



Ottawa, Friday, November 30, 2001

**Appeal No. AP-2000-050**

IN THE MATTER OF an appeal heard on August 16, 2001, under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by *Customs Tariff*, S.C. 1997, c.36, ss. 166, 169 and under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1, as amended by S.C. 1997, c. 36, ss. 166, 169;

AND IN THE MATTER OF decisions of the Commissioner of the Canada Customs and Revenue Agency dated September 14, 2000, with respect to requests for redetermination under subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*.

**BETWEEN**

**COSTCO CANADA INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2000-050

COSTCO CANADA INC.

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

This is an appeal under subsection 67(1) of the former and current *Customs Acts* from decisions of the Commissioner of the Canada Customs and Revenue Agency dated September 14, 2000, pursuant to subsection 63(3) of the former *Customs Act* and subsection 60(4) of the current *Customs Act*. The issue in this appeal is whether cases containing art materials are properly classified under tariff item No. 9609.90.00 as other pencils and crayons or, alternatively, under tariff item No. 9608.20.00 as felt-tipped pens, as determined by the respondent, or whether they should be classified under tariff item No. 9503.90.00 as other toys or, alternatively, under tariff item No. 9503.70.90 as other toys, put up in sets or outfits, as claimed by the appellant.

**HELD:** The appeal is dismissed. The Tribunal finds that the goods in issue are not classifiable as toys, given that nearly one half of the contents are made up of articles that are excluded from heading No. 95.03. Rather, the goods in issue are properly classified, pursuant to Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*, under tariff item No. 9609.90.00 as other pencils, crayons and pastels because these objects comprise approximately 60 percent of the contents of the goods in issue.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: August 16, 2001  
Date of Decision: November 30, 2001

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Eric Wildhaber

Clerk of the Tribunal: Margaret Fisher

Appearances: Michael A. Sherbo, for the appellant  
Jean-Robert Noiseux, for the respondent



**Appeal No. AP-2000-050**

**COSTCO CANADA INC.**

**Appellant**

**AND**

**THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY**

**Respondent**

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

**REASONS FOR DECISION**

This is an appeal under subsection 67(1) of the former *Customs Act*<sup>1</sup> and subsection 67(1) of the current *Customs Act*<sup>2</sup> from decisions of the Commissioner of the Canada Customs and Revenue Agency, dated September 14, 2000, pursuant to subsection 63(3) of the former Act and subsection 60(4) of the current Act. The issue in this appeal is whether cases containing art materials are properly classified under tariff item No. 9609.90.00 of the appropriate schedules of the former *Customs Tariff*<sup>3</sup> and the current *Customs Tariff*<sup>4</sup> as other pencils and crayons or, alternatively, under tariff item No. 9608.20.00 as felt-tipped pens, as determined by the respondent, or should be classified under tariff item No. 9503.90.00 as other toys or, alternatively, under tariff item No. 9503.70.90 as other toys, put up in sets or outfits, as claimed by the appellant. There are two types of cases. The first is identified as the “Jumbo Artist Case (MC196)”. The second is identified as the “Art Studio (MC1300)”. The goods in issue were imported by the appellant between October 17 and November 18, 1997, and on June 23, 1998.

The relevant tariff nomenclature<sup>5</sup> is as follows:

|            |  |
|------------|--|
| 95.03      | Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.   |
| 9503.70    | -Other toys, put up in sets or outfits   |
| 9503.70.90 | —Other   |
| 9503.90.00 | -Other   |
| 96.08      | Ball point pens; felt tipped and other porous-tipped pens and markers; fountain pens, stylograph pens and other pens; duplicating stylos; propelling or sliding pencils; pen-holders, pencil holders and similar holders; parts (including caps and clips) of the foregoing articles, other than those of heading No. 96.09. |
| 9608.20.00 | -Felt tipped and other porous-tipped pens and markers  |
| 96.09      | Pencils (other than pencils of heading No. 96.08), crayons, pencil leads, pastels, drawing charcoals, writing or drawing chalks and tailors’ chalks.   |
| 9609.90.00 | -Other   |

1. R.S.C. 1985 (2d Supp.), c. 1, as it read prior to the amendments made by *Customs Tariff*, S.C. 1997, c.36, ss. 166, 169 [hereinafter former Act].
2. R.S.C. 1985 (2d Supp.), c. 1, as amended by S.C. 1997, c. 36, ss. 166, 169 [hereinafter current Act].
3. R.S.C. 1985 (3d Supp.), c. 41 [hereinafter former *Customs Tariff*].
4. S.C. 1997, c. 36 [hereinafter current *Customs Tariff*].
5. The relevant nomenclature is the same under the former and current *Customs Tariffs*.

The following excerpts from the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>6</sup> to heading No. 95.03 are also relevant:

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

...

Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).

...

This heading also **excludes**:

- (a) Paints put up for children's use (**heading 32.13**).
- (b) Modelling pastes put up for children's amusement (**heading 34.07**).

...

- (h) Crayons and pastels for children's use, of **heading 96.09**.

## EVIDENCE

Neither party called witnesses at the hearing.

Physical exhibits of goods similar, but not identical, to the goods in issue were filed with the Tribunal. The appellant did, however, file various product literature with the Tribunal relating to each of the two types of goods in issue described above. It also included, to the agreed satisfaction of the parties, facsimile reproductions of the goods in issue. The parties also agreed that the goods in issue consisted of a case and certain precise contents. Because the goods in issue were not filed with the Tribunal, some confusion arose as to the material of each case. The parties consented that both the MC196 and the MC1300 cases were made of plastic. Each contained a plastic tray that was specifically designed to hold their respective contents. For the MC196, these consisted of 60 felt markers, 48 wax crayons, 45 oil pastels, 24 colour pencils, 2 lead pencils, 12 water paint tablets, 1 paint brush, 1 paint pallet, 1 ruler, 1 eraser, 1 pencil sharpener and 1 glue bottle. The MC1300 contained 36 felt markers, 24 wax crayons, 24 oil pastels, 24 colour pencils, 1 drawing pencil, 12 water colour paints, 1 ruler, 1 eraser, 1 pencil sharpener, 1 pair of scissors, 1 paint brush, 1 paint pallet and 1 tube of white paint. Both cases have a warning label that reads as follows: "WARNING: CHOKING HAZARD - Small parts. Not for children under 3 years."

## DECISION

Section 10 of the former and current *Customs Tariffs* provides that the classification of imported goods under a tariff item shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*.<sup>7</sup> Section 11 of the former and current *Customs Tariffs* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>8</sup> and to the Explanatory Notes. The General Rules are structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.

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6. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

7. *Supra* note 2 [hereinafter General Rules].

8. Customs Co-operation Council, 1st ed., Brussels, 1987.

The Tribunal agrees with the respondent that the goods in issue are classifiable in more than one heading and that, therefore, Rule 1 of the General Rules does not apply. The Tribunal also agrees with the respondent that neither Rule 2 nor Rule 3 (a) applies because two or more headings represent the goods. The Tribunal further agrees with the respondent that Rule 3 (b) is appropriate for the classification of the goods in issue. Rule 3 (b) reads as follows:

Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.

The Tribunal also agrees with the respondent that the goods are sets “put up for retail sale”. The goods in issue consist of articles put up together to carry out the specific activity of artistic endeavours; and they are put up in a manner suitable for sale directly to users without repacking and, therefore, constitute “goods put up in sets for retail sale” within the meaning of Rule 3 (b) and according to the Explanatory Notes to that rule.<sup>9</sup>

The question before the Tribunal is, therefore, as follows: What is the essential character of the goods in issue; are the cases toy sets of heading No. 95.03, pen sets of heading No. 96.08 or pencil, crayon or pastel sets of heading No. 96.09?

The Explanatory Notes to Rule 3 (b) of the General Rules relative to the determination of essential character are as follows:

- (VIII) The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

Dealing, first, with the appellant’s choice of classification in heading No. 95.03, Costco argued that the Explanatory Notes provide for collections of articles that would normally be classified elsewhere in the nomenclature to be classified in heading No. 95.03 “when they are put up in a form clearly indicating their use as toys” and that the heading covers “toys intended essentially for the amusement of persons (children or adults).”<sup>10</sup> According to the appellant, there were clear indications that the cases are for the use of children, notably because the warning labels concerning adult supervision and choking hazards affixed to the cases indicate their use for children over the age of 3 years.<sup>11</sup>

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9. The relevant excerpt of the Explanatory Notes to Rule 3 (b) of the General Rules is as follows:

- (X) For the purposes of this Rule, the term “goods put up in sets for retail sale” shall be taken to mean goods which:
- (a) consist of at least two different articles which are, *prima facie*, classifiable in different headings. Therefore, for example, six fondue forks cannot be regarded as a set within the meaning of this Rule;
  - (b) consist of products or articles put up together to meet a particular need or carry out a specific activity; and
  - (c) are put up in a manner suitable for sale directly to users without repacking (e.g., in boxes or cases or on boards).

10. *Supra* note 6.

11. *Transcript of Public Argument*, 16 August 2001, at 16-17, 29, 37-38.

The Tribunal does not accept the appellant's contention that such warning labels are indicative of a classification as toys. Labels appear on a multitude of goods, not just toys, such as packages of beads for the stringing of necklaces, boxes of pills, etc. The exhibits do, however, appear to be modelled after professional art cases and do appear to be meant for the creative amusement of a child or young adult. For instance, the wording on one of the cases reads: "This Giant Artist Case includes everything a young artist needs to create wonderful drawings."<sup>12</sup> Even the cartoon-like design on the cover of one of the exhibits is indicative that the goods in issue are intended as toys and not for the serious or professional adult artist. Such goods could well be classified as toys in heading No. 95.03.

However, given that the Tribunal does not have before it the cases that were imported, it would be inappropriate to conclude on these grounds alone that the goods in issue are toys. Moreover, the appellant produced no evidence, such as whether or not the goods in issue were displayed and offered for sale in its toy department rather than in its stationery or art department, beyond the above labelling and packaging information to support the conclusion that they were marketed as toys and not as art sets.

The appellant also argued, in the alternative, that the individual items in the cases were toys and, thus, that heading No. 95.03 was appropriate.<sup>13</sup> The Tribunal does not agree with the dichotomous distinction made by the respondent that an item is either a toy for amusement or a tool with a utilitarian function.<sup>14</sup> Rather, relying on the *Gage Canadian Dictionary*,<sup>15</sup> in which the concept of "creative toys" is found, the Tribunal is of the view that the pencils, crayons, pastels, markers, paints, etc. may well be toys, albeit creative ones.

Nevertheless, in the final analysis, the Tribunal rejects the appellant's contention that the goods in issue should be classified in heading No. 95.03 as other toys, given the exclusions in the Explanatory Notes to this heading. These notes specifically exclude from heading No. 95.03 "(a) Paints put up for children's use" and "(h) Crayons and pastels for children's use". Given that Rule 3 (b) of the General Rules instructs that it is the essential character of these sets that is determinative of classification, it does not appear to the Tribunal that the cases can be classified as toys in heading No. 95.03 when approximately one half of the contents of each case includes crayons, paints and pastels that cannot be classified as toys in heading No. 95.03. This is especially so given that there is no other article in the case that could give it the essential character of a toy, such as might be the case with a set of Lego that includes modelling paste, another item excluded from classification in heading No. 95.03.<sup>16</sup>

This reasoning of the Tribunal is similar to that of the respondent, who suggested that the Tribunal ascribe the general character of the goods in issue by way of a mathematical calculation. Essentially, the respondent's argument was that the essential character of the goods in issue is that of the components making up the major proportion of the sum of the components. Using this methodology, the respondent argued that approximately 60 percent of the components of the sets fall in heading No. 96.09 (pencils, crayons, pastels, etc.) and that, therefore, that heading, rather than heading No. 96.08, should apply. The

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12. The Tribunal notes that the adjective "young" is absent in the French version, which is as follows: "*La Malette Géante de l'Artiste* comprend tout le nécessaire pour créer de merveilleux dessins".

13. *Transcript of Public Argument*, 16 August 2001, at 26, 29, 36.

14. *Transcript of Public Argument*, 16 August 2001, at 46-49.

15. 1996, s.v. "creative".

16. The appellant made the argument, not accepted by the Tribunal, that to exclude a set as a toy because it includes an item specifically excluded by the Explanatory Notes would be widening the exclusion (*Transcript of Public Argument*, 16 August 2001, at 34). The Tribunal is of the view that, when the excluded items, as in this case, are being classified under Rule 3 (b) of the General Rules and provide the essential character of the goods in issue, then the exclusion is not broadened, but merely properly applied.

Tribunal accepts this approach, given that Note (VIII) of the Explanatory Notes to Rule 3 (b) of the General Rules is not exhaustive in the examples that it provides. The Tribunal, therefore, agrees with the respondent that, as between heading Nos. 96.08 and 96.09, the latter is the correct classification.

For the foregoing reasons, the appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member