TC04072

Appeal number: TC/2013/08162

Customs Duty – classification- seats with ropes comprising children's swings – 9503 other toys, or 9506 equipment for physical exercise

FIRST-TIER TRIBUNAL
TAX CHAMBER

BIGJIGS TOYS LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE CHARLES HELLIER
MRS GILL HUNTER

Sitting in public at 45 Bedford Square WC1 on 19 June 2014

Mrs Iaeland and Mr Iaeland, Directors of the Appellant for the Appellant

Lucinda Harris, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. This appeal concerns the Customs tariff classification of three types of swing imported by Bigjigs Toys: the Cradle swing, the Ladybird swing and the Flat swing.

2. We were shown an example of the Ladybird Swing, saw pictures from the appellant's internet site of all three sorts of swing, saw the instruction leaflet for the Cradle swing, and heard Mr and Mrs Iaeland's description of them.

3. The swings do not come with frames, but comprise a seat and ropes which may be attached to a frame or an overhead support.

The Cradle Swing.

4. This is a swing for a young child. It has a square wooden base to sit on about 15 inches square. From each corner of the base a synthetic rope rises and passes through three coloured wooden beads (each about ¾" in diameter). Then there is a square of four wooden cylinders each about 1 inch in diameter which lies in a plane parallel to the base and above the edges of the base; the four ropes, on leaving the beads, pass through holes in the ends of the wooden cylinders. Then the ropes each pass through two more coloured wooden beads, and then there is a further square of wooden cylinders. The ropes at each side of the swing rise and join about 2'6" above the topmost part of the seat structure, and then continue to 2 fixing rings with a height adjustment. There is a safety strap in the body of the swing which, when engaged, prevents the wooden poles being raised. The wood used is Chinese pine.

5. The swing would be suitable to be fixed to hooks in a door lintel, or outside to a tree or to a frame.

6. The instructions which come with the swing indicate that it is intended for infants aged 1 to 3 years and weighing no more than about 3 stone (25 kg). Our observation of the structure of the swing was that it would not have been comfortable for a child of five or more (and may well have been eschewed by such a child as a baby's swing) and would have been almost impossible for an adult to use without doing him or herself, or the swing, damage.

7. These features indicate to us that the swing is intended to be used by attaching it to a mounting, putting a young child or toddler in it and pushing him or her to and fro.

The Ladybird Swing.

8. This comprises a wooden disc which appears to be about 9 inches in diameter and is decorated with a ladybird design. A rope passes through the centre of the disc, being knotted or attached underneath, and then continues to a fastening (hook) which could be attached to a tree or a frame.

9. The swing would be suitable for a child of three years or more but would not be comfortable for a well proportioned adult.

10. This swing would be suitable for outside use, but given the additional degree of freedom of movement offered by having only one rope, would be unlikely to be suitable or intended for use inside an ordinary house.

11. These features indicate to us that this swing is intended to be used by a child on his or her own by climbing onto it and causing it to move around, or by being pushed to and fro by someone else.

The Flat Swing.

12. This is a more conventional swing. It consists of a rectangular wooden base (about 8" x 16") through the corners of which ropes pass and rise to fixing rings.

13. It would not be comfortable for a large or well proportioned adult to use, but would be suitable for a children over three years of age and many teenagers.

14. This swing would be suitable for use outside when fixed to a frame or a tree but not suitable for use in an ordinary house.

15. These features indicate to us that this swing is intended to be used by a child or teenager or a light adult by sitting on it and making it swing backwards and forwards or by being pushed.

The issue of BTIs and the appeal.

16. Following applications made by the company, HMRC issue three Binding Tariff Informations on 27 August 2013 which classified each of the swings under code 9506. 99. 90. 00 that is to say as

> "Articles and equipment for general physical exercise, gymnastics, athletics or other sports (including table tennis) or outdoor games, not specified or included elsewhere in this chapter; swimming pools and paddling pools": subheadings: other, other, other.

17. The appellant appeals against these classifications contending in the notice of the appeal that the swings should be classified under code 9503. 00. 99:

> "Tricycles, scooters, pedal cars and similar wheeled toys; doll's carriages, dolls;[1] other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.": subheadings other, other, other.

[1] We noted that in the copy of the CN in our bundle there appeared to be a comma rather than a semicolon between 'dolls' and 'other toys'. In the copies of the HSEN the heading was stated with a semicolon between those words and the text of the HSEN dealt with them as if they were separate parts of the heading. We proceeded on the basis that our photocopy had obscured part of the semicolon.

The Relevant Law

18. We shall return later to the question of the interaction of the Combined Nomenclature and the Toy Safety Directive, but there was no dispute about the following principles.

19. Article 20.1 of the Community Customs Code 2913/.92 provides for customs duties to be based on the Customs tariff on the EU. Council Regulation 2658/87 sets out in Annex I the combined nomenclature (the "CN") on which the common tariff is based. That nomenclature is comprised of the World Customs Organisation's harmonised system with further EU subdivisions.

20. The combined nomenclature classifies goods under numbered chapters each of which is subdivided into numbered headings; so that, for example, heading 39 in chapter 16 will carry the number 1639. The headings are further subdivided into sub headings (with a two digit number, eg 40) and sub sub headings (with a further two digit number, eg 10), so that a complete numerical classification might be 1639 40 10. Each heading, sub heading and sub sub heading carries a description. There may be further subdivision of some sub sub headings. The harmonised system's nomenclature extends only to the first six digits of the classification: the remainder are added by the EU.

21. Section 1 of Annex 1 contains general rules for interpretation (called GIRs). So far as potentially relevant in this appeal they provide that classification under the combined nomenclature shall be governed by the following principles:

> 1. The titles of sections, chapters and subchapters are 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 ... for any ... reasons 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 ...
> >
> > (b) … composite goods consisting of different materials or made up of different components ... 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.

...

6. For legal purposes, the classification of goods under subheadings 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 otherwise requires."

22. We bear in mind two consequences of these rules. First that the rules in GIR 3 apply only where the headings or notes in the nomenclature do not otherwise dictate, and second that GIR 3 applies only if there is more than one heading which is potentially applicable.

23. In addition to the rules and the nomenclature there are Explanatory Notes to the world Customs organisation's system, ("HSENs"), and Explanatory Notes produced by the European Commission ("CNENs"). Neither have the force of law but both may be important aids to interpretation.

24. The interpretation of the nomenclature, and the approach to be adopted to ascertaining the relevant characteristics of the goods to be classified was explained by the ECJ in Case C - 495/*03 Intermodal transports BV v Staatssecretaris van Financie*, where it said:

> "[47] According to settled to case law, in the interests of legal certainty and ease of verification, the decisive criteria for the classification of goods for customs purposes is in general to be found in their objective characteristics and properties as defined in the wording of the relevant CN and of the notes to the sections or chapters.",

and, later in the same case at [55]:

> "According to the court's case law, the intended use of a product may constitute an objective criterion in relation to the 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 ..."

And at [48] in relation to the use of HSENs the Court said:

> The explanatory notes to the CN and those to the HS are an important aid to the interpretation of the scope of the various headings but do not have legally binding force….
>
> The content of those notes must therefore be compatible with the provision of the CN and may not alter the meaning of those provisions…

The possible classifications

25. We have explained that the appellant's notice of appeal argues for the 9503 coding but in the course of correspondence with HMRC two other codings were discussed. These were 9508, and a heading of Chapter 44 - wood and articles of

wood. We address those other classification headings after considering 9503 and 9506.

26. We consider first, by reference to the terms of the headings, whether the swings can fall under any of them leaving aside until later the effect, if any, of GIR 3 and 4.

9503.

27. This heading is broken by semicolons[2] into 6 categories:

(1) tricycles, scooters, pedal cars and similar wheeled toys;

(2) dolls' carriages;

(3) dolls;

(4) other toys;

(5) reduced - size ("scale") models and similar recreational models working or not;

(6) puzzles of all kinds.

28. The only category in this heading into which the swings could fall his "other toys".

9506.

29. This heading contains two groups

(1) articles and equipment for general physical exercise, gymnastics, athletics, other sports (including table tennis) or outdoor games, not specified or included elsewhere in this chapter;

(2) swimming pool and paddling pools.

30. The only category in this heading into which the swings could fall is:

> "equipment for general physical exercise ... or outdoor games, not specified or included elsewhere in this chapter."

The parties' arguments

31. Mrs Iaeland argued that the swings were properly classified as "toys" within 9503. She says that:

(1) a toy is something with which a child will have an interaction;

[2] See footnote 1 above

(2) the EU toys Directive applies to the items the appellant sells: of its range of 2000 items, all but 15 are required to comply with the requirements of that directive since they are toys for the purposes of that directive. The definition of toys in that directive should apply also for the purposes of the combined nomenclature;

(3) although she accepts that in HSEN 9506 reference is made to playground swings and that there is no such reference in HSEN 9503, she says that:

(a) the absence of an express reference to swings in HSEN 9503 is not conclusive: the notes are for guidance and are not comprehensive definitions; and

(b) the swings are toys for social and domestic use, not the kind of swing one would find in a children's playground which are referred to in HSEN 9506. The swings are made of wood; playground swings are made of much tougher materials. Playground swings are more robust and could conceivably be cast as equipment for physical exercise or outdoor games; the swings in this appeal are toys for domestic use;

(4) the swings are for use under adult supervision; whereas the items of 9506 are typically used unsupervised;

(5) if the swings under consideration are potentially classifiable under both 9503 and 9506, then 9503 is more specific and should prevail in accordance with GIR 3(a).

32. Miss Harris says:

(1) "toys" are things a child plays *with*; the Oxford English Dictionary defines “toy” as "an object for a child to play with, typically a model or a miniature replica of something"; a swing, by contrast, is something to play *on*. A swing, like a slide, is not a toy: it is equipment;

(2) the need for adult supervision and outdoor use are not intrinsic requirements of all the items of 9506. “Outdoor games” is only one of the list of activities in the first part of 9506 and many of the others (such as table tennis) would take place indoors and without adult supervision;

(3) the definition in the Toys Directive is not relevant for the purposes of the combined nomenclature;

(4) even if the Toys Directive definition had some relevance to the interpretation of the CN, it could not be determinative because whilst for the purposes of the Toys Directive paddling pools may well be toys, for CN purposes they fall specifically into 9506 (rather than 9503), and are thus not toys;

(5) there is no intrinsic element in the items of 9506 which give them all a "public" rather than the private or domestic nature: paddling pools are typically used in private back gardens, but are classified with equipment under 9506, and not in 9503;

(6) a swing by contrast is something used for sports or outdoor games within 9506. One of the Oxford English Dictionary's definitions of ‘game’ is "an activity that one engages in for amusement": that is how a swing is used. It is thus equipment used for outdoor games within 9506;

(7) the OED also defines "game" as a form of competitive activity or sport played according to rules. Using a swing may not fall into that definition, but the existence of that second definition does not preclude the validity of the first;

(8) the presence of paddling pools in 9506 is magnetic. It affects the way one should construe that heading: both swings and paddling pools are used by children for amusement;

(9) the classification is put beyond doubt by the HSEN in relation to 9506 paragraph (D) (12) a which includes an example of requisites for sports and outdoor games:

> "equipment of a kind used in children's playgrounds (e.g. swings, slides, seesaws and giant strides)”

(10) had it been intended that there should be a distinction between swings used in public playgrounds and swings in domestic gardens, the HSENs would have drawn a distinction as they do in relation to toy sports equipment; a children's playground included a domestic garden.

Discussion

GIR 3 and the exception in 9506 for goods included elsewhere.

33. We note the words "not specified or included elsewhere in this chapter".

34. It seems to us that these words mean that if a swing fell within 9503 that heading will take precedence over 9506. GIR 3 provides a rule where goods are prima facie classifiable under more than one heading. It seems to us that this rule should be applied after the consideration of the terms of heading 9506, and that as a result if particular goods are “included elsewhere in” Chapter 95 they cannot fall within 9506, with the result that GIR 3 will not be called upon to adjudicate between 9506 and that other heading of Chapter 95. The situation would be different if the competing heading fell outside chapter 95: in that case it would be possible that the goods fell within the meaning of two different headings and GIR 3 would then apply to determine which.

The Toy Safety Directive: can its definition of “toys” be transposed into the CN?

35. Articles 1 and 2 of the Toy Safety Directive 2009/48/EC provide:

> CHAPTER I
>
> GENERAL PROVISIONS
>
> Article 1
>
> Subject-matter

> This Directive lays down rules on the safety of toys and on their free movement in the Community.
>
> Article 2
>
> Scope
>
> 1. This Directive shall apply to products designed or intended, whether or not exclusively, for use in play by children under 14 years of age (hereinafter referred to as toys).The products listed in Annex I shall not be considered as toys within the meaning of this Directive.
>
> 2. This Directive shall not apply to the following toys:
>
> (a) playground equipment intended for public use;
>
> (b) automatic playing machines, whether coin operated or not, intended for public use;
>
> (c) toy vehicles equipped with combustion engines;
>
> (d) toy steam engines; and
>
> (e) slings and catapults.

36. In *Card Protection Plan v Customs and Excise Commissioners* [1999] 2 AC 601, the ECJ was asked by the House of Lords whether certain services fell within the meaning of insurance services for the purposes of Art 13B(a) of the Sixth Directive.

37. The expression insurance was not defined by that Directive, but at that time there were in force two insurance Directives, 73/239 and 77/92; they did not define insurance either but contained an annex setting out classes of activity to which the directive would apply. The House of Lords asked whether "insurance" in Art 13B(a) included the activities listed in those insurance directives.

38. The Advocate General at [27] pointed out that it was necessary to interpret a community provision in the context of which it formed part, and that Directive 73/239 and 77/92 had been in force when the Sixth Directive was adopted. There had been later amendment by Directive 84/64,1 but he concluded that "for the purposes of the [VAT] exemption for insurance transactions [in art 13B(a)] the term insurance should be interpreted coterminously with the scope of the insurance directives for the time being in force.". The court, at[18] said

> "There is no reason for the interpretation of the term "insurance" to differ according to whether it appears in the directive on insurance or in the Sixth Directive."

39. In her submissions on this issue Miss Harris says:

> In contrast to the issue in *Card Protection Plan*, the Tribunal in this case does not have to interpret words of a Directive (or any legislative instrument). The question is how the swings should be properly classified within the combined nomenclature ("CN") which is a self-contained code. The purpose of the CN is to provide a

> systematic classification for all goods in international trade and to ensure that any product falls to be classified in one place and one place only. The starting point must therefore be the general rules for interpretation of the CN (the GIRs). Classification of a product falls to be determined by considering the wording of the relevant heading of the CN and the wording of the notes to the section or chapters, as well as any explanatory notes (the HSENs).

40. We do not wholly follow this argument. In *CPP* the court had to decide whether a particular service was an insurance service for the purposes of the Sixth Directive. To do that it had to determine the meaning of "insurance", a meaning which had to be the same across the EU. In this appeal we have to decide whether swings are toys. To do that we have to determine the meaning of "toys". That word, appearing in an EU instrument must likewise have an automonous EU meaning. The approach of the ECJ to determining the meaning of insurance must have some relevance to the construction of this EU instrument. The question to be asked is that the ECJ postulated: is there any reason for a different interpretation? In that context we accept that considerations other than the EU background may be relevant to the construction of an instrument based on a treaty between more states than those in the EU.

41. Miss Harris continues by referring to the principles contained in paragraphs [47] and[48] from *Intermodal* quoted above. Then she says:

> "This approach to classification must be strictly adhered to so that its effects in relation to goods imported into any of the EU member states from outside the area of the EU Customs Union will be precisely the same. Therefore the *Card Protection Plan* case unfortunately provides no real assistance as the legal principle is different and in this case there is a comprehensive self-contained code so there is no need to look outside the CN for the meaning of words or phrases."

42. Again it seems to us that the exercise the ECJ undertook in *CPP* was precisely part of ensuring that the meaning of "insurance" was exactly the same in all member states. Nor, more broadly, do we accept that the meaning of a word is wholly independent of its common use: the references Miss Harris makes to the dictionary definitions of words used in the Directive are useful aids to the meanings of the words in the CN but are not part of the CN.

43. It seems to us that the principle to be derived from *CPP* is that if words in different community instruments are to be construed as having different meanings there must be good reason for that difference, particularly where one instrument containing one definition was in force at the time the other was adopted, and so formed part of the context of the latter.

44. Miss Harris refers us to two decisions in relation to the CN in which the High Court and the Upper Tribunal respectively found no assistance in the construction of the CN from other legislation. The first was *Unigreg Ltd v Commissioners of Customs & Excise* [1998] 3 C.M.L.R. 128, in which Moses J upheld the finding of the VAT and Customs Tribunal that a product which fell within the definition of a "medicament" under the Medicine Act was nevertheless properly classified as a food

supplement, and not a medicament, under the CN. Moses J expressed the view (at paragraph 8) that "*the fact that a medical product falls under that directive is, at the very lowest, of so little weight that it is of no assistance. That directive is dealing with control of medicines in another context and is, therefore, deliberately phrased in very wide terms.*"

45. Moses J refers in this passage to "that directive" having previously referred to the Medicines Act. It is not immediately clear whether by "that directive" he means the UK Medicines Act or the EU Directive to which it gave effect. But the thrust of his comment remains useful: an enactment may, rather than providing a definition of the normal usage of a word provide an extended definition to bring within the ambit of the regulation an activity which would not otherwise fall within it. Conversely it may be artificially limited.

46. The second was *Amoena (UK) Limited v The Commissioners for Her Majesty's Revenue and Customs* [2013] UKUT 0394 (TCC) in which the Upper Tribunal rejected the argument that because a mastectomy bra is defined as a medical device under the Medical Devices Directive and also Group 12 of Schedule 8 to the VAT Act 1994 meant that it should be classified as a medical device for the purpose of the CN. The Upper Tribunal, having noted that counsel for the appellant "accepted that there was no CJEU authority for applying a definition in EU or national legislation to define the same term in a different EU instrument", went on to say:

> "[55]. In the absence of authority for the proposition we do not accept that the principle of legal certainty requires a term to be defined in the same way for the purposes of different legislation. This is particularly so where, as here, the legislation relates to different areas of law, namely product standards and safety, VAT and customs duty."

47. We do not find *Amoena* directly helpful since what was accepted there by the appellant's counsel appears to overlook what the ECJ said in *CPP*. In particular what was said in *CPP* did not relate to the principle of legal certainty but to the requirement to construe an instrument in its legislative context.

48. But it seems to us that both these cases illustrate contexts in which there may be good reasons for there being a difference in the meaning of a word in two community instruments. One instrument may adopt an artificial definition in order to simplify the language with which it makes particular provision: where it does that then even if the other instrument is part of the context for the one to be construed, there is a reason for not translating that definition to another instrument.

49. We consider that regard may be had to the context in which the CN was framed (see also for example [22] in Chacon Navas v Eurest Collectividades SA C-13/05). That may include the instruments of supranational bodies and possibly EU Directives, but the provisions of one EU Directive will not be determinative. The CN is part of an EU instrument whose chapters and headings are part of the World Customs Organisation's harmonised system; this is a good reason for construing it by reference

to wider context. In the same way as an autonomous EU meaning of a word in an EU Directive cannot be dictated by a particular national provision.

50. In our view, whilst the Toy Safety Directive's definition of toys in Article 1 as

> "products designed or intended, whether or not exclusively, for use in play by children under 14 years of age (hereinafter referred to as toys)"

artificially restricts the meaning of "toys" by the reference to age of the person playing with them[3], its use of the phrase "products designed or intended, whether or not exclusively, for use in play" might well be an acceptable ordinary definition of a toy. Indeed it seems little different from the OED definition which Miss Harris favours of "an object for a child to play with, typically a model or a miniature replica of something".

51. We find that the emphasis on play is important and is an important distinguishing feature of the products which are "toys" for the purposes of the CN.

The Competing headings - construction

52. In construing the headings in the nomenclature it seems to us that a word is coloured by its neighbours. But when comparing competing headings the colour bestowed on a word by its neighbours in one heading may be diluted by the contents of the other heading at the same level.

9503

53. We think that Mrs Iaeland's definition of "toys" as something with which a child will have an interaction is too wide: it includes food, books and toothbrushes, which are plainly not toys. In our view the essential element is play.

54. We accept that the usual English usage of "toy" is something you play "with". But in 9503 the words "other toys" follow a list of other goods: tricycles scooters, pedal cars, dolls carriages and dolls. Tricycles, scooters and pedal cars would normally be described as things you play "on", and only secondarily as things you play "with": their presence in the list preceding "other" toys thus suggests that at least some "other toys" may share the characteristic that you play "on" them as much as "with" them. However, the fact that it is less natural to describe the use of a swing as "play with a swing" than it is to describe use of a pedal car as "play with a pedal car", shows that swings do not fit completely naturally into "other toys".

55. The HSEN for 9503 says that the heading "other toys" includes:

> "(v) toys designed to be ridden by children not mounted on wheels eg rocking horses;…
>
> (xix) hoops, skipping ropes and tops…

[3] Indeed the HSEN 9503 at (D) expressly indicates that the heading includes toys for adults

(xxiii) play tents for use by children indoors or outdoors."

56. The suggestion in (v) that rocking horses, which one plays "on" rather than "with", are toys is persuasive support for the proposition that "other toys" is not limited to something one plays "with".

57. However the presence of paddling pools in 9506 which are plainly something you play "in" rather than "with" indicates that the extension of "other toys" to something you may play on is not comprehensive, or that swimming and paddling pools have some other feature which weighs sufficiently in the balance to make another heading appropriate. .

58. We think that it would be normal usage to describe the use of a swing as "riding on" the swing. Thus HSEN 9503 (v) indicates that a swing could be an "other toy"

59. We do not see in the list of the neighbouring words to "other toys" any characteristic of use mainly outdoors or indoors. Tricycles and scooters are typically for use out of doors, dolls both outside and indoors and puzzles indoors only. The 9503 HSEN's example play tents are specifically for use in or out of doors.

60. We do not sense any common thread in 9503 or in the meaning of "other toys" which indicates that goods of this heading are generally used under adult supervision. We come below to the conclusion that there is no common thread of the absence of supervision in the items of 9506. As a result we do not find that use or intended use under adult supervision is a relevant distinguishing feature in comparing and construing 9506 and 9503.

61. In relation to items like cricket bats there is an express recognition in HSEN 9503 (d)(iv) that toy cricket bats fall under 9503, despite otherwise also falling in the examples in HSEN 9506 for sports equipment. Miss Harris suggested that the presence of playground swings in (B)(12) in HSEN 9506 coupled with the absence of a corresponding example in HSEN 9503 for toy swings or domestic swings indicated that such swings were "of a kind" with playground equipment. On this point we accept Mrs Iaeland's submission that nowhere is it said the Explanatory notes are intended as comprehensive – they provide examples and explanation, not legislative definition. HSEN 9503(D) says that the heading "includes" the examples given, not that it is limited to the examples. We do not regard the absence of a reference to domestic swings in HSEN 9503 as persuasive that such swings cannot fall under that heading.

9506

62. "[O]utdoor games" lies in a list whose constituents all involve physical exercise: general physical exercise, gymnastics, athletics, and sports. We conclude that "outdoor games" is so coloured by this association as to require some significant component of physical exercise: equipment for outdoor chess would not fall within this category. We find physical activity a distinguishing feature of this heading.

63. The normal use of swimming and paddling pools involves such activity. For that reason it seems to us that they fall within this heading rather than 9503. They may be used to play in but that use involves significant physical activity. For that reason we do not consider that their presence in this group has a magnetic effect in relation to other garden equipment.

64. We accept that “outdoor games” are not limited to competitive activities and may include activities undertaken for amusement, but the presence of “amusement” is not a feature which distinguishes a toy from an outdoor game – a conclusion confirmed by HSEN 9503 para (D) which says of “other toys” that they are toys intended for the amusement of persons.

65. As Miss Harris says, HSEN 9506 at (B) (12) gives this example of equipment for outdoor games:

> “(12) Equipment of a kind used in children’s playgrounds (e.g. swings, slides, see-saws and giant strides).”

66. That such equipment should be included is consistent with our understanding of the heading since the use of such swings and slides involves significant physical activity by those amusing themselves on them.

67. We do not however consider that “children’s playgrounds” is intended to embrace an average back garden. Children’s playgrounds are to our minds places to which a number of children from different families may resort. The “kind” of swings used in a children’s playground will be more robust than in a back garden. We do not find that this note supports a conclusion that all swings fall into this heading.

68. We do not regard the absence of adult supervision in the inherent intended use of the equipment in this heading as a common feature. Much sports equipment is used under supervision in gyms and schools, and much is used by children and adults without supervision.

9508.

69. This section is headed:

> "Roundabouts, swings, shooting galleries and other fairground amusements; travelling circuses and travelling menageries; travelling theatres.

70. The semicolons in his heading break it into three groups; the question for us is whether the swings at issue fall into the first group:

> “roundabouts, swings, shooting galleries and other fairground amusements”.

71. The words "and other fairground amusements" indicate to us that the roundabouts, swings and shooting galleries with which the heading is concerned are those of the kind customarily found at fairgrounds. Had the heading been intended to encompass all forms of swing or roundabout it would have read "roundabouts, swings and shooting galleries; fairground amusements".

Chapter 44: Wood and Articles of wood.

72. Note 1(p) to this Chapter excludes from the chapter articles within chapter 95.

The Three Swings – classification

73. We should start by dismissing headings 9508 and any heading in Chapter 44.

74. So far as 9508 is concerned, The objective characteristics of the swings at issue in this appeal are not those of swings appropriate for, or customarily found, at a fairground: even though a fairground might make provision for swings for younger children, the items under appeal are less robust than such swings and are not supplied with the frame or mounting which is a necessary part of such fairground swings. They would not be suitable for fairground use.

75. We conclude that the swings do not fall under this heading.

76. So far as Chapter 44 is concerned, we conclude below that the swings fall within chapter 95. As a result they cannot also fall within this chapter even though they are made out of wood.

(1) The Flat Swing

77. This item permitted the user to engage in outdoor physical activity for amusement. It was in our view equipment for physical exercise or outdoor games, and capable of falling within 9506. We were comforted in that view by HSEN 9506: it had some similarities to the type of swing found in a children's playground. Although made of wood it was of a plain and moderately robust character.

78. As a result it falls within 9506 unless it falls within 9503 (since the heading to 9506 excludes anything which falls within 9503).

79. We did not regard it as an "other toy". Its intended use is for physical exercise rather than for play. Even though one might describe it as being ridden, it is ridden not principally for play but more for motion and exertion. We conclude it does not fall within 9503. It therefore falls in 9506.

(2) The Ladybird Swing

80. We came to the same conclusion for the same reasons in relation to the ladybird swing as we do in relation to the Flat swing. It falls to be classified under 9506.

(3) The Cradle Swing

81. We start by considering whether it falls within 9506.

82. We do not regard the Cradle Swing as being equipment for physical exercise. Its use is not for physical exercise but principally for the amusement of the occupant. The

swing may be pushed by someone else, and that may be physical exercise, but the swing was not for the pusher's physical exercise.

83. Nor do we regard it as equipment for outdoor games. Although it may be used out of doors, its intended use does not have the requisite element of physical exercise.

84. We do not regard HSEN 9506 (B)(12) as requiring that something which does not lie within the heading to be brought within it (see [48] of *Intermodal)*. But we do not regard the Cradle swing as falling within this guidance. Swings in children's playgrounds are used in often vigorous physical exercise by children: such swings fall within the heading. The Cradle Swing is not "of a kind" with such swings because (a) such swings come complete with sturdy frames; (b) such swings are made of sturdy materials, with thick plastic frames and metal chains to prevent vandalism: the Cradle Swing would not last long if hung up in most children's playgrounds (c) it is not the kind of swing used for physical exercise or a physical game and the kind of swings to which the HSEN refers are in our view limited to those which are.

85. We conclude that it does not fall within 9506.

86. The Cradle Swing is something for the amusement of a child: such use, where the relevant item may be played on, is sufficient to enable it to fall within "other toys".

87. The user of the cradle swing will ride on it. It is designed to be so ridden. It therefore falls within HSEN 9503 "other toys" (iv) being, like a rocking horse, designed to be ridden on by a child. That interpretative aid comforts us in our conclusion that the swing may fall within this heading.

88. We conclude that the Cradle Swing falls within 9503. As a result it cannot fall within 9506.

Subclassification and Conclusion

89. There was no controversy about the relevant subclassification once the heading had been determined.

90. The proper classification for the Cradle swing is 9503 00 99 90, and that for the other swings is 9506 99 90 00.

91. **Rights of Appeal**

92. 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.

CHARLES HELLIER
TRIBUNAL JUDGE

RELEASE DATE: 15 October 2014