



Ottawa, Tuesday, September 24, 2002

Appeal No. AP-2001-081

IN THE MATTER OF an appeal heard on April 8, 2002, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF a decision of the Commissioner of the Canada Customs and Revenue Agency dated December 4, 2001, with respect to a request for redetermination under subsection 60(1) of the *Customs Act*.

**BETWEEN**

**WILTON INDUSTRIES CANADA LIMITED**

**Appellant**

**AND**

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

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is allowed.

Ellen Fry  
Ellen Fry  
Presiding Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member

Michel P. Granger  
Michel P. Granger  
Secretary



UNOFFICIAL SUMMARY

Appeal No. AP-2001-081

WILTON INDUSTRIES CANADA LIMITED

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND  
REVENUE AGENCY

Respondent

The goods in issue are wax candles commonly used to decorate cakes. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3406.00.00 as candles, tapers and the like, as determined by the respondent, or should be classified under tariff item No. 9505.90.00 as other festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes, as claimed by the appellant.

**HELD:** The appeal is allowed. In the Tribunal's view, it is clear that the goods in issue are festive articles used to celebrate festive events, such as a child's birthday. The Tribunal was not persuaded that tariff item No. 3406.00.00 is the only tariff item which covers candles. While the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 34.06 provide that this heading covers candles whether or not the goods are "coloured, perfumed, decorated, etc.", Note 1(a) to Chapter 95 excludes only Christmas tree candles from that chapter. In the Tribunal's view, if it was clear that all festive candles were to be covered only under tariff item No. 3406.00.00, then a specific type of festive candle need not have been excluded from Chapter 95. Finally, the Tribunal is of the view that the goods in issue are *prima facie* classifiable in both heading No. 95.05 and heading No. 34.06 and that heading No. 95.05 provides the most specific description. Hence, pursuant to Rule 3 (a) of the *General Rules for the Interpretation of the Harmonized System*, the goods in issue should be classified under tariff item No. 9505.90.00.

Place of Hearing: Ottawa, Ontario  
Date of Hearing: April 8, 2002  
Date of Decision: September 24, 2002

Tribunal Members: Ellen Fry, Presiding Member  
Peter F. Thalheimer, Member  
Zdenek Kvarda, Member

Counsel for the Tribunal: Clarissa Lewis

Clerk of the Tribunal: Anne Turcotte

Appearances: Douglas J. Bowering, for the appellant  
Marie Crowley, for the respondent

**Appeal No. AP-2001-081**

**WILTON INDUSTRIES CANADA LIMITED**

**Appellant**

**AND**

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

**Respondent**

TRIBUNAL: ELLEN FRY, Presiding Member  
PETER F. THALHEIMER, Member  
ZDENEK KVARDA, Member

**REASONS FOR DECISION**

This is an appeal under subsection 67(1) of the *Customs Act*<sup>1</sup> from the respondent's decision dated December 4, 2001, that the goods in issue are properly classified under tariff item No. 3406.00.00 of the schedule to the *Customs Tariff*.<sup>2</sup> The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 3406.00.00 as candles, tapers and the like, as determined by the respondent, or should be classified under tariff item No. 9505.90.00 as other festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes, as claimed by the appellant.

The goods in issue were imported into Canada on June 11, 1999, and were classified under tariff item No. 3406.00.00 by the respondent. On September 5, 2000, the appellant requested a redetermination under tariff item No. 9505.90.00 pursuant to subsection 60(1) of the Act. On March 21, 2001, this request was denied. On April 2, 2001, the appellant requested a further redetermination pursuant to subsection 60(1) of the Act. The respondent denied the request and maintained the original classification on December 4, 2001.

The goods in issue are wax candles of the kind commonly used to decorate cakes. The candles come in five sizes, ranging from 2.25 to 8 inches tall. The candles are cylindrical, wavy or shaped like a crayon. Some candles are smooth-surfaced, while others have spiral grooves.

The relevant nomenclature is:

3406.00.00	Candles, tapers and the like.
95.05	Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.
9505.10.00	-Articles for Christmas festivities
9505.90.00	-Other

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1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].  
2. S.C. 1997, c. 36.

## EVIDENCE

Mr. Gavin Martin, sales representative for Wilton Industries Canada Limited, gave testimony as to the history and nature of the candles and their use in festive occasions, such as birthdays and weddings. Mr. Martin testified that the candles were manufactured in the People's Republic of China and distributed through the appellant to retailers in Canada.

Various exhibits were filed.<sup>3</sup> The following exhibits were examples of some of the goods in issue: "Celebration Candles", "Glitter Candles", "Candle Party Thins" and "Crayon Candles".<sup>4</sup> The Wilton yearbook, a catalogue sent out to retailers specifying the company's wares, was also filed as an exhibit.<sup>5</sup> Mr. Martin testified that the full line of Wilton products is shown in the yearbook and that all the candles in issue are also shown in the yearbook. Mr. Martin testified that there are several types of candles shown, including moulded candles in the shape of popular figures. Mr. Martin indicated that the candles identified as "Candle Party Thins" were marketed, along with the other candles exhibited, as birthday cake or party candles. Mr. Martin indicated that the candles in the shape and likeness of crayons<sup>6</sup> were also used to decorate cakes. In cross-examination, Mr. Martin acknowledged that all the candles shown are made of wax, contain a wick and are burned to produce light. Mr. Martin testified that the candles shaped like a candy cane and a Christmas tree (both not goods in issue)<sup>7</sup> were known as Christmas candles in the industry or as decorative candles.

## ARGUMENT

The appellant drew a distinction between classifying goods in accordance with their physical characteristics and classifying them in accordance with their intended use. The appellant referred to *Nicholson Equipment v. DMNR*,<sup>8</sup> in which the Tribunal determined that various cake decorations (small plastic ornaments and statuettes) were provided for in heading No. 95.05. It submitted that, like the goods that were the subject of that decision, the goods in issue are, by their size, directed to the festive use of being placed as decorations on cakes. It also asserted that the festive use of the candles is indicated by the manner in which they are marketed, as well as by their shapes. Further, the appellant relied on *Nicholson* and argued that birthdays are festive occasions covered in heading No. 95.05. As Mr. Martin testified that the goods in issue were candles used to decorate cakes and to celebrate festive occasions, particularly birthdays, the appellant argued that the candles in issue must be classified in heading No. 95.05.

The appellant referred to documentation<sup>9</sup> describing the importance of candles in the tradition of celebrating birthdays. It disputed the respondent's contention that the candles were "generic", in the sense that they bear no affiliation with any particular festival. It referred to the exhibits previously shown of the candles in issue and the evidence indicating their festive nature. The appellant pointed to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>10</sup> to heading No. 95.05 and to the

3. Exhibits A-1 to A-12 respectively: "Celebration Candles", "Glitter Candles", "Candle Party Thins", "Crayon Candles", Hallmark Cards "Party Express Birthday Candles", a candy-cane-striped Christmas candle, a Christmas tree candle, a streamer, a Christmas cracker, a Christmas jingle bell assortment, "Santa Snow" artificial snow and the Wilton 2002 yearbook.
4. Exhibits A-1 to A-4.
5. Exhibit A-12.
6. Exhibit A-4.
7. Exhibits A-6 and A-7.
8. AP-97-110 and AP-97-113 (2 September 1998) (CITT) [hereinafter *Nicholson*].
9. Tribunal Exhibit AP-2001-081-14.1, "List of Supplementary Documents", Documents A to K.
10. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter *Explanatory Notes*].

exclusion of Christmas tree candles in Note 1(a) to Chapter 95. It contended that these candles would have been included in Chapter 95, had they not been expressly excluded in Note 1(a) to that chapter. It questioned why they would be excluded under Note 1(a) to Chapter 95 if it had not been possible to include them under Chapter 95 in the first instance.

The appellant further contended that the candles are *prima facie* classifiable as festive articles pursuant to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*.<sup>11</sup> It argued that, if Rule 1 did not conclude the matter, Rule 3 (c) would apply to classify the goods in issue in the latter of the two applicable headings, that is, heading No. 95.05.

The respondent submitted that the candles were properly classified in heading No. 34.06 and were *prima facie* classifiable as candles, tapers and the like.

The respondent underlined the physical characteristics of a candle and its dictionary definition.<sup>12</sup>

The respondent submitted that the goods are, in and of themselves, not identifiable with any particular festive occasion and are, hence, “generic” in nature.

The respondent referred to the Explanatory Notes to heading No. 34.06, which state that this heading covers the goods in issue “whether or not coloured, perfumed, decorated, etc.”. He argued that the Tribunal should also read “design, affiliation or use” into the Explanatory Notes.

The exclusion of Christmas candles and Christmas tree candles from Chapter 95 was alleged to be consistent with the inclusion of the goods in issue in heading No. 34.06, as Note (b) of the Explanatory Notes to heading No. 95.05 indicates that Christmas candles and Christmas tree candles should be classified in heading No. 34.06.

The respondent argued that excluding Christmas candles from heading No. 95.05, but not excluding other festive candles, such as Halloween candles, from this heading, would be an absurd result. The respondent contended that the classification of the candles is supported by Customs Notice N-179,<sup>13</sup> which states that “the main criterion for eligibility to this heading is that decorations be designed with themes appropriate to the ‘festive occasion’ and not used year round.”<sup>14</sup> An example of the goods excluded from heading No. 95.05 is given: “consumable goods such as candles . . . and Halloween make-up (cosmetics)”.<sup>15</sup>

The Tribunal’s attention was directed to its decision in *Avon Canada v. DMNR*,<sup>16</sup> in which the issue was whether the goods were clocks or festive articles. The respondent argued that a parallel should be drawn between the broad wording of the Explanatory Notes to heading No. 91.05 with respect to clocks and the wording of the Explanatory Notes to heading No. 34.06 with respect to candles, favouring inclusion of the candles under tariff item No. 3406.00.00.

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11. *Supra* note 2, schedule [hereinafter General Rules].

12. “a usu. molded or dipped mass of wax or tallow containing a wick that may be burned (as to give light, heat, or scent or for celebration or votive purposes)”, *Merriam-Webster’s Collegiate Dictionary*, 10th ed., s.v. “candle”.

13. Department of National Revenue, “The Administration of Heading 95.05” (3 November 1997).

14. *Ibid.* at 4.

15. *Ibid.* at 6.

16. AP-99-074 (30 August 2000) (CITT).

The respondent argued that, if the Tribunal finds that the goods are classifiable in either heading No. 95.05 or heading No. 34.06, Rule 3 (a)<sup>17</sup> of the General Rules should apply and, therefore, the most specific description would favour classification in heading No. 34.06.

## DECISION

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*.<sup>18</sup> The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in the schedule to the *Customs Tariff*.

The General Rules are structured in cascading form. If the goods cannot be classified in accordance with Rule 1, reference is to be made to Rule 2. If reference to Rule 2 does not resolve how the goods are to be classified, then regard must be had to Rule 3, and so on numerically down the list of General Rules.

Rule 1 provides the following:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

The Tribunal agrees with the respondent that the goods in issue could be classified in heading No. 34.06, given that the Explanatory Notes to heading No. 34.06 cover candles “whether or not coloured, perfumed, decorated, etc.”. However, the Tribunal also considers that the goods in issue could be classified in heading No. 95.05. The Explanatory Notes to Heading No. 95.05 state that the heading covers:

- (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
  - (1) . . . Cake and other decorations . . . which are traditionally associated with a particular festival.

The Tribunal agrees with the appellant’s argument that, while Note (b) of the Explanatory Notes to heading No. 95.05 only expressly excludes “Christmas candles and Christmas tree candles” from that heading, it does not prevent other types of candles, such as birthday candles, from being classified in heading No. 95.05.

The Notes to Chapter 95 and the Explanatory Notes to heading No. 95.05 are not conclusive, in the Tribunal’s view, of the classification of the goods in issue. While Christmas candles are directed to heading No. 34.06, the Explanatory Notes are silent as to the treatment of other candles used during festive occasions. Indeed, if candles used during birthdays or other festive occasions were to be also excluded from heading No. 95.05, in the Tribunal’s view, they would have been expressly excluded.

Based on the evidence, and as held in *Nicholson*, the Tribunal considers that birthdays are a “particular festival” as contemplated in the Explanatory Notes to heading No. 95.05. The Tribunal also considers that the birthday candles in issue are festive articles, in particular, “cake . . . decorations”, as

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17. Rule 3 (a) of the General Rules indicates that, when goods are classifiable in two different headings, the heading which provides the most specific description is to be preferred.

18. *Supra* note 2, schedule.

contemplated by the Explanatory Notes to heading No. 95.05. Accordingly, the Tribunal is of the view that the goods in issue are covered by these explanatory notes.

Therefore, in the Tribunal's view, the goods in issue are classifiable not only in heading No. 34.06 but also in heading No. 95.05.

When reference to Rule 1 of the General Rules does not resolve the matter of classification, the Tribunal must look to the subsequent rules in order. Rule 2 does not apply.

The Tribunal is of the view that the goods in issue should be classified pursuant to Rule 3 (a) of the General Rules, which indicates that, when goods are classifiable in two or more headings, the heading which provides the most specific description is to be preferred. It is the Tribunal's view that heading No. 95.05 ("Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes") is more specific than heading No. 34.06 ("Candles, tapers and the like").

The candles are not "generic" in nature, as contended by the respondent,<sup>19</sup> but are clearly designed for festive use.<sup>20</sup> Candles can be a means to mark a celebrated occasion or festival<sup>21</sup> and to provide entertainment. To rely merely on a physical description does not address how a candle may have a specific and festive use, such as in the context of celebrating a child's birthday, for example. Candles are closely associated with the tradition of celebrating such a festive occasion, as shown in the plethora of evidence provided by the appellant.<sup>22</sup> Candles such as these have become so closely associated with birthdays that they are frequently referred to in the popular lexicon as "birthday candles".<sup>23</sup> Therefore, the candles in issue are clearly "[f]estive, carnival or other entertainment articles" and are more specifically classified as such pursuant to Rule 3 (a) of the General Rules.

The Tribunal wishes to add that, if Rule 3 (a) of the General Rules had not ended this matter, Rule 3 (c) would have applied to allow the appeal. Rule 3 (c) indicates that, when goods cannot be classified by reference to Rule 3 (a) or 3 (b),<sup>24</sup> they shall be classified in the heading which occurs last in numerical order among those which equally merit consideration. Accordingly, Rule 3 (c) would lead to classification under tariff item No. 9505.90.00.

For the foregoing reasons, the candles should be classified under tariff item No. 9505.90.00 as "[f]estive, carnival or other entertainment articles" and not under tariff item No. 3406.00.00 as "[c]andles, tapers and the like".

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19. Respondent's Brief, Tab 1.

20. Festive is an adjective meaning "for a feast, festival, or holiday; gay; joyous; merry: *A birthday or wedding is a festive occasion*", *Gage Canadian Dictionary*, 1997, s.v. "festive".

21. Festival: 1: a time of celebration marked by special observances; esp: an occasion marked with religious ceremonies 2: a periodic season or program of cultural events or entertainment. *The New Merriam-Webster Dictionary*, (Springfield, Mass.: Merriam-Webster, 1989). Festivals began in antiquity as religious and ritual observance of the seasons, often including sacred community meals or feasts. Today, festivals are held to commemorate, celebrate or re-enact events and seasons. *The Canadian Encyclopedia*, Vol. I (Edmonton, Alta.: Hurtig, 1985).

22. The appellant's "List of Supplementary Documents" contained articles on birthday traditions around the world.

23. The birthday candle has a long history, dating back to the ancient Greeks and extending to various cultures around the world. *Supra* note 10, Document C.

24. Rule 3 (b) of the General Rules does not apply to this matter as the goods in issue are not "[m]ixtures, composite goods consisting of different materials or made up of different components" nor "goods put up in sets for retail sale", which cannot be classified by reference to Rule 3 (a).

Consequently, the appeal is allowed.

Ellen Fry  
Ellen Fry  
Presiding Member

Peter F. Thalheimer  
Peter F. Thalheimer  
Member

Zdenek Kvarda  
Zdenek Kvarda  
Member