



**TC03501**

**Appeal number: TC/2012/08441**

*Customs Duty –import tariff classification - was HMRC’s classification of product correct – no – appeal allowed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**INSECTLORE**

**Appellant**

**- and -**

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

**TRIBUNAL: JUDGE ALISON MCKENNA  
MS HELEN MYERSCOUGH**

**Sitting in public at Bedford Square on 12 March 2014**

**Keith Hobson from iTax UK LLP for the Appellant**

**Mark Fell of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. The Appellant is the UK branch of a US-based Corporation called Insectlore Incorporated. The UK branch is responsible for the sales and marketing of the US Corporation's products in the UK and Europe.

2. This appeal is a consolidation of two appeals, relating to the import tariff classification applied by HMRC, and the customs duty consequently said to be due, to a product known as the "Butterfly Garden", and to a smaller version of the Butterfly Garden known as "Port-A-Bug". We will refer to these as "the Products". The Tribunal has viewed the Products and we understand that they provide a habitat for a caterpillar and for a chrysalis and an environment in which there is an opportunity to observe the metamorphosis of the chrysalis into a butterfly, which is then intended to be released. If the Product is ordered direct, the Appellant will add the caterpillars and food to the Product before shipping. Alternatively, if the Appellant provides the Product to retailers, the subsequent owner of the Product may send off for the caterpillars and food. The food and a pipette provided for dropping water into the contained environment facilitate the natural process of transformation. It was clear from the Products' packaging that they are marketed as children's toys and indeed we understand that they have won awards for being good toys and have featured in the lists of best-selling toys.

3. The Products were imported to the UK from China in September 2009 under tariff number 9507 90 00 00 (applicable to "*Fishing rods...butterfly nets and similar nets*") and attracting a duty rate of 3.7%. HMRC issued two Post Clearance Demand Notes using tariff codes substituted by its Review Officer on 31 July 2012. HMRC's decision was that the correct tariff code was 6307 90 10 00 (applicable to "*Other made up articles of knitted fabric – items not included elsewhere*") attracting a duty rate of 12%. In the appeal before us, the Appellant argued either for the classification of 9507 90 00 00 or, in the alternative, that of 9503 00 99 90 (applicable to "...*other toys, put up in sets or outfits...*") attracting 0% duty.

4. It was noted by the parties that different views have been taken as to the correct import tariff classification for the Products. HMRC had originally suggested that the tariff should be 39.26 "*articles of plastic*" or 56.08 "*articles of netting*". The HMRC officer was then apparently advised by CITEX to apply code 95.03 "*educational toys put up in sets*" but HMRC's Review Officer subsequently decided that 6307 90 10 00 was the correct classification. The Appellant has itself suggested the two alternative classifications described above. The Tribunal is asked to decide whether HMRC's final decision on review was correct.

### *The Law*

5. The level of customs duties on goods imported from outside the European Community are based on the Customs Tariff of the European Communities which includes the Combined Nomenclature of goods and the rates and other items of charge normally applicable to those goods. The Combined Nomenclature is established on the

basis of the “Harmonised System” compiled by the World Customs Organisation, laid down in the International Convention on the Harmonised Commodity Description and Coding System 1983 to which the EU is a party. The Combined Nomenclature uses an eight-digit numerical code to identify a product. We were referred to the General Rules for the Interpretation (“GRIs”) of the Combined Nomenclature in Annex 1 of *EC Council Regulation 2658/87* and in particular GRI’s 1 and 3 which provide as follows:

GRI 1 states that the titles of sections, chapters and sub-chapters are provided for ease of reference only. GRI 1 also provides the basic rule of classification: namely, that classification of goods is to be determined according to the terms of headings and any relevant section or chapter notes. The subsequent rules are to be applied, but are only to be referred to if GRI 1 does not enable classification to be made.

GRI 3(a) provides that where goods are classifiable under two or more headings, then the heading which provides the most specific description is to be preferred.

GRI 3(b) provides that mixtures, composite goods consisting of different materials or made up of different components, are to 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.

GRI 3(c) provides that where goods cannot be classified by reference to GRI 3(a) or (b), they shall be classified under the heading which occurs last in numerical order among those which merit equal attention.

6. We were also referred to a number of other aids to the construction of the Combined Nomenclature, although none of these is legally binding. These are (i) *The Combined Nomenclature Explanatory Notes* (known as “CNENs”), drawn up by the European Commission; (ii) *Explanatory Notes to the Nomenclature of the Customs Co-operation Council* (known as “*Explanatory Notes to the Harmonised System*” or “HSENS”), drawn up by the World Customs Organisation; and (iii) Opinions of the World Customs Organisation. Finally, we were referred to the system of Binding Tariff Informations (“BTIs”) issued by customs authorities of the EU, which may be relied upon as evidence in classification proceedings. Mr Hobson additionally referred us to some American determinations in relation to the Products, but we were unable to establish the relevance and authority of these determinations and Mr Hobson was unable to assist us on the point. Accordingly we take the view that they do not bind us in any way.

7. It was agreed by the parties to this appeal that the Products must be classified under the Combined Nomenclature by reference to their objective characteristics and properties, as defined in the headings of the Combined Nomenclature and that it is for the Tribunal to determine the objective characteristics and properties of the Products,

having regard to their physical appearance, composition and presentation. There was a difference of opinion between the parties as to the extent to which the Tribunal could consider the intended use and customer perception of the Products, but it was agreed that these considerations only came into play (if at all) to the extent that further clarification was required after considering the objective characteristics and properties of the Products.

8. We were referred to the Upper Tribunal’s recent decision in *Barrus & Kubota v Revenue and Customs* [2013] UKUT 0449 (TCC) at paragraph [41] which summarised the approach to be adopted by the First-Tier Tribunal to the classification of products as follows:

*In our view the following principles can be derived from the authorities we have reviewed:*

(1) *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...;*

(2) *The relevant criteria must be apparent from the external characteristics of the goods so that they can be easily appraised by the customs authorities (Farfalla Fleming);*

(3) *By the examination of the external characteristics the main purpose of the product must be inferred. It does not matter if there are other purposes for the product (Neckermann);*

...

(5) *Marketing materials and a product’s targeted use are not to be taken into account (Kamino , Honda)...*

*The Appellant’s Case*

9. The Appellant’s main argument was that HMRC’s classification of the Products under 6307 90 10 00 was wrong because the net does not give the Products their essential character under GRI 3(b), as illustrated by the relative weight and cost of the PVC, nylon and wire materials in the Products. The Appellant referred the Tribunal to its evidence as to the relative weight and cost of the nylon/PVC and wire, as against the net.

10. The Appellant’s primary submission was that the Products should be classified under 9507 90 00 00, which features in Chapter 95 of the Combined Nomenclature under the title “*Toys, games and sports requisites; parts and accessories thereof*”. The relevant headings and sub-headings of code 9507 90 00 00 are:

9507 Fishing rods, fish-hooks and other line fishing tackle; fish landing nets, butterfly nets and similar nets; decoy ‘birds’ (other than

those of heading No 9208 or 9705) and similar hunting or shooting requisites:

9507 10 00 Fishing rods

9507 20 Fish-hooks, whether or not snelled:

5 9507 20 10 Fish-hooks, not snelled

9507 20 90 Other

9507 30 00 Fishing reels

9507 90 00 Other

11. The HSEs relating to 9507 90 00 00 provide as follows:

10 **Fish landing nets, butterfly nets and similar nets.** These usually consist of pocket-like nets of textile yarn or cord, mounted on a wire support and fixed to a handle.

12. In making his submissions in relation to this argument, Mr Hobson argued that the Products are nets with wire support and a handle and could be used for the purpose of catching butterflies, although this was not their main purpose. Further that on the basis of their objective characteristics the Products should be classified as a butterfly net.

13. The Appellant's alternative submission was that the Products should be classified under 9503 00 99 90, which also features in Chapter 95. The relevant headings and sub-headings of code 9503 00 99 90 are:

9503 00 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:

25 ....  
9503 00 99 Other

14. The HSEs relating to Chapter 95 include the following provision:

(D) Other toys

30 This group covers toys intended essentially for the amusement of persons (children or adults)...

15. Mr Hobson's submission in relation to this classification was that the perception of customers and the intended use of the Products are capable of describing its objective characteristics and properties, and that the Products are clearly designed to enable children to be amused by and to learn from participation in and observation of the lifecycle of butterflies.

*HMRC's Case*

5 16. HMRC submitted that the classification adopted by its Review decision was the correct one on the following basis. Code 6307 90 10 00 features in Chapter 63 of the Combined Nomenclature, whose title is “*Other made-up textile articles; sets; worn clothing and worn textile articles; rags*”. Note 1(t) to Section XI of the Combined Nomenclature (which includes Chapter 63) provides that Section XI “*does not cover...articles of Chapter 95 (for example, toys, games, sports requisites and nets)*”.

10 17. The relevant headings and subheadings of code 6307 90 10 00 are as follows:

6307 Other made up articles, including dress patterns:

....

6307 90 Other

6307 90 10 Knitted or crocheted

15 18. The HSEs relating to Chapter 63 provide as follows:

GENERAL

This Chapter includes:

20 (1) Under headings 63.01 to 63.07...made up textile articles of any textile fabric (woven or knitted fabric, felt, non-wovens etc.) which are **not** more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature

25 19. HMRC's case in relation to classification 6307 90 10 00 was that the Products are composite goods consisting of more than one material (namely net, PVC, nylon and wire) and that the material which gives the Products their essential character (within the meaning of GRI 3(b)) is the net. It was submitted that the net forms the majority of the surface area which makes up each of the Products and allows the Products to function as a habitat for butterflies or similar insects, containing them  
30 whilst allowing light and air in, and that the net consists of a made up article which is knitted, which falls within the meaning of the phrase “*Other made up articles, Other, Knitted*” in code 6307 90 10 00.

35 20. In responding to the Appellant's case in respect of code 9507 90 00 00, HMRC submitted that the Products do not fall within the meaning of the phrase “*butterfly nets and similar nets*”. It was submitted that the term “butterfly net” has a well established ordinary language meaning, which includes certain external characteristics and functional aspects, for example, Chambers Dictionary (12th Edition) defines a “butterfly net” in terms of its external characteristics, as “a small-meshed conical net with a wide round open end on a hoop attached to a handle, used for catching  
40 butterflies”. It was submitted that this analysis of “butterfly net” is supported by the

statement in the HSEs referred to at paragraph [11] above. HMRC submitted that the concept of a “butterfly net” should be analysed in terms of both its external characteristics and functionality and that the Products were not “butterfly nets” because (i) they do not have the requisite external characteristics, being (a) a net which is held open at one end, and (b) extended handles enabling them to be waved and (ii) the primary function or purpose of the Products, inferred from their external characteristics, is evidently not the catching of butterflies or other insects. HMRC submitted that the primary function of the Products, inferred from their external characteristics, is the creation of a habitat for butterflies and similar insects within which they can be contained and which enables the passage of air and light. Further, it was submitted that the Products are not “similar nets” under 9507 90 00 00 because (i) the Products differ too much from butterfly nets in terms of external characteristics and (ii) the primary function of the Products, inferred from their external characteristics, is not the catching of butterflies or similar insects. It was submitted that the function of catching is of such importance to the concept of “butterfly net” that a product whose primary function is not catching will be too dissimilar to a butterfly net to qualify as a “similar net” and (iii) that the Products fall substantially outside of the description of “butterfly nets and similar nets” in the HSEs (which is cross-referred to in the CNEs) as “usually” consisting of “pocket-like nets of textile yarn or cord, mounted on a wire support and fixed to a handle”.

21. HMRC’s case in relation to the Appellant’s second submission was that the HSEs to 9503 suggest (at (D)) that “toys” can be understood in this context as items “intended essentially for the amusement of persons” and that this test was not satisfied in relation to the Products because the Products provide a habitat for butterflies and other insects, which does not necessarily involve the amusement of persons, and therefore cannot be said to show that the Products are intended essentially for the amusement of persons. HMRC submitted that it could only be argued that the Products may be used for the amusement of children if (i) the subjective intentions of the Appellant; (ii) the section of the market at which the Products happen to be targeted by the Appellant; and/or (iii) the manner in which the Products are marketed by the Appellant are taken into account. However, marketing materials and a product’s targeted use are not to be taken into account for classification purposes and the main purpose of a product must be inferred from its external characteristics. It was submitted that if one ignored the manner in which the Products are targeted and marketed by the Appellant, and looked solely at the external characteristics, then one could not argue that the Products are essentially intended for the amusement of persons.

22. HMRC also submitted that classifying the Products as toys would be contrary to the approach which has been adopted by customs authorities of member states of the EU as regards products whose external characteristics suggest a function as artificial habitats for organisms, as such products have tended to be classified according to the main material of which they are constructed. The evidence before the Tribunal include a sample of BTIs issued by EU customs authorities making the following classifications: glass fish tanks classified according to their principal material of glass by HMRC and French customs; wire dog cages classified according to their principal material of wire by HMRC; a wire bird cage classified according to its principal

material of wire by French customs; a wire cage for small animals classified according to its principal material of wire by French customs; and wooden animal houses classified according to their principal material of wood by HMRC.

*Conclusion*

5 23. We are mindful of the guidance from the Upper Tribunal, described at  
paragraph [8] above, and have directed ourselves to the establishment of the external  
characteristics and properties of the Products. This approach has led us firstly to  
reject the Appellant’s primary submission in favour of code 9507 90 00 00. We  
accept Mr Fell’s argument that the Products are not “butterfly nets” or “similar nets”  
10 because they do not have the requisite external characteristics, being (a) a net which is  
held open at one end, and (b) extended handles enabling them to be waved. They are  
clearly not designed for the purpose of catching butterflies, although we accept that it  
would be possible to use them for this purpose, in the same way that it would be  
possible to use a jam jar or another receptacle to trap an insect. However, we regard  
15 the essential physical characteristics of a butterfly net as being too dissimilar to those  
of the Products and we do not accept that the possibility of using the Products to catch  
a butterfly can lend it the essential characteristics of a butterfly or similar net so as to  
make it appropriate to classify it under code 9507 90 00 00.

20 24. Turning to HMRC’s submissions, we do not accept that the Products merely  
provide a habitat for a creature in the same way that a fish tank or a bird cage does. It  
seems to us that the most prominent physical characteristic of the Products is their  
suitability for facilitating and observing a process which results in the development of  
a creature which is shortly to be released. A product designed for the release of a  
living creature is not what one would usually describe as a habitat. HMRC  
25 emphasised that the dominant physical characteristic of the Products is the netting in  
its submissions in support of a classification under 6307 90 10 00 and we agree that it  
is right to view this feature as dominant. However, we regard the netting as lending  
the products the essential characteristic of permeability, and that this serves not only  
to let light and air into the Products, as HMRC observed, but also specifically allows  
30 the viewer to observe at close quarters the metamorphosis of the caterpillar into a  
chrysalis and then into a butterfly. For this reason we regard the products as  
fundamentally different from the habitat classification BTI cases to which HMRC  
referred us.

35 25. We regard the Products as items “intended essentially for the amusement of  
persons” in that their principal characteristics and properties combine to provide a  
unique opportunity for the observation of a natural process within a controlled  
environment. We are mindful of the need to disregard the subjective intentions of the  
Appellant and its targeted marketing of the Products. However, it seems to us that the  
main purpose of the Product, inferred from its external characteristics, is to create a  
40 unique viewing platform for the metamorphosis of the insect and an environment in  
which the metamorphosis may be facilitated, for example through the use of the  
pipette to drop water into the Products and through the circulation of light and air.  
This process of transformation from caterpillar to butterfly is of course a natural one  
and clearly not itself created for entertainment, but the confinement of the entire

process within a specially-designed environment which allows the natural process to happen yet also to be observed by human beings means that the Products, in our view, fall under the heading of 9503 00 99 “Other” as intended to be used essentially for the amusement of children or adults.

5 26. This leads us to the conclusion that HMRC’s classification under code 6307 90  
10 10 00 was incorrect. GRI 3(a) provides that where goods are classifiable under two or  
more headings, then the heading which provides the most specific description is to be  
preferred. In this case, it seems to us that the objective characteristics of the Products  
lead us to the more specific description of “Toys: Other” so that defining the Products  
by reference only to the material of which they are made would not be the correct  
approach.

27. For the reasons given above, we allow this appeal. This will have the effect of  
extinguishing the Post Clearance Demand Notes and requiring the duty already paid  
to be refunded to the Appellant.

15 28. 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  
20 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)”  
which accompanies and forms part of this decision notice.

25 **ALISON MCKENNA**  
**TRIBUNAL JUDGE**

**RELEASE DATE: 14 April 2014**

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