



TC04759

Appeal number: TC/2015/2218

TYPE OF TAX – Customs Duty – Customs classification of animated toy – whether toy was “stuffed” – yes – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

GOLDEN BEAR PRODUCTS LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE AMANDA BROWN
MICHAEL ATKINSON**

**Sitting in public at Centre City Tower, 5 – 7 Hill Street, Birmingham, B5 4UU on
13 November 2015**

Mr Michael Hodge of Customs Associates Ltd, representative for the Appellant

**Mrs Jennifer Newstead-Taylor, Counsel, instructed by the General Counsel and
Solicitor to HM Revenue and Customs, for the Respondents**

DECISION

1. This is an appeal by Golden Bear Products Limited (“the Appellant”) against a
5 Binding Tariff Information (“BTI”) issued by HM Revenue & Customs (“HMRC”) and dated 25 September 2014 classifying “In the Night Garden Lullaby Iggle Piggle” (“the Toy”) under commodity code 950300 41 00 thereby attracting a duty rate of 4.7%.

Factual background

10 2. The Appellant carries on business as a producer of children’s branded toys. On 18 August 2014. The Appellant submitted an application for a BTI ruling in respect of the Toy which was described as “In the Night Garden Lullaby Iggle Piggle product. A toy representing a non-human creature approximately 24cm high (sitting) covered with soft fabric. The product comprises a body of solid plastics fitted with a sound
15 module. When a switch is operated, the toy plays 4 different songs. The soft stuffing constitutes a minimal filling as only the ‘paws’ and ‘feet’ are stuffed. The ‘body’ contains a solid sound module and electrics and the head contains a light system. Please see an attached photograph showing the inside of the toy. A classification statement was issued with the minutes of an EU tariff meeting held between 6th/8th
20 April 2011 (56th Meeting) which is relevant to this classification request”. The classification sought was 950300 49 00 “Toys representing animals or non-human creatures – other”.

3. On 25 September 2014 HMRC issued a BTI decision classifying the Toy under
25 commodity code 950300 41 00 “Toys representing animal or non-human creatures – stuffed”. That decision was subject to formal review and on 29 January 2015 the decision was upheld.

The Toy

4. The Tribunal was given the opportunity to examine the toy in some considerable detail.

30 5. “In the Night Garden” is a BBC Children’s Television series narrated by Derek Jacobi. Wikipedia described the programme as aimed at children aged from 1 to 6 years old. It is filmed mostly in live action, and features a mix of actors in costume, puppetry and computer animation. It is designed to relax and entertain its principal audience, the under 4s. The characters include Iggle Piggle who is played by Nick
35 Kellington. Iggle Piggle is a blue teddy bear-like doll with a bean-shaped head and a sideways red Mohawk. He always carries his red blanket and tends to fall flat on his back when surprised. He is the main character of the show. He arrives at the beginning and leaves the Night Garden at the end of each episode in a boat, for which the blanket doubles as a sail. Iggle Piggle has a bell in his left foot, a squeaker in his
40 tummy, and a rattle in his left hand.

6. The Toy visually replicates Iggle Piggle. It is a blue teddy bear like doll which is seated. The fabric of the Toy is soft somewhat akin to a good quality microfibre cloth. It is largely pale blue with some darker blue inserts; the limbs being of darker fabric than the body and face; the head is three tone. The soles of its feet are made of a similar fabric in red. Across the right hand side of its head is the red Mohawk, being represented by four felt like tabs stitched into the head seam. The Toy's arm like 'paws' are stitched together and hold the red blanket. Its facial features are stitched into the fabric and are very simplistic wide round eyes a simple curved line nose and a smiling mouth. The forehead of the Toy is long representing approximately 50% of the head with the features all being in the lower half of the head. Otherwise, the proportions of the character are non-human with the head length approximating the torso length.

7. The Toy is reasonably heavy (though the Tribunal was not given its exact weight). When it is turned over its bottom is not covered in fabric. The fabric is sealed around the hard plastic base of the musical animator. Within the base is a battery cover which, compliant with toy safety regulations is screwed down and an on off switch.

8. When the Toy is switched on and the left paw is pressed the Toy gently sways in a figure of 8 motion whilst a series of 4 lullabies are played during which the Toy's "cheeks" light up scrolling through a series of colours. When all four lullabies have been played consecutively the Toy becomes silent and still and the lights go out.

9. Within the Toy is contained a musical and light animation unit. The unit itself represents 51% (62.5% if the batteries are also taken into consideration) of the overall weight of the Toy. It is a rather unseemly white plastic unit whose base is approximately oval and approximately 10cm across the widest part. This tapers up to a height of approximately 8cm, this section is largely smooth, and the speaker appears to be on the side of this part of the unit. From the top of the base then protrudes a part of the structure which is made of a number of differently shaped parts and which cause the Toy to sway. The whole unit stands approximately 15cm tall. From the base of the unit there are some LED lights on the end of fine wires and the switch wires.

10. The Tribunal were given the opportunity to examine the Toy with the animation unit removed. It was clear that the limbs of the Toy were softly but entirely stuffed, though they were not stitched at the ends with the consequence that stuffing from the body could have pushed into the limbs or vice versa. The head too was largely filled with stuffing whilst allowing space for the top of the animation unit to be pushed in. The body too contained stuffing. It was recognised by the Tribunal that the very nature of hollow fibre stuffing is that it is highly compressible and thus when not compressed expands to fill space. However, without the animation unit the body contained sufficient stuffing material to be able to continue to sit reasonably adequately; it was only slightly slumped. The tribunal removed all the filling material from the body and the Toy entirely collapsed.

11. When the Toy was felt with the animation unit within it, it was clear that around the very uneven parts of the animation unit there was sufficient stuffing to more than protect a child from the hard uneven plastic. There was also some filling material around the smooth part of the unit. The unit could be detected in the head to a point just above the eyes. The fine wires running to the LED lights in the cheeks could be felt with some determination. As could the switch wires which ran down the left arm to the “paw”.
12. The label stitched into the side of the Toy provides that it is suitable only to be sponge cleaned.
13. When the animation unit was in operation on a flat surface, the Toy was stable. Whilst the upper body swayed in a figure of 8 motion the unit did not change its location. The animation unit would operate if the Toy was seated in a soft surface such as a carpet or bed. It also functioned if it was laid on its back though not as fully; the movement was inhibited but the musical and lighting functionality was not impaired.
14. The Tribunal were provided with statistics concerning the relative weight and cost of the component elements: fabric, stuffing, animation unit and batteries. By its very nature the stuffing element was small (of the order of 10%) on both weight and cost.
15. The Toy is presented in an open cardboard box for sale. The Toy is not protected by any form of plastic or acetate so the surface of the Toy can be touched and felt without removing the packaging. The box invites customers to test the animation. The art work on the packaging is very much directed at the In the Night Garden brand but emphasises the product’s intended use as an animated toy.
16. The Tribunal were shown the TV advert which again focusses on its intended use as a lullaby or sleep aid.

Other Toys

17. The Tribunal were also given the opportunity to examine other toys some of which were produced by the Appellant and some by other producers. In particular the Tribunal were shown “Sleepy Sheep” and “Gentle Giraffe” produced by Cloud B. These products were the subject of a 2014 tribunal decision concerning their classification. The Tribunal considers that judgment below and its relevance to the present appeal.
18. Sleepy Sheep and Gentle Giraffe were aimed at the same intended market as the Toy. They are sold as sleep aids. They have a fully removable sound unit that plays sound tracks entitled “whale”, “ocean”, “rain” and “stream”. The sound unit is approximately 10cm x 4cm x 1.5cm and it fits into a pocket in the back of the sheep or giraffe; the pocket is fully lined. Without the sound unit inside both the sheep and the giraffe would, in all regards look and feel like any other soft toy other than a Velcro strap on its back intended to attach it to a cot.

19. In addition the Tribunal was shown other toys in the Appellant's Iggle Piggle range with a view to illustrating those toys that the Appellant accepts as "stuffed".

20. By way of contrast the Tribunal was also shown a bouncing Tigger which all parties accepted was not "stuffed". The Tribunal were unable to deconstruct Tigger but were able to feel that Tigger's compressible hollow fibre type stuffing was limited to its limbs and to the front of its head helping to form the snout and features. The body was comprised only of the animation unit which was covered in plush fabric. The body sat on a semi rigid coiled tail which felt as if it contained some sort of insulated piping but not soft stuffing.

21. When in operation Tigger "sang" in that its mouth moved to the words of the "Tigger Song" and it bounced on its tail. On the smooth surface of the desk it did change its location as it bounced.

22. In addition the Tribunal was shown one of the Appellant's own products Winning Wenlock, an animatronic of the London 2012 mascot. Like Tigger Winning Wenlock's body consisted of the animation unit covered with plush fabric; its legs were stuffed but its arms were not, and there was limited stuffing in the head to create shape.

Other BTIs

23. The Tribunal was provided with 28 UK issued BTIs for other products in which a classification code of 950300 41 had been given together with a Statement on the classification of "toy animal containing stuffing" from the Tariff Committee also providing for the same "other" classification. All these BTIs either confirmed that there was no stuffing or minimal stuffing, it appearing to the Tribunal that stuffing of limbs only is certainly considered to be minimal for classification purposes.

The required legal approach

24. The provisions of Council Regulation (EEC) No 2658/67 of 23 July 1987 ("the Tariff Regulation" and Annex 1 thereof ("the Combined Nomenclature") determine the proper classification of goods entering the EU. Annex 1 is amended annually and the amendment takes effect from 1 January and is reproduced in the UK Tariff.

25. The Combined Nomenclature provides a systemic classification for all goods in international trade and is designed to ensure, with the aid of the six General Interpretation Rules ("GIRs") that any product falls to be classified in one place.

26. Volume 2 Part 1 Section 3 of the UK Tariff explains the legal procedure for tariff classification. The first step is to establish the correct four digit Heading number. GIR 1 states that classification shall be determined according to the terms of the headings and any relevant Section or Chapter Notes. It also provides that, where appropriate, classification shall be determined according to the provisions of GIRs 2 – 5. GIR 6 extends the classification to sub-heading level.

27. In simple terms the provisions of the GIRs ensure a single classification for any product. The combined effect of GIR 1 and 6 is that classification will first be sought under the headings and subheadings of the Combined Nomenclature. Where that cannot be achieved because no single classification pertains to the goods GIRs 2 – 4 provides the means of resolution. GIR 5 concerns packaging etc.

28. Volume 2 Part 1 paragraph 3.3 of the UK Tariff refers of the Explanatory Notes to the Harmonised System (HSENS) and to the Explanatory Notes to the Combined Nomenclature (CNENS).

29. The principle of legal certainty sits at the very root of the classification process. The role of the GIRs and the non-binding contents of the HSENS and CNENS are aimed at ensuring the consistent and certain application of the classification system. An importer should be certain that the classification given to any particular product will be consistent whichever state in which it is sought and consistent as between products which are similar. Whilst a BTI is binding for the importer and the product it is binding in every member state. All BTIs issued are publicly available and thus facilitate the legal certainty and consistency required in the system.

30. The basic approach to classification has been explained by the CJEU:

“in the interests of legal certainty and for ease of verification, the decisive criteria for the classification of goods for Customs purposes is in general to be sought in their objective characteristics and properties as defined in the wording of the relevant CN” (*Holz Geenen GmbH v Oberfinanzdirektion Munchen C-309/98 para 14*).

31. Intended use of a product may also constitute an objective criterion for classification if it is inherent to the product, and that inherent character must be capable of being assessed on the basis of the product’s objective characteristics and properties (*Holz Geenen GmbH v Oberfinanzdirektion Munchen C-309/98 para 15*).

32. It is for the national court, in this case the Tribunal, to determine the objective characteristics, having regard to a number of factors including their physical appearance, composition and presentation (*Wiener SI GmbH v Hauptzollamt Emmerich C-338/95 paragraph 21*).

33. In the present appeal the dispute between the parties was a narrow one. They were in agreement that the Toy was to be classified in Chapter 95 of the UK Tariff under heading 9503 “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” and under subheading 950300 “Toys representing animals or non-human creatures”. The dispute is whether the Toy is “stuffed”. If it is then it is to be classified as such under 950300 41 and if it is not then it will be classified under “other” 950300 49. The difference in duty rate is 4.7%.

34. The parties were agreed that only GIR 1 and 6 were appropriate. The Tribunal agrees. The Toy is most definitely a toy representing a non-human creature and thus to be classified either as “stuffed” or “other”.

5 35. Whilst there is both a HSENS and a CNENS concerning “other toys” under chapter 95 neither is relevant to the resolution of the present dispute. Similarly there are no section notes for Section XX, into which Chapter 95 falls nor are there any relevant Chapter notes for Chapter 95.

10 36. In order to determine the present appeal the Tribunal must identify and consider the objective characteristics of the Toy and then determined whether, by reference to those characteristics, it is “stuffed”.

Cloud B

15 37. As indicated in paragraphs 16 and 17 above *Cloud B Limited [2014] UKFTT 997* concerns the classification of Sleepy Sheep and Gentle Giraffe. In that case following the direction given by the CJEU, the Tribunal sought to determine the objective characteristics of the products however, at paragraph 19 the Tribunal notes “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 38. At paragraph 21 that Tribunal noted the submission of Cloud B that “stuffing” in the context of classification sub-heading 950300 41 is not defined and went on to express the view that “it was 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. The Tribunal continued at paragraphs 21 and 22, commenting:

30 “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 that is ‘soft, light and compressible’.

40 23. We do not agree with the Appellant’s observations in relation to the reference in the Commission Statement ... 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, The reason why the stuffing was disregarded was that it was observed to be ‘minimal’. We accept

5 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 ‘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 sat there may be 10%, 20%, 30% stuffing. However we are considering two products which can only be described as ‘totally stuffed’”.

10 39. That Tribunal concluded that the presence or absence of the sound box in the products was not and could not be determinative of whether the toys in question were stuffed (a point on which both parties to this appeal agree); however, when the objective characteristics of the product were considered the Tribunal concluded that Sleepy Sheep and Gentle Giraffe were clearly stuffed toys.

15 **Submissions of the parties**

40. For the Appellant it was essentially submitted that the Toy was more like the range of toys which had been granted classification as “other” i.e. 950300 49. In substance the Tribunal understood the Appellant to contend that the stuffing in the Toy was minimal it so contended by reference to the fact that by reference to both weight and cost the stuffing was of the order of 10% of the Toy.

41. It further contended that the intended use of the Toy was not as a cuddly toy, rather it was intended to be sat next to the bed to sooth and comfort a child to sleep.

42. Accordingly, even applying the appearance, composition and intended use analysis of the Cloud B judgment the Appellant contended that only the appearance might indicate that the Toy was stuffed and even that was doubtful given the exposed plastic on the base of the Toy.

43. By contrast HMRC contended that the Toy was stuffed. HMRC appeared to convert the analysis of the Cloud B Tribunal into a rigid test for this Tribunal to apply. HMRC appeared to contend that the objective characteristics relevant to be considered were limited to appearance, composition and possible use. HMRC placed great emphasis on the fact that whilst the intended use was as a night time ‘music box’ there was nothing to prevent a child using the Toy in precisely the same manner as it would a cuddly toy.

44. HMRC also placed reliance on the form and style of the open packaging as substantiating that purchasers were effectively being invited to touch, feel and ensure that it was soft and cuddly.

45. HMRC contended that since by reference to the appearance and composition of the Toy it was stuffed it must therefore be classified as such.

Discussion

46. The Tribunal's function in the present appeal is clear and uncontentious. The Tribunal must determine the objective characteristics of the Toy. Those characteristics have been described in a non-exhaustive way by the CJEU as the appearance, composition, presentation and, provided it is inherent in the characteristics of the product, its intended use. From these characteristics the Tribunal must identify the classification heading that most accurately describes the goods in a way that ensures legal certainty across similar products.

47. At paragraphs 6 – 16 above is a description of the Toy.

48. In terms of appearance the Tribunal considers that the Toy has soft rounded surfaces and, bar the plastic base, all surfaces are compressible. When in operation the movement and light features which accompanied the lullabies are immediately apparent even in a well lit room. However, on balance the Tribunal considers that the appearance of the Toy is that it is a stuffed toy.

49. The composition of the Toy clearly includes compressible soft stuffing. As noted at paragraph 15 that stuffing represented 10% of weight and cost. The Tribunal was not provided with any volume data, no doubt because the very nature of soft stuffing makes accurate measurement all but impossible. However, by reference to the Tribunal's objective assessment of the level of stuffing, it is observed that the limbs are completely stuffed, the head was soft stuffed to the extent of approximately 90% and the body of the order of 50%.

50. The presentation of the Toy, as indicated, was in an open box. The Tribunal accepts the evidence of the Appellant that the nature of the packaging was driven largely by cost and not with a view to allowing customers to establish the "cuddliness" of the product. The packaging was clear as to the features of the Toy which included sound, movement and light.

51. Much was made by both sides of the intended and unintended uses of the Toy. HMRC made much of the fact that nothing in the Toy prevented it from being used by a child as a "cuddly" toy. The Appellant, understandably focused on the use for which the Toy had been designed – a sleep aid.

52. The Tribunal considers that the intended use of the Toy was abundantly clear from the inherent characteristics of the Toy such that it represented an objective characteristic of the product, consistent with paragraph 15 of *Holtz* (to which neither party specifically referred). The intended use of the Toy is as a sleep aid. The alternative use as a "cuddly" toy, by contrast was hypothetical and not, in the Tribunal's view, inherent in the product because of the weight of the Toy and the rigidity created by the animation unit.

53. This Tribunal must determine, in light of these findings, whether the Toy is to be classified as a stuffed non human toy.

54. It appears to this Tribunal that the Cloud B tribunal essentially equated "stuffed" toys with "cuddly" toys. Consideration of the full analysis articulated by that Tribunal reveals that this approach was one which was, in fact, suggested to it by

Cloud B. The Tribunal adopted the suggested approach and in, effect, applied it against Cloud B which was contending, in large part as a consequence of the intended use of the products, that they were not cuddly toys in a colloquial sense.

55. This Tribunal, following examination of the products which were before the
5 Cloud B Tribunal agrees absolutely with the conclusions of that Tribunal regarding classification. The Sleepy Sheep and Gentle Giraffe were, without question, stuffed toys. Without the sound box they were entirely stuffed; the sound box added functionality but did not detract from the fact that the toys were stuffed. However, this Tribunal does question whether equating cuddly with stuffed will necessarily
10 produce the correct classification in more borderline situations. For instance this Tribunal would consider that a traditional Steiff type teddy bear would be considered to be stuffed despite the stuffing, which was historically wood wool, effectively rendering the bear solid and thereby not soft and cuddly.

56. In the context of the Toy the Tribunal would not necessarily conclude that it
15 was cuddly, the weight of it, the existence of the animation unit which contributed significantly to the weight of it, the smooth plastic base and its overall design would militate against a conclusion that the Toy was a cuddly toy.

57. However, that does not, in this Tribunal's view, lead to the conclusion that the toy is other than stuffed. Every part of the Toy had stuffing in it. The rabbit which
20 was the subject of the Classification Committee ruling (and considered in Cloud B) contained minimal stuffing (limited to its limbs and ears). Tigger and Winning Wenlock too contained minimal stuffing (limited to limb(s) and head shaping). The Toy was predominantly stuffed and certainly to an extent that could not have been considered to be minimal. Had the stuffing been in the limbs, head and used just to
25 smooth the lumps and bumps of the moving parts of the animation unit the Tribunal might have had greater difficulty; but every part of the Toy used stuffing. Unlike Tigger and Winning Wenlock whose body shape had been created by the animation unit which was then covered with plush fabric, the Toy used stuffing material to create and form the shape of the Toy to be a suitably accurate effigy of Iggle Piggle.

30 58. The guidance from the CJEU is clear that all the objective characteristics and properties of a product are to be considered when determining classification. The tribunal finds it interesting to note that in connection with Section XVI and XVIII of the Combined Nomenclature concerning electronic items of various types which may have multiple functions whilst appearance, composition, presentation and intended
35 use are all relevant objective characteristics the section notes explicitly provide that primary function will determine the classification of the product. For reasonably obvious reasons Section XX (into which Chapter 95 falls) does not include a "principal function" note. The Tribunal is thereby reassured that the intended use identified for the Toy cannot take precedence over the other objective characteristics
40 of the Toy.

Decision

59. The Tribunal finds that the classification appropriate to the Toy is 950300 41 00 “Toys representing animal or non – human creatures – stuffed”. On that basis HMRC’s decision is upheld and the appeal is dismissed.

5 60. 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)”
10 which accompanies and forms part of this decision notice.

AMANDA BROWN

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TRIBUNAL JUDGE
RELEASE DATE: 30 NOVEMBER 2015