



TC04100

Appeal number: TC/2013/04654

Customs duty - Customs classification of two soft toys containing recorded sounds to assist babies and children to sleep - Whether the toys ranked as “stuffed” or not - Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

CLOUD B LTD

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE HOWARD M. NOWLAN
MR MICHAEL BELL ACA CTA**

Sitting in public at 45 Bedford Square in London on 4 August 2014

Michael Jones, counsel, on behalf of the Appellant

Suella Fernandes, counsel on behalf of the Respondents

DECISION

Introduction

- 5 1. This was a relatively simple Customs appeal in which we had to decide how two soft children's toy animals that contained a soundbox that produced soothing sounds, intended to assist babies and children to sleep, should be classified for Customs purposes.
- 10 2. Both parties accepted that the toys, one a sheep and the other a giraffe, fell within the general category of "toys representing animals or non-human creatures". That category was, however, subdivided into two sub-categories, the above text being followed by either the word "stuffed", or "other". If the products were rightly categorised as "stuffed", they would then suffer duty at the rate of 4.7%. If they were not categorised as "stuffed", so that they fell within the residual category of "other", no duty was payable. Whilst both parties
- 15 agreed that the products fell within the general category of "toys representing animals or non-human creatures", had they been rightly classified as some form of electronic devices (thus rather disregarding their appearance and form and concentrating solely on their prime intended function) the applicable rate of duty would again have been 4.7%.
- 20 3. There was no dispute to the proposition that, apart from a relatively small hard plastic electronic component, the sound box. (about the size of 2 or 3 old-style music tape cassettes bonded together side by side), the toys were stuffed. They were covered in attractive and seemingly good quality soft outer skins, making them look exactly like a stuffed sheep and a stuffed giraffe. The sheep was about 8 to 10 inches tall in its sitting position; it was fairly
- 25 chubby, and its eyes were shut as if it was sleeping. The overall dimensions of the giraffe were roughly the same, save for the obvious point that it had a much longer neck. Apart from the sound-producing device, the toys were completely stuffed. When one picked them up, they felt exactly like stuffed toys, albeit that one could feel the sound-producing device. It was, however, fairly well protected by the stuffing on all sides, other than the one in the
- 30 back of the toy which contained the various operating buttons. Since many stuffed toys contain a squeaker, or nowadays some form of electronic device designed to amuse the child, the unobtrusive presence of the sound-producing device did not lead one to conclude that the toy felt particularly different from any number of obviously stuffed animal toys, and it certainly looked no different.
- 35 4. The Appellant's principal contention had been that when there was no definition of the word "stuffed", one should look to the intended use of the product to decide whether it was stuffed. In that quest, the word "stuffed" should be taken to suggest a toy designed to be cuddled and played with by babies and children. Since the prime function of the toys in
- 40 question was one that they would perform either when the child had fallen to sleep, or certainly after the curtains had been closed and the parent would very much hope that the child would not be playing with any toys, it was claimed that the prime function of these toys was as a sleep promoting device and not as a cuddly toy. Furthermore both animals had Velcro straps designed to attach the animals to the outer side of cots. This was both to
- 45 minimise the risk of Sudden Infant Death Syndrome ("SIDS") and also so that the animal could be put in a fixed position, with the volume of the device then set to a suitable, and constant, level. Were the child to have the toy in the cot, and able to cuddle it, the risk of SIDS might be greater and if the toy was covered by a duvet, the sound could be muffled. Accordingly in terms of function, when operated in the way that the toy was intended to be

used, it was reasonable to assume that it would not be cuddled, and for that reason ought not to be regarded as being stuffed.

5 5. Our decision is that both toys were stuffed. We are required to look at the objective
characteristics of the product at the time of importation, and that means that we should
consider the appearance, composition and intended function of the product. The two
products in question both plainly looked as if they would be stuffed, and indeed they looked
indistinguishable from ordinary stuffed animals. In terms of composition, they were plainly
stuffed. In terms of function, we accept that they were sold, and almost certainly generally
10 purchased, as “sleep-aids”, but we consider that their attractive appearance, and the feature
that they could be cuddled by a child so that a child could well become devoted to one of
these products, exactly as a child might be devoted to any other cuddly toy, was of some
significance even in relation to the intended use of the toy as a sleep aid. This is because a
child might well prefer to be lulled to sleep by the much-loved sheep or giraffe, whilst quite
15 possibly being less attracted to a plastic box playing similar sounds. Particularly when the
actual question posed to us is simply whether these products are stuffed or not, we consider
that when the stuffing will sometimes be conducive to the primary sleep function, and when
in terms of composition and appearance, it is just glaringly obvious that these two products
are stuffed, we can reach no other decision that that they should be so classified for Customs
20 purposes.

The facts in more detail

A description of the products

25 6. The manufacturer of the toys in question, the US parent of the present Appellant, clearly
conducts the trade of producing sleep-aids, and certainly no mention was made of the
Appellant or its parent producing other cuddly toys.

30 7. The Appellant moreover sold several other sleep aids of different descriptions, and it is
noteworthy that when the sheep, marketed as “Sleep Sheep” and the giraffe, marketed as
“Gentle Giraffe” were presented to HMRC for Binding Tariff Information rulings (“BTIs”),
four other products were also presented for such rulings. Three of the other products were
either turtles or a Ladybug. The fourth was a toy car, with eyes, and that was subject to
35 altogether different classification because a car (even one with eyes) is not an animal or a
creature.

8. We have already described the fact that both the Sleep Sheep and the Gentle Giraffe
40 looked very much like ordinary stuffed toys, and the Appellant did not particularly dispute
this. The point was made that the two were slightly heavier than equivalent size
conventional stuffed toys, and more expensive, so that somebody aiming to buy a
conventional stuffed toy would be very unlikely to buy a Sleep Sheep or a Gentle Giraffe.
In terms of composition, we were told that the stuffing material, which was doubtless a very
light material, still constituted just in excess of 50% of the weight of the two products, and in
45 terms of volume it would have constituted a far greater percentage of the total volume.

9. The electronic sound box was removable by unfastening a Velcro tag, and then
removing the cassette. In normal use the soundbox would not be removed, and was likely
to be removed only if the two AA batteries needed to be changed or if the parents wanted to
50 use the soundbox on its own but did not wish, for instance, to take a bulky soft toy on holiday

with the child. As an alternative, impressed customers could buy a smaller sheep or giraffe containing the same sleep function, with a view to clipping that one onto a push-chair, a car seat, or again to use on holiday.

5 10. The electronic soundbox played a choice of four soothing sounds; the volume could be
adjusted by turning a knob and each different sound was obtained by pressing a different
button. There was also a slide that enabled the parent to set the sound function to operate
for 23 or 45 minutes. When the soundbox was inserted in the toy, these buttons etc could
10 be accessed through a small gap in the lining of the toy, closed by the Velcro tag that did not
obscure any of the controls. The sounds had been chosen by experts in the field, and we
considered the sounds to be realistic, and presumably soothing.

11. As we mentioned in the Introduction, both the sheep and the giraffe had substantial
15 Velcro tags that were designed to enable the parents to attach the toy to the pillars of
conventional cots. As already indicated, this was because the suggested method of using the
toy in its sleep function was not to put it into the cot, but to attach it to the side, to guard
against SIDS, and to ensure that the volume remained at a constant level.

12. Turning now to the turtles, as one might expect with toy turtles, and the same applied
20 to the Ladybug, the Appellant explained that the majority of the toy was the shell, which
enclosed the illuminator that projected soothing lights. The shell was plastic, seemingly
with a fabric cover but the shell and the basic body were not stuffed. Any flippers and the
head were stuffed, but they were relatively small parts. Overall the fabric content, including
the stuffing comprised 24% of the total weight of the toy. The sleep promoting function of
25 all four other products (i.e. including the car) was that an internal light shone through small
star-shaped holes in the shell of the animal or the roof of the car, and the starry lights then
shone dimly on the ceiling. Amongst other results of this method of operation it was fairly
obvious that the other four products would generally operate by being placed on some
30 adjacent table or chest of drawers so that the light would appear on the ceiling. Were any of
these four products ever placed in the cot, they would almost certainly be turned over or
covered, such that they would cease to function as intended.

Marketing

35 13. The products with which we are concerned were marketed in sections of stores
dedicated to products such as sleep aids, and not with other teddy bears and cuddly tops.
They were presented in retail boxes, which had two cut-outs. The very large cut-out on the
front displayed the toy inside the box so that it was possible to see exactly what the product
40 looked like, and it was possible to feel the outer fabric and the plushness of the toy through
the cut-out. The other cut-out was in the back of the left side of the box, and this gave
access to the soundbox that had been removed from the toy. The reason for this was so that
the intending customer could press the various buttons and hear the available sounds.

14. The box was attractive. It had pictures of the product on its various faces, and most of
45 the pictures illustrated the intention that it should be used by being strapped to the side of the
cot, rather than put into the cot. Virtually all the text emphasised the attributes of the sleep
function. This was natural both because the sleep function was obviously the products'
primary intended use, but also because there was no need to state that the product looked
sweet, and indeed looked reasonably soft and suitable to be cuddled, because that was fairly
50 obvious from looking at the product through the front cut-out.

15. On the bottom of the box there was some more technical text. One short paragraph on the bottom made the point that the product should be used by strapping it to the side of the cot in order to diminish SIDS risk. The text in question was certainly not prominent, and we both rather assumed that part of the motivation for inserting it could well have been to avoid possible legal actions against the seller in the event of a tragic death

16. Turning to on-line marketing, we were shown the Amazon and Cloud B website marketing material, and we noted that these made it clear that the toy was a two-function toy. Indeed the Appellant's own website contained the words:

"Two functions in one product:

- *Cuddly companion and toy*
- *Soothes baby to sleep with calming nature sounds"*

The Appellant's counsel made the fair point that the reason why the reference to the product being a cuddly companion and toy had been put first, before the product's more technical function, was that this was an understandable marketing device, particularly when the potential internet buyer would not be able actually to see and touch the product, as in the retail shop.

The Appellant's contentions

17. The Appellant contended that:

- When there was no definition of the term "stuffed", it was legitimate to look to the intended use and function of the product, and then to assert that "**stuffed** animal toys" were toys intended to be cuddled, whereupon it was then claimed that this product was not intended to be cuddled. Accordingly it should not be classified as "stuffed". Glossing over the "cuddle" function just quoted in the previous paragraph, the instructions on the box made it clear that the product was principally a sleep-aid product and not a cuddly toy, and indeed pictures on the box confirmed the text which said that the product should be attached to the pillars of the cot, and not dropped into the cot so that it might be cuddled.
- The Respondents had been wrong to use in support for their decision, and review decision, the text of a Commission Statement made at the 56th Mechanical/Miscellaneous meeting in 2011, which had dealt with a very small covered rabbit. We were shown this rabbit, and although we were unable to make its claimed functions work, it was obvious, on feeling it, that the outer skin simply surrounded two solid plastic components, one in the body and the other in the head. One could feel the exact shape of the plastic through the covering. The relevant observation in the Commission Statement had been that "Given that the soft stuffing only constitutes a minimal filling of the toy as only the paws are stuffed, classification as stuffed toys representing animals under CN code 9503 00 41 is excluded." The Appellant then contended that in CN definitions and notes, when the percentage of some substance was taken to be critical to classification, the figure was always specified. Thus in the case of some small motor-bike, we were told that numerous exact specifications were mentioned and, to meet some particular classification, the motor had to be of fewer than 49 cc, and the speed of

the bike in question had to be no higher than 20 m.p.h. Since no reference was made in the Commission Statement to the level at which stuffing became determinative, or “non-minimal”, it was impossible to say when stuffing became determinative, so that again one had to refer to the intended function of the toy and to the point in the previous bullet point.

- The Respondents had been wrong to refer to other BTIs, partly because other BTIs should not be used to govern the classification of different products, and also because the BTIs in question all referred to fundamentally different products. They invariably referred to stuffed toys that had some electronic function, the purpose of which was to make the toy more appealing when the child played with it. That intended function was in other words quite different from, and indeed almost the exact opposite of, the intended function in this case.
- The Respondents were also wrong to make the point that if the soundbox was removed from the toy, the toy could be used as a perfectly ordinary stuffed toy. Customs classification should be based on how the product was intended to function and how it was intended to be used, and not on some utterly secondary use that might be followed if and when the soundbox had been removed.

20 *The Respondents’ contentions*

18. The Respondents contended that:

- The Appellant’s own description of the product, in the document requesting the BTI itself, commenced by stating that the purpose of the toy was “Calming sounds to help Children Sleep”, but then immediately referred to the two functions in exactly the way that we quoted above in paragraph 16. The products could hardly thus be said not to be stuffed, when as a pure physical matter of content they were stuffed and they plainly looked to be stuffed, and when, even on the Appellant’s test that “stuffed” meant that the toy was suitable to be cuddled, it was indeed asserted that it was a “cuddly companion and toy”.
- Perhaps, more relevantly, when the sole issue was whether the product, admitted by all to be an animal toy, was stuffed or not, it was impossible to conclude that it was not stuffed, and thus within the “other” category, when as a pure physical matter of contents, and appearance, the relevant products were stuffed, precisely as if they were ordinary cuddly toys.

Our decision

19. The approach that we are required to take, in deciding on the appropriate classification of products, is to consider their objective characteristics at the time of presentation for classification. We find the notion of how precisely to define and interpret the expression “objective characteristics” to be somewhat illusive, but nevertheless it appears to be clear that what we should do, in a reasonably common sense manner, is to consider the appearance, composition and intended function of the products.

20. The actual issue before us was relatively simple in that firstly it was common ground between the parties that only Rules 1 and 6 of the General Interpretative Rules were relevant, so that we were just concerned with the natural meaning of the words in the CN codes, and were untroubled by such issues as mixed, unassembled or incomplete products. The second

respect in which the issue before us was rendered relatively simple was that the parties were absolutely agreed that the two products in dispute were rightly classified under the heading for “toys representing animals or non-human creatures”, and the only disputed issue was whether the products were stuffed or not.

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21. The Appellant rightly pointed out that there was no definition of “stuffed”, and then remarked that we would presumably agree that if the products had been stuffed with ball bearings, we would not have considered them to be stuffed. Indeed we would not, but that is because it is really not necessary to define every word used in product descriptions. In the context of toy animals, it is abundantly clear that what is contemplated by the question as to whether a toy sheep is or is not stuffed, is whether the outer skin is padded out with relatively soft, light, and almost certainly compressible material.

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22. While there is no definition of the word “stuffed” in the present context, its meaning is relatively obvious, and indeed in turning to consider the function of the product and then asserting that stuffed products can be identified because they will be soft to cuddle, the Appellant itself assumes the same obvious meaning of “stuffed” in reaching the conclusion that it must mean something along the lines that will make a toy cuddly. And what makes a toy cuddly is of course the insertion of stuffing, in the sense that we have just described, namely the insertion of material that pads out the skin of the animal and that is “soft, light and compressible”.

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23. We do not agree with the Appellant’s observations in relation to the reference in the Commission Statement that we referred to in paragraph 17 above. Firstly, the comment that we quoted from the Statement plainly itself revealed a common sense assumption as to what stuffing was. Apparently it was decided that the ears of the relevant rabbit were stuffed, and nobody was greatly concerned with enquiring about the material used. The reason why the stuffing was disregarded was that it was observed to be “minimal”. We agree. The ears of the particular specimen rabbit might have been squeezed so frequently that we were actually unable to conclude that they were stuffed at all. Assuming however that they were stuffed, the reason why that toy was not considered to be “stuffed” was that the stuffing was minimal. We accept that there may be no percentage threshold at which stuffing ceases to be minimal, but it must be absolutely implicit in the particular ruling that had the stuffing not been considered to be “minimal”, then the other conclusion would have been reached and the toy would have been classed as a stuffed rabbit. There might be some difficulty in applying a test that requires us to consider whether the stuffing in various animal toys is minimal or not, when say there may be 10%, 20%, 30% stuffing. However we are considering two products that can only be described as being “totally stuffed”. We accept that they each contain a soundbox within a hollowed out envelope within the body of the toy that takes up a very small percentage of the total volume, just as countless stuffed toys will contain electronic gadgets of one form or another but, that apart, the toy animals are totally stuffed. If anyone sought to insert more stuffing, either the sheep would look pregnant or deformed or the stitching would have burst. It is simply absolutely impossible to conclude that the stuffing in the present two products can be disregarded as being minimal.

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24. Even if we considered the absence of a definition of what constitutes “stuffing” to preclude us from adopting a perfectly natural common sense meaning in the appropriate context, we reject the notion that we should look solely to the intended function of the product in order to determine its classification. We will make the point below that even if that was the correct approach, we would still conclude that the product ranked as cuddly and

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stuffed. However the preliminary point is that we should still look at all the characteristics of the product and when it looks cuddly, it feels as if it is obviously padded, it looks entirely as if a child could treat it precisely like any other cuddly toy, we are entitled to look at all those characteristics in judging whether the product is stuffed. On appearance and composition, in other words, these two products are plainly stuffed, and we should not ignore those features.

25. As just indicated, however, if we concentrate now solely on intended function, we still conclude that this product is a cuddly toy, and that it is stuffed. We agree with the Appellant that the Respondents are wrong to refer to the fact that the product would become a cuddly toy if the soundbox was removed, because we should not be looking at some residual, or unintended, use. That, however, misses the point that we consider it entirely relevant to conclude that these two products, the sheep and the giraffe, are designed to be soft and cuddly as an integral element of performing their primary function. We do not dispute that this product could be used solely at bedtime, and solely by being attached to the pillars of a cot such that a child might never touch it. In contrast to the hard-shelled turtles, however, the two products that we are concerned with are designed to be cuddly, the publicity and marketing material makes that clear, and one must presume that most children would cuddle the sheep and the giraffe, just as they would cuddle any other soft toys. We are not, in this context, assuming that the soundbox will have been removed in order for the product to be so used. With the soundbox in place, the product is just as suitable a cuddly toy as it would be with the cassette removed, and almost certainly indistinguishable from countless other stuffed animal toys that will have electronic devices that might make the animal do amusing things. We accept that devices to promote amusement to the child who is awake and playing have a different function from the soundboxes in the products with which we are concerned, but our point is that both types of product are, and can be played with by a child as, cuddly toys.

26. We do not doubt the good sense of the addition of the Velcro strap, and the recommendation that, with SIDS risks in mind, it might well be sensible for this product to be strapped to the pillars of cots, and not placed in the cot with the young child. If, however, there are parents who allow their young children to cuddle a favourite toy in bed, we cannot see that they would draw any distinction between normal cuddly toys and the two with which we are now concerned. Bearing that in mind, and recognising that both these animals are actually extremely sweet, and cuddly, we consider that there might well be occasions when one of these products became a child's favourite, and indeed one that was treated precisely like a favourite teddy bear. It may even assist the child in going to sleep if the volume is set at a low level and the much favoured sheep can be cuddled by the child as it makes its soothing noise. In this regard, we consider it quite integral to the function of the two products that they are indeed soft and cuddly.

27. The Appellant seemed surprised that the Respondents should have reached different classification decisions when considering the two stuffed animals and the three turtle-like animals, and the car. The last four operate in a quite different way and could not fulfil their intended function unless placed on a flat, uncovered surface so that the lights could be seen dimly on the ceiling. No child would wish to cuddle them because they were not padded. Admittedly their padding in the fins and head was still more substantial than the padding in the rabbit considered in the Commission Statement, but the padding was still relatively insignificant, and nobody would have described the turtles as "stuffed toys" or "cuddly toys". Their non-cuddly nature, and their method of performing their function rendered them quite different to the two products with which we are principally concerned.

28. Our decision is accordingly that the two relevant products in this Appeal are “stuffed”. They look stuffed. Physically they are stuffed, and indeed “totally stuffed”. They are marketed, in part at least, as cuddly toys. In retail shops, the cut-out in the boxes makes it obvious that the products are sweet-looking cuddly toys. Babies and children will almost inevitably use them, and quite likely cherish them, as any other cuddly toys, and we even consider their cuddly nature to be a factor that might, for some users, support their primary intended function of lulling the child to sleep.

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10 ***Right of Appeal***

29. This document contains full findings of fact and the reasons for our decision in relation to each appeal. Any party dissatisfied with the decision relevant to it 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.

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**HOWARD M. NOWLAN
TRIBUNAL JUDGE**

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RELEASED DATE: 3 September 2014

