a Beyblade was "suitable for use solely or principally with articles of chapter [95]" and was therefore to be classified with them in accordance with Section XX Chapter 95 Note 3 (see paragraph 34 above).

42. Beyblades were not a toy, in Ms Murray's submission, a toy was not something that was designed for a competitive activity, which was characteristic of a game. Ms Murray argued that none of the items listed under Heading 9503 was a competitive activity. Furthermore, certain items which might be used in a game but which were listed under Heading 9503 were expressly excluded if they were intended to be used in a game. For example, toy balls were listed under Heading 9503, but balls intended for use in competitive games such as billiards would fall within Heading 9504 (HSEN 9503 D(xix)).

43. Even if the Tribunal considered that a Beyblade was a “toy”, Ms Murray submitted that a Beyblade was also part of a game. Therefore, GIR 3 had the result that a Beyblade fell within Heading 9504, being the last in numerical order.

44. As regards HMRC's argument that a Beyblade was a spinning top and therefore toy within Heading 9503, Ms Murray observed that HMRC relied upon HSEN (xix) to Heading 9503 (see paragraph 33 above). Ms Murray noted that HSENs do not have

the force of law: *British Sky Broadcasting Group plc and another v HMRC* Cases C-288/09 and C-289/09 [2011] STC 1519 at paragraph 63 – 65.

45. Moreover, Ms Murray argued that HMRC's contentions ignored the settled case-law that the intended use of the product also constituted an objective criterion for classification, where it was inherent in the product.

46. In the present case, Ms Murray submitted that the inherent design and features of the Beyblade made it clear that the Beyblade was intended for use solely as part of a game in which two players fight against each other and not for individual use as a spinning top. There were a number of different designs each with a different fighting function. In addition, a Beyblade could pose a potential safety hazard if not released within a Beystadium. It was accepted that a Beyblade could be made to spin on any surface, but this would not be a proper or intended use of the product. In contrast, a conventional spinning top was intended to be spun and observed: it would spin slowly and safely and had no other function.

47. Relying on the CJEU decision in *Sysmex Europe* [2014] EUECJ C-480/13 at [29] and [31] – [32] ("*Sysmex*"), Ms Murray submitted that it did not matter that it was possible to use a Beyblade for spinning on its own. That possibility was to be ignored in the same way as the potential use of the product in that case as a dye was ignored. In this connection, Ms Murray argued that evidence of actual use could be used to establish intended use (relying on the words in *Sysmex* at [35]: "in practice….").

Arguments for HMRC

48. Mr Brinsmead-Stockham submitted that Beyblades were "toys" and, more particularly, spinning tops, within the plain wording of Heading 9503. This classification was consistent with GIR 1 and with the general principles of classification articulated by the CJEU.

49. Mr Brinsmead-Stockham referred to the definition of "toy" in the Shorter Oxford English Dictionary as follows:

> "An object to play with, often a model or miniature replica of something and esp. for a child; something intended for amusement rather than for practical use; a plaything."

50. In addition, Mr Brinsmead-Stockham took us to HSEN (D) in relation to "Other toys" which stated:

> "this group covers toys intended essentially for the amusement of persons (children or adults)."

51. Mr Brinsmead-Stockham also relied on the decision of this Tribunal in *Bigjig Toys Ltd v HMRC* [2014] UKFTT 960 (TC) at [51], where the Tribunal observed:

> "…the emphasis on play is important and is an important distinguishing feature of the products which are "toys" for the purposes of the CN."

52. Beyblades were, therefore, in Mr Brinsmead-Stockham's submission, "toys" for three reasons:

(1) based on their "objective characteristics and properties" Beyblades were spinning tops (which were set spinning by a launcher);

(2) Beyblades could be played with by children and adults as spinning tops without the need for any further articles i.e. they had independent play value; and

(3) spinning tops have a long history as playthings for children and were clearly "toys".

53. The above analysis was supported, in Mr Brinsmead-Stockham's view, by HSEN 9503 D (xix) which provided that Heading 9503 included:

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

54. Although not legally binding, Mr Brinsmead-Stockham submitted that HSEN's were highly persuasive and referred to the decision of the CJEU in *Sysmex* at [30], where the Court said:

> "the Explanatory Notes drawn … up by the WCO, as regards the HS, may be an important aid to the interpretation of the scope of the various tariff headings…."

55. We were also referred to the decision of Briggs J in *GE Ion Track Ltd v HMRC* [2006] EWHC 2294 where it was stated at [23] that:

> "Often the positive rather than the exclusionary provisions of the HSEN will shed brighter light on the appropriate heading to be adopted."

56. HSEN 9503 D (xix) was, in Mr Brinsmead-Stockham's submission, a positive provision which made it clear that "spinning…tops" were "Other toys" falling within Heading 9503.

57. Reference was also made by Mr Brinsmead-Stockham to the fact that HMRC's proposed classification was consistent with that adopted by other Member States, in particular Germany and France, which also classified Beyblades under Heading 9503. Although not binding on us, it was submitted that the classification by other Member States supported HMRC's position and that if we were to decide in favour of Hasbro's proposed classification (Heading 9504) this would lead to distortions in trade between Member States.

58. As regards Section XX Chapter 95 Note 3 (see paragraph 34 above), Mr Brinsmead-Stockham submitted that Hasbro's reliance on Note 3 was misconceived. In the first place, Hasbro's argument was that the Beyblades were "articles… for table or parlour games." In order to rely on Note 3, Hasbro would need to establish that the Beyblades fell within the description of "parts and accessories of articles [for table or parlour games]." This was not, he submitted, an apt description of Beyblades.

Secondly, Beyblades were not "parts and accessories" – they were "articles of [Chapter 95]" in their own right (i.e. "toys") and were not "parts" or "accessories" of some larger or different article.

59. We were referred to *Peacock AG v Hauptzollamt Paderborn* [2000] EUECJ C-339/98 where the ECJ held at [21] that:

> "the word 'part' … implies a 'whole' for the operation of which the part is essential."

60. We were also referred to the CJEU's concept of a "functional unit" which the Court described in *Ruma GmbH v Oberfinanzdirecktion Nurnberg* [2007] EUECJ C-183/6 at [32] as arising:

> "where a machine or appliance consists of separate components which are designed to contribute together to a single clearly defined function."

61. Mr Brinsmead-Stockham submitted that a Beyblade was a "functional unit" with a "clearly defined function" of operating as a spinning top: it was not "a part or accessory."

62. It was submitted that currently valid BTIs in respect of Beyblade products provided no support to Hasbro. Mr Brinsmead-Stockham noted that it may be necessary for HMRC to review the classification of other Beyblade products in the light of our decision.

63. As regards Ms Murray's reliance on "intended use" (as part of a competitive game), Mr Brimsmead-Stockham noted that the CJEU in Sysmex at [31] stated:

> "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." (Emphasis added)

64. Mr Brinsmead-Stockham pointed to the use of the word "may" as indicating that reliance on the intended use of a product was not always necessary for the purpose of classifying goods under the CN. He referred to the decision of the ECJ in *Neckerman Versand AG v Hauptzollamt Frankfurt am Main-Ost* [1994] EUECJ at [6] – [7] as indicating that it was only necessary to have regard to the intended use of the product in the absence of a definition in either the CN or the HSENs or the CNENs.

65. Moreover, Mr Brinsmead-Stockham argued that the intended use relied on by Hasbro was not "inherent" to the product. Hasbro argued that the "intended use" was that a Beyblade was part of a game in which two players "battle" – but this was not inherent to the Beyblade tops themselves. The only inherent use of the Beyblade tops was as "spinning tops".

66. Mr Brinsmead-Stockham also submitted that *Sysmex* provided no support for Hasbro's argument that evidence of *actual use* could be used to establish intended use.

67. In any event, even if intended use was relevant for the purposes of classification, Mr Brinsmead-Stockham argued that Beyblades also had an inherent intended use as spinning tops and that players in a Beyblade game used Beyblades as spinning tops.

68. As regards Hasbro's argument that Beyblades fell entirely outside Heading 9503, Mr Brinsmead-Stockham submitted that its arguments did not support its conclusion.

69. First, as regards the argument that a toy was not something which was designed for competitive activity (unlike a game), this ignored the fact that HSEN 9503D (ix) expressly included items which were used for competitive activity e.g. toy sports equipment. It also ignores the fact that not all the items listed in Heading 9504 were used for "competitive activity".

70. Secondly, the contention that the use of Beyblades as toys should be discounted in the same way that the possible use of the product in *Sysmex* as a dye was ignored (i.e. as a purely theoretical possibility) was, according to Mr Brinsmead-Stockham, incorrect. First, Beyblades could be used as spinning tops and this was more than a theoretical possibility. Second, Hasbro incorrectly assumed that a Beyblade would only be used as a "toy" when used on its own. However, even in the context of "table or parlour games" the Beyblades would be used as spinning tops and thus as "toys".

71. Mr Brinsmead-Stockham submitted that, at its highest, Hasbro's case was that Beyblades fell within both Heading 9503 and heading 9504. In this case, GIR 3(a) (and not GIR 3(c)) would determine the appeal in HMRC's favour. GIR 3(a) required the classification to be under the CN Heading which "provides a more specific description". Mr Brinsmead-Stockham argued that Heading 9503 ("other toys"), as interpreted in accordance with HSEN D (xix), referred specifically to "spinning tops" which was a more specific description of Beyblades than "articles for…table or parlour games." Moreover, Heading 9503 described the class of articles contained within it by reference to the articles themselves, as opposed to Heading 9504 which referred to the function of those articles. Heading 9503 therefore adopted an inherently more specific approach to describing the articles contained within it. Furthermore, the structure of the CN Heading 9503 was more specific than Heading 9504 in that Heading 9503 was not divided into sub-headings.

72. Because GIR 3(a) applied in priority to GIR 3(c), Mr Brinsmead-Stockham submitted that the Beyblades were correctly classified under Heading 9503. In this context, we were referred to the description of GIR 3(c) as "truly a last resort" by Briggs J in *GE Ion Track Ltd v HMRC, supra,* at [22].

73. Even if we applied GIR 3(c), it was submitted that Heading 9504 did not "equally merit consideration" with Heading 9503. Heading 9503 provided a more complete description of Beyblades.

Discussion

74. We have concluded that Beyblades fall within both Heading 9503 "Other toys" and Heading 9504 "articles for…table or parlour games."

75. Taking Heading 9504 first, the evidence of Mr Foster, which we accept, was clearly that Beyblades were designed and intended by Hasbro to be used in a game in which Beyblade tops "battled" against each other in a Beystadium. It seemed to us that this was clearly a game and that, therefore, a Beyblade was an “article for” a table or parlour game.

76. Ms Murray drew our attention to the definition of "game" in the *Oxford English Dictionary*. We are, of course, aware that dictionary definitions are only a starting point in the interpretation of legislation (including the CN) and that a word will very frequently be defined, not by a dictionary, but by its context. Nonetheless, dictionary definitions are, with that caveat, helpful. The *OED* definition of "game" was as follows:

> "II. An activity played for entertainment, according to rules, and related uses.
>
> a. An activity or diversion of the nature of or having the form of a contest or competition, governed by rules of play, according to which victory or success may be achieved through skill, strength, or luck."

77. We do not, in this decision, purport to give a comprehensive definition of what is a "game". We can certainly envisage games, or at least activities which would normally be described as a game, which can be played by one person alone. Nonetheless, in ordinary usage, we think that the *OED* definition fairly describes the game in which Beyblades "battle" each other in a Beystadium and we see nothing in the surrounding context of the CN provisions which would suggest a different meaning.

78. 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). Heading 9504 refers to "articles for… table or parlour games". The use of the word "for" seems to us clearly to require us to have regard to the intended use or function of the article in question. If the article was intended for use in a table or parlour game then, it seems to us, that it was an article "for…table or parlour games." Having accepted Mr Foster's evidence that Beyblades were intended to be used in a "battling" game, that the game had rules (promulgated on a website but also often supplemented by "local" rules devised by the players themselves) we conclude that the Beyblades were "articles for…table or parlour games". The nature of the game, as described by Mr Foster, is clearly competitive: the purpose of the game is to see which player's Beyblade remains spinning once the opponent's Beyblade has been knocked over or has stopped spinning.

79. We should add that it was not suggested that, if Beyblades were used in a game, the game was not a table game (ie a game which could be played on a table) nor was

it suggested that the game was not a "parlour" game – which we take to be simply a game that can be played indoors.

80. That said, we also consider that a Beyblade, although intended by Hasbro to be used in a game, can also be regarded as a "toy". In other words, a Beyblade can 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 e.g. in a Beystadium.

81. Mr Brinsmead-Stockham also referred to the dictionary definition of a "toy" in the *Shorter Oxford English Dictionary* as follows:

> "An object to play with, often a model or miniature replica of something and esp. for a child; something intended for amusement rather than for practical use; a plaything."

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.

83. We did not agree with Ms Murray's argument that a "toy" did not include something that was used in a competitive activity. As was pointed out, HSEN 9503D (ix) includes in the definition of "toy" items that can be used in competitive activities e.g. toy sports sets.

84. Accordingly, we have concluded that a Beyblade falls within Heading 9503 and heading 9504.

85. This, therefore, means that we must apply the tie-breaker rules in GIR 3.

86. In our view, GIR 3(a) provides a solution. We agree with Mr Brinsmead-Stockham'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.

87. For these reasons we conclude that, in accordance with GIR 3(a), Beyblades are correctly classified under Heading 9503 "Other toys". It follows, therefore, that the appeal must be dismissed.

88. Finally, we wish to record our thanks to both Ms Murray and Mr Brinsmead-Stockham for their instructive and helpful submissions.

89. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

GUY BRANNAN

TRIBUNAL JUDGE
RELEASE DATE: 8 JULY 2015