



TC01840

Appeal number: TC/2010/02410

Customs Duty – classification – Combined Nomenclature – airsoft guns classified by HMRC under heading 9304 – whether importer’s claimed classification as “toy weapons” under heading 9503 appropriate – held, no – HMRC’s classification upheld – appeal dismissed

FIRST-TIER TRIBUNAL

TAX

AIRSOFT ARMOURY LTD

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S
REVENUE AND CUSTOMS**

Respondents

**TRIBUNAL: JOHN CLARK (TRIBUNAL JUDGE)
MARK BUFFERY FCA, AIIT**

Sitting in public at 45 Bedford Square, London WC1 on 5 December 2011

Stephen Cheshire, Director, for the Appellant

Jonathan Davey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The Appellant (Airsoft Armoury”) appeals against a tariff classification decision made by the Respondents (“HMRC”) in respect of products imported during 2006, 2007 and 2008. The appeal is against HMRC’s decision to classify airsoft guns imported by Airsoft Armoury as falling within tariff code number 93040000 (for details, see below).

The law

2. The details of the legal framework set out in Mr Davey’s skeleton argument were the same as those in the case of *Outside In (Cambridge) Ltd t/a Lumie* [2011] UKFTT 441 (TC); they were set out in detail in that decision and we therefore do not repeat them here.

3. Tariff code no. 93040000 is as follows:

“Other arms (for example, spring, air or gas guns and pistols, truncheons), excluding those of Heading 9307.”

Note 1(e) to that heading states:

“1. This chapter does not cover:

(e) bows, arrows, fencing foils or toys (Chapter 95);”

4. Tariff heading no. 9503 is as follows:

Tricycles, scooters pedal cars and similar wheeled toys; bolls’ carriages; dolls, other toys; reduced-size (‘scale’) models and similar recreational models, working or not; puzzles of all kinds.”

Note 1(s) to that heading states:

“1. This chapter does not cover:

(s) arms or other articles of Chapter 93”).

Tariff code no. 95030081 is as follows:

“Other

- Toy weapons”

The facts

5. The evidence consisted of a bundle of documents, and certain other documents provided by each party at the hearing. Mr Cheshire did not give formal evidence, but provided information in the course of his presentation of Airsoft Armoury’s case. We have taken relevant parts of such information into account, but with the proviso that this information cannot be given the same weight as formal evidence. For HMRC Marilyn Seago, the Review Officer gave a witness statement and also gave oral evidence.

6. From all the evidence we find the following background facts; we consider disputed matters later in this decision.

7. Between August 2006 and July 2008 Airsoft Armoury imported consignments of various goods including, in particular, airsoft guns using tariff heading 9503, and specifically the heading 95030081. Mr Cheshire told us that a colleague had telephoned HMRC and asked for information as to the correct heading for airsoft guns, and that his colleague had been advised that they should be classified under “Toys”; as the evidence on this was disputed, we consider it below.

8. In May 2009 HMRC’s officer Mrs Amarjit Loyal visited the premises of Airsoft Armoury. In the course of her visit, she concluded that the tariff code heading which Airsoft Armoury had been using was not correct.

9. On 23 July 2009 Mrs Loyal wrote to Mr Cheshire as Director of Airsoft Armoury. The initial paragraphs of her letter stated:

“I refer to my visit on 7 May 09 in connection with Commodity codes relevant to the products (Airsoft guns) you are importing. You have been advised in my e-mail of 16 June 09 that there is already a BTI Binding Tariff Information) for the ‘airsoft guns’ which established these products as proper to Tariff Heading 93040000 and not 95030081.

Tariff Heading 93040000 attracts 3.2% Customs duty, whereas 95030081 has ‘nil’ rate of duty.

As you have imported the ‘airsoft guns’ using the incorrect commodity code we have to call for the unpaid duty & import VAT for the last 3 years. Please see attached schedule detailing duty from 18 Aug 2006 to 16/07/08.

Underpaid duty amounts to £13942.57 & import VAT to £2439.95. Total amount due is £16382.52. However you can reclaim the import VAT against VAT Certificate C79.”

10. With her letter she also enclosed a Post Clearance Demand Note showing the total amount due.

11. On 18 August 2009 Mr Cheshire wrote to HMRC contesting their classification decision (and, by implication, the Post Clearance Demand Note).

12. That letter was treated by HMRC as a request of a formal departmental review of HMRC’s classification decision. On 2 October 2009 Marilyn Seago wrote to Mr Cheshire with the results of her review. This was that the item in question [ie airsoft guns] was correctly classified under commodity code 93040000, which meant that she must uphold the decision to issue a Post Clearance Demand Note. She referred to the background to the decision and to the legislation and guidance, and then set out her decision:

“Having given due consideration to the information available I must uphold the decision to issue Post Clearance Demand Note (C18)

C18023193 in respect of underpaid duty and import VAT due to misclassification of the above goods.

When reaching my decision I have considered the terms of the following heading [*sic*]

- 5 9304 [set out as at paragraph 3 above]
- 9503 [set out as at paragraph 4 above]
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- Other:
- Toy weapons 95030081”

10 [This was followed by a detailed explanation of why the airsoft guns did not fall within the latter heading; we consider this below in the context of the parties’ arguments.]

13. On 2 March 2010 Mr Cheshire on behalf of Airsoft Armoury filed its Notice of Appeal. HMRC’s Statement of Case was filed in February 2011.

15 *Arguments for Airsoft Armoury*

14. The grounds for appeal set out in Airsoft Amoury’s Notice of Appeal were, in principle:

(1) Airsofts were neither arms nor a weapon. The definition of weapon applied by HMRC did not cover airsofts as they were neither:

- 20 (a) a thing designed or used for inflicting bodily harm; nor
- (b) a means employed for trying to gain an advantage in a conflict.

(2) Airsofts were designed to be used in the sport/pastime of airsoft and their low muzzle energy was designed specifically not to inflict bodily harm. An airsoft was no more a weapon than a cricket bat.

25 (3) In reaching their decision HMRC had referred to a BTI issued by Ireland (considered below), but this had not been issued until September 2009, after the period covered by the decision.

30 (4) The appeal was being made because HMRC wished to describe the items as arms/weapons when they were toys. They were designed as toys, manufactured as toys and used as toys.

15. Mr Cheshire explained that the dispute with HMRC came down to a very simple question: were airsoft guns toy weapons or were they firearms? A firearm, as defined in s 57 of the Firearms Act 1968, was “a lethal barrelled weapon”. The definition of “arms” in the Cambridge Dictionary was: “weapons and equipment used to kill and injure people”.

16. He referred to firearms and the licensing requirements in the UK. An air gun with a power level below 12 foot pounds was called an unlicensed firearm. He submitted that if a gun was not a lethal barrelled weapon, it was not a firearm but a toy or model.

17. In a letter from HMRC dated 2 October 2009 [not included in the bundle] they had stated that Chapter 95 did not cover arms. It appeared to Mr Cheshire that HMRC were confused; they had referred to an air gun, and he contended that Airsoft Armoury had not been importing air guns. He submitted that airsoft guns were not lethal barrelled weapons; they were not air guns and they were not unlicensed firearms.

18. He referred to the lack of clarity as to the power level required before an item became a lethal barrelled weapon, and to a letter dated 19 September 2011 headed “Re: Airsoft lethality thresholds” written by Andy Marsh, Deputy Chief Constable of Hampshire Police and Chairman of the Firearms and Explosives Working Group. [We consider below the issues raised in and by this letter and its status in the context of the present appeal.] Everything which Airsoft Armoury had imported was below 1.5 foot pounds or 1.5 joules and was incapable of causing an injury.

19. If HMRC considered that an airsoft gun was not a firearm but could still be an “arm”, Mr Cheshire could not follow the logic of their argument. He referred to the legislation relating to “Realistic Imitation Firearms”. He submitted that an airsoft gun could not be an “arm” because it could not be used to kill and injure people. He described airsoft guns as being made of relatively weak materials.

20. He submitted that “airsofts” were toys. “Toy” was defined in the Cambridge Dictionary as an object which was used by an adult or child for pleasure rather than serious use. Airsoft models (or imitations) of real firearms were used in the hobby of airsoft skirmishing, which he likened to “paintball without paint”. They were an integral part of this, which was a recreational activity. It followed that the definition of “toy” could be used to describe the object used in this pastime. He referred to the approach to classification stated by the ECJ in *Intermodal* at [47]:

“According to settled case law, 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 found 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.”

21. He re-emphasised that airsoft models were made from relatively weak materials and were specifically designed to be of such a low power level as to be incapable of inflicting an injury of note. Mr Cheshire referred to the mechanisms of gas powered airsofts and to battery powered airsoft guns; the latter shared many parts with remote controlled cars.

22. He submitted that the objective characteristics of an airsoft model (an item specifically designed to be used as a toy in a recreational activity, sharing many parts with toy cars, built to be incapable of becoming a firearm, and modelled on a real firearm) meant that tariff heading 9503, containing toy weapons and recreational models whether working or not, was the most suitable for airsofts.

23. He emphasised that an example of an airsoft gun had been shown to Mrs Loyal when she visited Airsoft Armoury’s premises; difficulties would have arisen with

posting an example to HMRC, as specific compliance requirements applied before an airsoft gun could be posted to anyone.

24. In the course of his reply to HMRC's argument, Mr Cheshire produced to us for examination two samples, both of which would on the HMRC view be regarded as "arms". One was an example of an airsoft gun as such, and the other was of yellow plastic and did not resemble a real weapon.

25. The definitions did not mean that an airsoft gun was an air gun. He submitted that although the EC Regulation made no reference to power levels, it did refer to "arms". Airsoft guns were not "arms", in view of their power level, nor (for the same reason) were they air guns. The Regulation stated the reason for the classification as being that the item concerned "may cause bodily harm". He argued that it was not possible to harm anyone with an airsoft gun, which was incapable of being used to kill or injure.

26. He referred to other parts of Chapter 95, which included (for example) fencing equipment. He commented that participants in the sport of fencing required face protection, and that the items concerned under that heading were used for sport and recreation.

27. In respect of the BTIs cited by HMRC as supporting their view [for details of the BTIs, see below], he made the following comments. He emphasised that there were 27 Member States of the EU, and that details of such questions were shared between them by internet. On the German BTI, he indicated that he did not consider himself an expert on that product; he thought what was being described was an air gun as such. The BTI referred to "risk of injury", which he considered would be inappropriate in the context of an airsoft gun. He suspected that the anonymised BTI issued by HMRC related to goods imported by a friend of his. Mr Cheshire viewed the approach to these BTIs as involving a basic error; airsoft guns were put into the category of "arms", then "soft" was deleted from the description "airsoft guns". Airsoft guns were not considered to be air guns. Air guns could injure or kill; Mr Cheshire was unaware of any injury occurring as a result of a shot from an airsoft gun. He re-emphasised the conclusions of the report enclosed with Mr Marsh's letter.

28. He submitted that from examination of the evidence produced by the Police, the Forensic Science Service and various Acts of Parliament, it was clear that airsoft models should be classified as toys or models and not as firearms.

Arguments for HMRC

29. Mr Davey submitted that the appeal should be decided on the documentary evidence, and that if the Tribunal did not accept this primary submission, it should take into account that there might be instances in which the submissions for Airsoft Armoury went beyond the documents. If other matters were presented as fact, it should be borne in mind that everything had to be weighed in the balance.

30. In respect of Mr Cheshire’s references to the airsoft guns not hurting people, there was no expert evidence. The conventional approach in relation to expert evidence was that there should be a report, or witness statement on a particular issue. Some of Mr Cheshire’s submissions were of fact and were not part of the witness
5 evidence; as a consequence, HMRC had not been able to examine these matters in advance. Although the letter from Mr Marsh had been sent to HMRC in advance of the hearing, such a letter would not normally be regarded as expert evidence.

31. Mr Davey took us in some detail through the legal framework, as recorded in
10 *Outside In t/a Lumie* at paragraphs 3 to 6, and emphasised the need to follow the hierarchical order as governed by that framework.

32. He made what he submitted was the crucial point in the present case. This was that what was under examination was not a question of the provisions of the Firearms Act 1968, nor of the proper construction of the Violent Crime Reduction Act 2006. Weapons had for many decades been subject to statutory regimes relating to licensing.
15 This was not the question which this Tribunal had to decide. The appeal involved looking at the EC customs tariff, not the licensing regime. There were no references in the EC legislation to firearms licensing, nor were there any references in the licensing legislation to EC legislation.

33. Mr Davey referred to the description and characteristics of airsoft guns, and to a
20 picture of an example. He handed up a print-out from Airsoft Armoury’s website, which referred to a change in the law regarding the purchase of airsoft guns, and showed a number of products available for purchase, subject to the legal conditions mentioned. In HMRC’s view, what was under examination was various types of air gun. He referred to the Oxford English Dictionary definition of “air gun”: “A gun for
25 shooting a pellet or other missile by the force of compressed air.” HMRC accepted that there could be various different ways of making an airsoft gun.

34. Mr Cheshire had referred in his submission to “air gun”. This term predated the licensing legislation by many years. Mr Davey submitted that the more natural definition was that from the Oxford English Dictionary. The contrast was with a
30 firearm; the force involved was not a defining characteristic. He referred to the definition in that dictionary of “firearm”; this showed that there was a distinction in ordinary language between an air gun and a firearm. Mrs Seago’s evidence [considered below] was that airsoft guns were seen by HMRC as akin to air guns.

35. HMRC submitted that on the face of things, an airsoft gun was not a “toy” in the ordinary sense of that word. “Toy” covered a huge range, as could be illustrated by considering the contents of a toy box. Developing the concept became more and more strained; could a [ie a real] yacht or racing car be regarded as a toy? Nor were airsoft guns, in terms of the Regulations concerning “Realistic Imitation Firearms”, used in the “acting out of military or law enforcement scenarios for the purposes of
40 recreation”. They were akin to air guns.

36. In the context of the Tariff, Mr Davey referred to the heading of Chapter 95, and to Note (s). Airsoft Armoury was relying on heading 95030090. He submitted that the

previous items above that heading should be considered. The heading itself referred to toy weapons; he suggested as an example a water pistol, or something from Toys R Us. The present example was very far removed from that. He contrasted the process of following through Chapter 93 to heading 9304; this did not involve dolls, trains, models etc. HMRC submitted that on the face of things, this was the heading which more accurately described the subject matter of the present appeal.

37. Mr Davey referred to the surrounding materials. The Explanatory Note (“EN”) to Chapter 93 showed as excluded from that Chapter:

“(Cross-bows, bows and arrows for archery, and arms having the character of toys (Chapter 95).”

The EN to heading 93.04 stated that it included:

“(4) Air guns, rifles and pistols. These resemble normal rifles, pistols etc., but they have provision for compressing a column of air which is released into the barrel of the weapon when the trigger is pulled, thus ejecting the ammunition.”

38. That note made no reference to particular power levels; nor was there any reference to power levels in the heading itself. He submitted that this was relevant and accurately described a standard airsoft gun as an example of an air gun.

39. He also referred to Commission Regulation (EC) No 242/96. The description of the goods covered by this Regulation was:

“Air-pistol, of plastic with an internal mechanism and internal part of the barrel made of metal, capable of firing plastic pellets.”

The classification was 93040000. The reasons given were, first, the application of General Rule 1 for the interpretation of the Combined Nomenclature (“CN”) and by the wording of that code, and also as follows:

“The classification of the product in heading 9304 is due in part to the fact that it may cause bodily harm in view of its range and power of impact.”

40. Mr Davey submitted that this was a description of an airsoft gun. The code heading was the one which HMRC said should be used in the present case. The Regulation was not specific in terms of the power output energy; it did not say that if an item was below a specific level, it should be treated as a toy.

41. He also referred to four BTIs, which we consider below. He then emphasised the process which should be followed when considering the classification of an item; Mrs Seago had done this when considering the decision on review. He submitted that all the BTIs supported, rather than going against, HMRC’s decision.

42. In response to the points made on behalf of Airsoft Armoury, and in particular Mr Cheshire’s question raised at the beginning of his argument, the question for consideration by this Tribunal was not whether airsoft guns were “weapons” or “firearms”; it was a “red herring” to go into questions relating to the Firearms Act.

5 The process was to decide which heading was the appropriate one. Whether an airsoft gun was a firearm, a lethal weapon or particular type of arm was not the question for decision. The Tribunal was not required to decide on the issue of inflicting bodily harm. The intention behind the item was of limited relevance; the question was the objective characteristics of that item.

10 43. It was not in dispute that a person engaged in airsoft activity had to wear protective eyewear, and possibly protective clothing. The print-out from Airsoft Armoury's website referred to the lower age limit for use of airsoft guns as now being 18; this was a long way from Toys R Us. Further, although not strictly relevant, the print-out indicated that a licence was now required for airsoft gun use. On the face of the documentary evidence, it was far from clear that airsoft guns could not harm people. Further, particular types of airsoft gun could harm, as they were more powerful; there was a broad range covered by the term "airsoft gun".

15 44. Mr Cheshire had referred to some airsoft guns as sharing some parts with toy cars. Mr Davey submitted that the Tribunal should reject that argument. It did not mean that airsoft guns were toys. On the normal meaning of the word, they were guns. They were a typical example of an air gun, as this was to be interpreted according to ordinary rather than licensing legislation, and the use of the term in the EC Customs Tariff.

20 45. The question was whether, having regard to all the points for consideration, HMRC's decision should stand, or Airsoft Armoury had discharged the burden of proof falling on it to satisfy the Tribunal that the classification for which it contended was correct (in which event HMRC's decision would fall away). Mr Davey submitted that Airsoft Armoury had not even come close to satisfying the burden and that
25 accordingly its appeal should be dismissed.

Discussion and conclusions

30 46. As Mr Cheshire placed considerable reliance on the UK legislation relating to firearms, licensing and imitation firearms, we comment first on the extent to which this may or may not affect the result of Airsoft Armoury's appeal. On what Mr Davey described as the crucial point, we must emphasise that we are examining EU legislative provisions; the relevant provisions cannot in our view be affected by the national legislation of any Member State, whether the UK or any of the others. As a result, we do not consider that the UK legislation relating to firearms and other matters referred to by Mr Cheshire (including the copy letter from Andy Marsh) can
35 be applied for the purposes of interpreting those EU materials.

40 47. There may also be a similar question as to the extent to which English dictionary definitions can (or should) be used. However, in the absence of any overarching EU source of definitions, we can see no alternative to individual Member States using dictionaries in their own language to interpret the expressions contained in the EU legislative provisions, particularly as such provisions are set out in a range of different languages. Although in the UK the Tariff is referred to as the "UK Customs Tariff",

the position, as set out in Mr Davey’s written submissions, is that the CN has direct effect in the UK.

48. As Mr Davey submitted, the burden of proof that HMRC’s classification is not correct falls on Airsoft Armoury. If the latter cannot satisfy us that classification of airsoft guns under heading 930400 is incorrect, that classification must stand.

49. We agree with Mr Davey that the starting point is consideration of the particular product in question, and accept his description of airsoft guns:

“Airsoft guns are made of plastic with an internal metal barrel. They have an internal mechanism enabling them to fire plastic pellets by virtue of the release of a compressed column of air into the barrel of the gun.”

We do not refer at this stage to his description of the purposes for which airsoft guns are used, as we consider the question of purpose to be secondary to the question of their objective characteristics, as indicated in *Intermodal* at [47] (referred to by both parties).

50. We would like to stress the importance in classification cases of allowing the Tribunal, and, at earlier stages in such discussions, HMRC, to examine some or more samples of the items in question. We found it very helpful that Mr Cheshire produced an example of an airsoft gun for us to inspect, and also that he produced one for Mrs Loyal to see when she visited Airsoft Armoury’s premises. We appreciate the particular difficulties which would have been involved in providing a sample of an airsoft gun for inspection by Mrs Seago, but in general it appears to us desirable that the officer reviewing a classification decision should have an opportunity to examine a sample before making the review decision.

51. Mrs Seago explained in evidence that she had researched through the internet available information concerning airsoft guns. This showed that the recommended minimum age for users in the UK was 18. She had considered the Wikipedia article on airsoft guns. Mr Cheshire reminded us that Wikipedia articles should be considered with some caution, because of the way in which Wikipedia, as a free and open publication, had information provided to it. We accept his reservations as to the reliability of the information contained in the article, although he did accept that most of the information in it was correct. We accept Mrs Seago’s evidence that as a result of her research, she found the minimum age for users to be 18, and that users had to don protective wear before using airsoft guns, and that consequently she had concluded that airsoft guns could inflict injury.

52. Mr Cheshire contended that airsoft guns were not “arms”, as they could not be used to kill and injure people. We accept on the basis of the sub-heading “Safety concerns” in the Wikipedia article that it would be most unlikely for an airsoft gun to kill a person, as this states:

“Airsoft is safe with proper care, and the recommended playing age is 18 or above. The plastic projectiles expelled from airsoft guns travel at fairly low velocity and are too light to penetrate the skin. Though some

heavier projectiles made of copper or metal can penetrate skin, they are banned at all Airsoft events.

However, weapons upgraded to higher than 500 fps (feet per second) can penetrate the skin at shorter distances. This is usually countered by such high-power weapons either being disallowed or restricted from being fired within a minimum engagement distance. All sites require players to wear protective eyewear, in the form of goggles, masks or glasses. Many Airsoft sites require players to be 18 years or older to play.”

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10 53. We therefore consider whether (as Mrs Seago had concluded) airsoft guns are capable of inflicting injury. Some indication is given in the Wikipedia passage just quoted, but we need to review the other materials included in the evidence.

15 54. The letter from Andy Marsh dated 11 September 2011 cannot be treated by us as expert evidence, for the reasons indicated by Mr Davey. Further, the letter is dealing with a different issue, as appears from the final paragraph:

“In summary, I offer that it will be safe to conclude that fully automatic airsoft guns operating at 1.3 joules or less and single shot (or semi automatic) airsoft guns operating at 2.5 joules or less would not engage the lethality threshold crossing over into stricter controls under the Firearms Act. This would mean that airsoft firearms that are also realistic imitation firearms operating at or below these thresholds would, nonetheless, not be required to be sold by a Registered Firearms Dealer but that the other control provisions provided by the Violent Crime Reduction Act would apply.”

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25 55. The question whether a particular form of airsoft gun does or does not cross the lethality threshold is far removed from the other question arising from Mrs Seago’s evidence, namely whether airsoft guns are capable of causing injury to others participating in airsoft activities. The attachment to Andy Marsh’s letter was a copy of letter dated 24 March 2011 headed “Report on work carried to [sic] establish airsoft threshold lethality”. In order to relate this to the issue raised by Mrs Seago’s evidence, we would have needed evidence from the two individuals who produced that report. Without such information, we find it impossible to relate the significance of the matters which they were examining to the wider issue of whether airsoft guns were capable of inflicting injury.

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35 56. The terms in which the Wikipedia article is expressed do not permit a comparison between the power analysis referred to by Mr Cheshire (related to the analysis in Mr Marsh’s letter and the report attached to it) and the information provided in the Wikipedia article. In the absence of expert evidence, we accept Mrs Seago’s conclusion based on the need for those participating in airsoft activities to wear protective clothing (and, in particular, protective eyewear) that airsoft guns in general are capable of inflicting harm on other persons, even though this may be only a modest or minimal level of harm or injury. Further, the power rating of an airsoft gun would only be relevant if the CN or supporting materials specifically differentiated between power ratings for the purposes of classifying guns, whether airsoft guns or any other type.

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57. The other matters mentioned by Mrs Seago as having been taken into consideration in arriving at her decision were the four BTIs and EC Regulation 242/96. We consider these after looking at the terms of the CN, and in particular the respective headings under Chapter 93 and Chapter 95.

5 58. There is an apparent degree of conflict between Note 1(e) to Chapter 93 (see paragraph 3 above and Note 1(s) to Chapter 95 (see paragraph 4 above). To resolve the issue, we find it necessary to examine the relevant headings in Chapter 95, which Mr Cheshire argues to be the appropriate Chapter.

10 59. This raises the question whether airsoft guns fit the description of “toys” in Chapter 95 (see the extract in paragraph 4 above). Every heading in the full list above “Other: - Toy weapons” appears to us to refer to items of an entirely different nature from airsoft guns, although we accept it as being an inevitable consequence of the nature of the process of determining classifications that a number of possibilities have to be eliminated before the most suitable heading can be found. The fact that airsoft
15 guns are, at least as a theoretical matter, capable of injuring opponents in an airsoft skirmishing conflict is unlike the normal position as would be understood for something amounting to a toy.

20 60. Moving down to the heading for which Mr Cheshire argues, “Other: - Toy weapons - - *other*” fits cowboy guns, “pop guns” (if these still remain available), water pistols etc, but looks a doubtful choice of heading for serious sporting-type equipment. We note that other forms of sporting equipment such as archery items, fencing items etc fall elsewhere in Chapter 95 (Heading 9506), and also note that for such items the rate of duty is generally 2.7% rather than the 0.00% applicable to items falling within 9503. The fact that the particular types of sporting item are placed
25 within a particular part of Chapter 95 which is completely separate from heading 9503 does not in itself appear to us to be a justification for including airsoft guns within heading 9503. As an illustration of the way in which distinctions between particular classifications may appear less than obvious, fencing items, which it appears would include épées (as mentioned by Mr Cheshire in the course of cross-examining Mrs
30 Seago), fall within 9506, but swords, cutlasses, bayonets etc fall within 9307.

35 61. The Explanatory Note, EN 95.03(D)(ii), refers to “Toy pistols and guns”. This does not appear to us to be an appropriate description for airsoft guns. Mr Cheshire referred to a dictionary definition; we note that the Concise Oxford English Dictionary defines “toy” as: “an object for a child to play with, typically a model or miniature replica; a gadget or machine regarded as providing amusement for an
adult”. We interpret the latter part of such definition as applying to cases where reference is made, for example, to a yacht or car being “a rich man’s toy”, rather than the definition extending the concept of “toy” to items for the enjoyment of adults generally.

40 62. Apart from the above doubts as to the claimed classification under the “Toys” heading, it has to be asked whether the effect of Chapter Note 1(s) to Chapter 93 is to exclude airsoft guns from heading 9503008190. This calls into question whether they can be described as “arms”, that term being used both in the Section heading, and in

the heading to 9304 – “Other arms (for example spring, air or gas guns and pistols, truncheons), excluding those of Heading 9307”.

63. “Other arms” is used immediately after the heading “Other firearms and similar devices . . .” As heading 9304 uses the words “for example” before “spring, air or gas guns and pistols”, this would not prevent airsoft guns from coming within that heading if they can properly be described as “arms”.

64. The Oxford English Dictionary definition of “weapon” (as used, in the plural, in the 95030081 heading contended by the Appellant to be the appropriate one) is “An instrument of any kind used in warfare or in combat to attack and overcome an enemy”. The definitions of “arms” given in the same dictionary are: (1) Defensive and offensive outfit for war, things used in fighting”; (2) “Instruments of offence used in war; weapons”. The Concise Oxford English Dictionary definition is: “weapons, armaments”.

65. The items covered in Chapter 93 are not limited to items used in warfare. Airsoft guns are used in a form of combat, even though it is recreational rather than intended to cause serious harm to the opponent(s).

66. As mentioned above, consideration of the purpose or purposes for which the goods are used is of less significance than their objective characteristics. In relation to purpose, we are satisfied from the website information handed to us by Mr Davey and from Mr Cheshire’s presentation of Airsoft Armoury’s case that airsoft guns are used for the purpose of airsoft skirmishing, which is a sport or game of imitation combat or conflict, or for the purpose of re-enactment of combat or conflict. We accept that in practice the impact of the plastic bullets on an opponent in the course of such a conflict may often be so light that it will not necessarily be apparent that the opponent has been hit, and that therefore it may be necessary for the opponent to acknowledge or admit that he or she has been hit. Although these activities are recreational forms of fighting, we consider it appropriate to describe airsoft guns as falling within the second limb of the first of the Oxford English Dictionary definitions above, namely “things used in fighting”.

67. Having considered the Chapter headings and the Chapter Notes, we go on to examine other available interpretative materials. The ENs (strictly, the CNENs or HSENs) are not legally binding (see *Intermodal* at [48]) but provide interpretative assistance, see *BAS Trucks BV v Staatssecretaris van Financien* [2007] Case C-400/05) at [28]:

“The explanatory notes drawn up, as regards the combined nomenclature, by the Commission and, as regards the HS, by the World Customs Organisation may be an important aid to the interpretation of the scope of the various headings but do not have legally binding force (see Case C-405-97 *Mövenpick Deutschland* [1999] ECR I-2397, paragraph 18).”

68. We accept Mr Davey’s submission relating to the EN covering heading 9304; we agree that this description covers airsoft guns as well as, or rather as examples of,

“Air guns, rifles and pistols”. Further, as Mr Davey submitted, the EN makes no reference to particular power levels, nor is there any reference in Heading 9304 to power levels.

5 69. Mr Davey also referred us to Commission Regulation (EC) No 242/96, cited at paragraph 39 above. We bear in mind that such Regulations are considered in discussions between Customs authorities in a number of Member States, but may relate to issues under active review by only one of, or only a few of, those Customs authorities. As a result, Regulations may not reflect a particularly widespread agreement between Member States, but may represent the result of a “consensus by default”. We are aware that there have been a number of instances where Regulations have been challenged as being inconsistent with the terms of the CN.

15 70. In the present case we see no obvious reason for suggesting that the Regulation is inconsistent with the CN. Mr Cheshire’s challenge to the Regulation was based on the absence of reference to power levels, and on the meaning in the Regulation of the word “arms”; he did not suggest that the Regulation was inconsistent with the CN.

20 71. We agree that the description in the Annex to Regulation No 242/96 is entirely appropriate for an airsoft gun. We also accept Mr Davey’s submission that there is no distinction by reference to power levels between items covered by the Regulation, and no suggestion that any item of a particular power level should instead fall within a different Chapter heading. We regard the “Reasons” given at column 3 of the Annex to the Regulation (see paragraph 39 above) as significant in the context of assessing the characteristics, and therefore the classification, of airsoft guns generally, whatever their power rating.

25 72. There were four BTIs referred to by Mr Davey (and considered by Mrs Seago). The first was a German BTI commencing on 15 September 2005 and expiring on 14 September 2011. The description of the goods (as translated into English) was:

30 ““Air Sport Gun”; these are disassembled replicas of machine pistols with pistol body, shoulder stock, barrel extension, two gun sights (one of them can be illuminated by means of two coin cell batteries; no laser sights) and shoulder strap.

The products are mainly made of plastic, base metal and textile materials. The kinetic energy of the missiles is produced by releasing a spring.

The maximum range is approximately 15 metres.

35 There is a risk of injury if the product is used at close distance.

The products are put up for retail sale in a styrofoam/cardboard package also containing operating instructions, plastic balls and balls filled with food colouring.

40 If the products were supplied with a laser sight accessory, they would be deemed to be prohibited weapons, within the meaning of the Firearms Law, pursuant to §2 (3) of the Firearms Law.

...

Products of this kind belong to code number 9304 0000 00 0 of the electronic tariff, coming under “other firearms (sporting pistols).”

73. The second BTI was one issued by HMRC, valid from 4 December 2003 to 3 December 2014. The description of the goods was:

5 “A spring powered air soft gun with a green ABS plastic body and
black ABS plastic, zinc or aluminium parts. Features include: a see
through plastic magazine, a quick release button for the magazine, a
silencer, a detachable handle rest and a rear and fore sight for mounting
10 on the top. It also features a hop up system and 6mm projectiles.
Overall length (without silencer attached) 65 cm.”

The classification was to 93040000, based (inter alia) on Note 1(s) to Chapter 95.

74. The third BTI had been issued by Slovakia. The description of goods (as translated) was:

15 Plastic weapon in the shape of a pistol. The working principle of this
weapon is based on air compression in the chamber by means of a
piston with a spring, in which the compressed air ejects the relevant
ammunition through the barrel. Before pulling the trigger, it is
necessary to load it. The ammunition used are [*sic*] plastic 6mm
20 bullets. The outer packaging of the product bears a marking that reads
“air soft gun”.”

The classification was to 93040000, based on GRIs 1 and 6, the wording of the heading, the HSEN to 9304, and Commission Regulation (EC) No 242/96.

75. The other BTI taken into consideration was described in general terms by Mrs Seago in her review letter. We did not see a copy of that BTI, but her letter stated:

25 “You should also be aware that there are various BTIs issued by
Ireland for airsoft guns which have been classified under heading
93.04. In particular, one of them, reference IE09NT-14-590-12 relates
to an airsoft gun with a firing power of less than 1 joule. This confirms
that it is not necessary to be deemed a firearm to fall under heading
30 93.04.”

76. Mr Cheshire challenged in certain respects the conclusions based on these four BTIs. His challenge in respect of the Irish BTI was based on its date, as it post-dated the transactions to which this appeal relates. We accept that it was later, but it had been issued in time to be considered by Mrs Seago when carrying out her review as an
35 indication of the approach taken by the relevant authority in another Member State. It also demonstrates that low power levels are not seen as a criterion for excluding airsoft guns from heading 9304.

77. We view the BTIs with a degree of caution, as they are issued by individual Member States and, as a result, may not represent a universal or majority Community-
40 wide view. Further, there are often significant differences between the products covered by different BTIs.

78. While having regard to that note of caution, we find that these BTIs give at least some support to the view that the proper heading for airsoft guns is 93040000. Another reason for caution, as indicated in argument by Mr Cheshire, is that the products covered by these BTIs may appear to have at least some differences from the products covered by the decision to which this appeal relates.

79. Although of limited persuasive force, examination of one of the other headings within Chapter 93 may give some indication of the appropriate classification heading for airsoft guns. Ammunition is included in heading 9306. There is nothing corresponding to this within the relevant part of Chapter 95. As there is no mention of ammunition associated with “Toy weapons”, this may be an indication (although not in itself definitive, as discussed at paragraph 60 above) that weapons requiring ammunition are more likely to fall under Chapter 93.

80. Mr Cheshire referred to a telephone conversation between his colleague and HMRC. Mrs Seago’s evidence was that she had checked with HMRC’s Tariff Classification Service helpline whether there had been any record of Airsoft Armoury being advised in 2003 that 930081 was the correct code; the Tariff Classification Service had been unable to find any record of such a telephone call from this trader. In the absence of any evidence such as a note taken by Mr Cheshire’s colleague at the time of that conversation (which we therefore have to describe as an alleged conversation), we are unable to satisfy ourselves that a conversation did take place. We regard it as important for traders to keep their own record of conversations with HMRC helplines in case such disputes arise, so that there is some basis for questioning whether HMRC’s records are complete and correct. If there had been proof that such a conversation had taken place, this would have raised issues going significantly wider than the scope of this appeal.

81. Our overall conclusion is that airsoft guns do not fit within heading 95030081. Thus, taking into account the basic principles to be followed in classification cases, as set out in *Outside In, t/a Lumie*, we find that Airsoft Armoury does not succeed in showing that HMRC’s classification is incorrect. Further, we are satisfied that airsoft guns fall to be classified under heading 93040000, as decided by Mrs Loyal in her letter dated 23 July 2009 and confirmed on review by Mrs Seago in her letter dated 2 October 2009. Despite the arguments cogently put by Mr Cheshire, we find that we must dismiss Airsoft Armoury’s appeal.

Right to apply for permission to appeal

82. 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.

JOHN CLARK
TRIBUNAL JUDGE
RELEASE DATE: 21 February 2012

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