

Ottawa, Friday, November 8, 2002

Appeal No. AP-2001-088

IN THE MATTER OF an appeal heard on July 23, 2002, under section 67 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 14, 2001, with respect to a request for redetermination under section 60 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 dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-2001-088

WILTON INDUSTRIES CANADA LIMITED

Appellant

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND
REVENUE AGENCY

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Commissioner of the Canada Customs and Revenue Agency dated December 14, 2001, made pursuant to subsection 60(4) of the *Customs Act*. The goods in issue are Christmas-themed cake, muffin and cookie pans. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7615.19.00 as other aluminum kitchen articles, as determined by the respondent, or should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities, as claimed by the appellant.

HELD: The appeal is dismissed. The Tribunal is of the view that the goods in issue are not *prima facie* festive articles and are, therefore, not classifiable under tariff item No. 9505.10.00, but, rather, under tariff item No. 7615.19.00. The goods in issue are used for baking at Christmas time; they are not, in and of themselves, “[f]estive, carnival or other entertainment articles”. As the goods in issue are made of aluminum, and since they are accurately described by the terms of heading No. 76.15, as well as by the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to this heading, the Tribunal finds that the goods in issue are properly classified under tariff item No. 7615.19.00.

Place of Hearing: Ottawa, Ontario
Date of Hearing: July 23, 2002
Date of Decision: November 8, 2002

Tribunal Member: Patricia M. Close, Presiding Member

Counsel for the Tribunal: Clarissa Lewis

Clerk of the Tribunal: Margaret Fisher

Appearances: Douglas J. Bowering, for the appellant
Elizabeth Richards, for the respondent

Appeal No. AP-2001-088

WILTON INDUSTRIES CANADA LIMITED

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 section 67 of the *Customs Act*¹ from a decision of the Commissioner of the Canada Customs and Revenue Agency dated December 14, 2001. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7615.19.00 of the schedule to the *Customs Tariff*² as other aluminum kitchen articles, as determined by the respondent, or should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities, as claimed by the appellant.

The goods in issue were imported into Canada on October 19, 1999, under tariff item No. 7615.19.00. On August 31, 2000, the appellant requested, under paragraph 74(1)(e) of the Act, a redetermination of the classification of the goods in issue under tariff item No. 9505.10.00. On November 6, 2000, under paragraph 59(1)(a) of the Act, the respondent granted the appellant's request. On November 27, 2000, under subsection 60(1) of the Act, the appellant, unaware that the previous request had been granted, requested a further redetermination of the tariff classification of the goods in issue under tariff item No. 9505.10.00. On December 14, 2001, pursuant to subsection 60(4) of the Act, the respondent denied the appellant's request and reclassified the goods in issue under tariff item No. 7615.19.00. The goods in issue are three types of aluminum baking pans and moulds:

- Catalogue No. 2105-G-2040, "Holiday Stocking Pan", in the shape of a gift-filled Christmas stocking, used for making cakes;
- Catalogue No. 2105-G-8463, "Petite Christmas Tree Pan", a rectangular pan with 12 miniature Christmas trees, used to make muffins, tarts, brownies or gelatins; and
- Catalogue No. 2105-G-6209, "Christmas Giant Cookie Pans", in the shape of a gingerbread boy, used for making cookies or brownies.

The relevant tariff nomenclature is as follows:

76.15	Table, kitchen or other household articles and parts thereof, of aluminum; pot scourers and scouring or polishing pads, gloves and the like, of aluminum; sanitary ware and parts thereof, of aluminum. --Table, kitchen or other household articles and parts thereof; pot scourers and scouring or polishing pads, gloves and the like:
7615.11.00 00	--Pot scoures and scouring or polishing pads, gloves and the like
7615.19.00	--Other

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

95.05	Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.
9505.10.00	-Articles for Christmas festivities

EVIDENCE

Mr. Gavin Martin, Eastern Ontario sales representative for Wilton Industries Canada Limited, gave testimony on the goods in issue and the Wilton yearbook, a catalogue of the appellant's wares. Mr. Martin first gave testimony on the use and nature of the goods in issue. He testified that these items are featured in the Christmas section of the Wilton yearbook. He noted that the goods in issue could possibly be purchased or used outside the Christmas season, but that they were specifically made for this festive season. Mr. Martin stated that the goods in issue are reusable and made of aluminum.

The respondent had no questions for Mr. Martin.

The appellant then called Mr. François Blais, Director of the Centre for Legal Translation and Documentation at the University of Ottawa. Mr. Blais has worked in the field of legal translation for 22 years. The appellant asked the Tribunal to accept Mr. Blais as an expert in language and translation.

The respondent objected to Mr. Blais giving any legal conclusions regarding the interpretation of the tariff headings at issue. Mr. Blais was accepted by the Tribunal as an expert in translation from English to French.

Mr. Blais testified that there was no difference between the French and English versions of the wording of heading No. 95.05, i.e. between "[f]estive . . . articles" and "[a]rticles *pour* fêtes" [emphasis added], in that the word "*pour*" (for) is implicit in the English version. The word "*pour*", he noted in his expert report, encompasses everything needed for any kind of celebration. He further added, in testimony, that the word "for" could mean "as a preparation toward".

Mr. Blais testified that, in both languages, "festive articles" would mean articles that pertain to a feast, articles to be used for a feast, or articles as a preparation toward a feast or festival and that such meanings would be the commonly understood meanings of the phrase.

Mr. Malcolm Williams also testified on behalf of the appellant as an expert in translation from French to English. He is a freelance translator and part-time professor at the University of Ottawa who has been teaching and translating for over 20 years. He has also worked for the federal government as a translator. Mr. Williams testified that he agreed with everything that Mr. Blais had said. As part of his testimony, he prepared a report on the dictionary definition of "festive" ("of or for a feast, festival or holiday"³). Mr. Williams testified that the *Gage Canadian Dictionary* is the primary dictionary used by the Canadian Government Translation Bureau. The respondent had no questions for Mr. Williams.

ARGUMENT

The appellant noted that the Section Notes and Chapter Notes form the legal background for tariff classification purposes, not the *Explanatory Notes to the Harmonized Commodity Description and Coding*

3. *Gage Canadian Dictionary*, 1996, s.v. "festive".

System.⁴ The Section Notes to Section XV of the *Customs Tariff* state that Section XV does not cover articles of Chapter 95 (which includes “festive articles”).

The appellant questioned the respondent’s assertion that goods of heading No. 95.05 must be primarily for decoration, be made of non-durable material and not have a primarily utilitarian function.⁵ The appellant noted that these criteria come from internal customs documents and are not legally binding. The Explanatory Notes to heading No. 95.05 state that, “generally”, the goods will be “made of non-durable material”. The appellant referred to Appeal Nos. AP-97-110 and AP097-113,⁶ in which the Tribunal determined that various cake decorations (small plastic ornaments and statuettes) were provided for in heading No. 95.05. In *Nicholson*, it was stated that goods do not necessarily have to be made of non-durable material in order to be classified in heading No. 95.05.

The appellant also questioned the respondent’s position that the articles must themselves be used for decoration to qualify for classification in heading No. 95.05. The respondent noted the Tribunal’s decision in AP-99-074⁷ in which the issue was whether the goods were clocks or festive articles. The appellant questioned the reference to this decision, as the clocks could be used year-round once the Christmas tunes were turned off. The appellant submitted that, by contrast, the goods in issue would only be used during the Christmas season, in accordance with the Explanatory Notes to heading No. 95.05, and would only have an incidental use the rest of the year.

The appellant argued that the goods of Section XV are considered for classification in the *Customs Tariff* in a different manner from the goods of the later sections. Goods of Section XV, it submitted, are generally classified according to their physical characteristics or content, such as aluminum. In the higher tariff classifications, it submitted, goods are generally classified in accordance with their functions. The appellant submitted that identifying an article by its intended use is more specific than identifying it by its composition. Moreover, the appellant argued that it is difficult to identify the goods in issue as articles of aluminum.

The appellant referred to Customs Notice N-179.⁸ This is a guideline document of the Canada Customs and Revenue Agency. It was submitted that the respondent was inconsistent, in his brief, with the policies contained in this notice and that the notice itself had not been amended to reflect subsequent Tribunal decisions regarding tariff classification in heading No. 95.05.

The appellant briefly referred to two U.S. customs tariff cases, particularly, *Midwest of Cannon Falls v. The United States*.⁹ In that decision, Circuit Judge Clevenger stated:

Although the examples in the Explanatory Notes are probative and sometimes illuminating, we will not employ their limiting characteristics to narrow the language of the classification heading itself. Nothing from the pertinent subheading 9505.90.60—“other festive, carnival or other entertainment articles”—limits 9505.90.60 to only “non-utilitarian” items.

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

5. Respondent’s Brief at 6.

6. *Nicholson Equipment v. DMNR* (2 September 1998) (CITT) [hereinafter *Nicholson*].

7. *Avon Canada Inc. v. DMNR* (30 August 2000)(CITT).

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

9. 96-1271, -1279 (Fed. Cir. 1997) [hereinafter *Midwest*].

The appellant argued that, given the similarities of the U.S. *Customs Tariff* and Canadian *Customs Tariff*, these decisions were persuasive and that care must be taken not to unnecessarily limit the wording of a heading.

Referring back to the significance of heading No. 95.05, the appellant submitted that “[a]rticles for . . . festivities” would include articles used in the preparation of festivities, such as baking holiday meals. It asserted that the goods in issue are almost exclusively used at Christmas time and that the preparation of the baked goods is an integral part of the Christmas holidays.

The appellant stated that the intended use of the goods in issue is evident by their shape and three-dimensional relief. While they are made of aluminum, their intended use is to produce baked goods. The appellant asserted that there is nothing in the *Customs Tariff* that would exclude such articles from being classified as “festive articles”. The Explanatory Notes to heading No. 95.05 state that this heading covers “[a]rticles traditionally used at Christmas festivities” (“[l]es articles habituellement utilisés à l’occasion des fêtes de Noël”). The appellant submitted that, here, the word “at” or “à” means “during”. The appellant, therefore, argued that this could be referring to the time at which the articles are used, during the Christmas season.

In conclusion, the appellant requested that the goods in issue be classified as articles for Christmas festivities under tariff item No. 9505.10.00.

The respondent submitted that to allow heading No. 95.05 to cover all articles primarily or exclusively used during the celebration of a festivity would give too broad a meaning to this heading and would ignore its plain meaning. To be consistent with the Tribunal’s previous findings with respect to heading No. 95.05, the Explanatory Notes and the heading itself, the articles classified in this heading must be decorative in nature. The goods in issue should also be festive in nature, and a factor of consideration is whether the goods are durable. Further, the respondent submitted that the goods must not have a primarily utilitarian function.

The respondent asserted that the goods in issue are not, in and of themselves, decorative. Previous Tribunal decisions that have classified goods as “festive articles” have all concerned articles that have been decorative. The Explanatory Notes to heading No. 95.05 state that the heading covers “decorative articles”, which, the respondent submitted, is the key consideration. The goods in issue, it was submitted, are not decorative, but plain aluminum baking pans not used for any ornamental purpose.

In Appeal No. AP-96-080,¹⁰ the issue was whether various cake ornaments and statuettes were properly classified in heading No. 95.05. The respondent referred to this decision, particularly the Tribunal’s interpretation of heading No. 95.05. The respondent pointed out the Tribunal’s recognition that the goods in that case had their own decorative nature, such that they could be considered cake decorations or ornaments.

In *Nicholson*, the goods were various figurines placed on cakes. With the examples of these cases, the respondent submitted that, in order to be covered by heading No. 95.05, the goods must be decorative, in and of themselves.

The respondent also referred to *Midwest*, which was discussed by the appellant. In that case, the goods were Jack O’lanterns used at Halloween. These goods were items used and displayed only at

10. *Nicholson Equipment v. DMNR* (25 April 1997) (CITT).

Halloween. The respondent emphasized that these goods are decorative in nature and also have a utilitarian function, whereas the goods in issue are not decorative in nature.

The respondent referred to *Park B. Smith, Ltd. v. United States*,¹¹ in which the United States Court of International Trade quotes from *Midwest* and sets out two requirements for meeting the definition of “festive articles” in the U.S. *Customs Tariff*. Firstly, the goods must be “closely associated” with a festive occasion and, secondly, the goods “must be displayed and used by the consumer only during the festive occasion.” The respondent wanted the Tribunal to take particular note of the wording “displayed and used”, as it is consistent with the respondent’s position that the goods must be decorative, in and of themselves, to be considered “festive articles”. Such decorative goods, which have been found to be classifiable in heading No. 95.05, are Christmas linens, rugs, placemats, napkins, mugs, toys, stocking hangers, metal wreaths and so forth.

Further, the respondent submitted that the fact that the goods in issue are meant for repeated use and are durable mitigates against the appellant’s position.

Where the goods in issue have a primarily utilitarian function, as well as a decorative function, the respondent argued that it is a higher burden to prove proper classification of the goods in heading No. 95.05. In the case of the goods in issue, they are purely utilitarian and, the respondent argued, are not classifiable in heading No. 95.05.

DECISION

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the *General Rules for the Interpretation of the Harmonized System*¹² and the *Canadian Rules*.¹³ 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 a 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.

Rule 1 of the General Rules 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 issue in this appeal is whether the goods in issue are properly classified under tariff item No. 7615.19.00 as other aluminum kitchen articles, as determined by the respondent, or should be classified under tariff item No. 9505.10.00 as articles for Christmas festivities, as claimed by the appellant.

11. 96-02-00344 (2001) (USITC) [hereinafter *Park Smith*].

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

13. *Ibid.*

The competing headings in this case are as follows:

- 76.15 Table, kitchen or other household articles and parts thereof, of aluminum; pot scourers and scouring or polishing pads, gloves and the like, of aluminum; sanitary ware and parts thereof, of aluminum.
- 95.05 Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.

Rule 1 of the General Rules states that “classification shall be determined according to the terms of the headings”. The Tribunal is of the view that the goods in issue are not *prima facie* “[f]estive, carnival or other entertainment articles”. According to the Tribunal, articles such as the goods in issue can be classified in heading No. 95.05 when they are, in and of themselves, “[f]estive . . . or other entertainment articles”. The goods in issue are not such festive articles nor are they entertainment articles. Rather, they are used to make, or are one step removed from, the festive article, that is, the Christmas cookie or cake.

Similarly, with regard to the items listed in the Explanatory Notes to heading No. 95.05 for “[a]rticles traditionally used at Christmas festivities”, one finds articles that are actually used during the festivities, e.g. Christmas crackers and Christmas stockings. One does not find the articles used to make such articles, for example, the patterns used to make the stockings. Similarly, while cakes are covered, the goods used to produce them—cake and cookie pans—are not mentioned. The Explanatory Notes to heading No. 95.05 state, in part, 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) Decorations . . . Cake and other decorations . . . which are traditionally associated with a particular festival.
 - (2) Articles traditionally used at Christmas festivities.

The goods in issue are made of a durable aluminum. The Tribunal notes that goods classified in heading No. 95.05 are “generally” made of non-durable material. While non-durability is, therefore, not a prerequisite for classification in this heading, in this case, the Tribunal finds that the goods are properly classified in heading No. 76.15 as table, kitchen or other household articles of aluminum.

Although the Tribunal heard from two expert witnesses that the terms “festive articles” and “*articles pour fêtes*” have the same meaning and that one of the meanings of the word “*pour*” is “as a preparation toward”, the Tribunal is not convinced that Parliament meant that everything used in the preparation toward Christmas festivities should be classified in heading No. 95.05 as a festive article. Moreover, the Tribunal notes that note (A)(1) of the Explanatory Notes to heading 95.05., by using the preposition “at” in “Articles traditionally used at Christmas festivities”, reinforces its view that what is contemplated by this heading is to cover articles being used during the Christmas festivities, not before them. This is also supported by the French version of the same note, which uses “Les articles habituellement utilisés **à l’occasion** des fêtes de Noël” [emphasis added].

Although it is clearly not bound by U.S. decisions, the Tribunal notes that, in *Midwest* and *Park Smith*, it was required that the goods be “**displayed** and used” [emphasis added] only during the festive season. The goods in issue are used, it could be argued, at Christmas time, but they are certainly not displayed. The appellant has not cited a case in which the goods were not displayed, but nonetheless included in heading No. 95.05.

Having concluded that the goods in issue were not classifiable in heading No. 95.05, the Tribunal is of the view that they are properly classified according to Rule 1 of the General Rules in heading No. 76.15. The Explanatory Notes to heading No. 76.15 provide, in part, that it “covers the same types of articles as are described in the Explanatory Notes to headings 73.23 and 73.24, particularly the kitchen utensils, sanitary and toilet articles described therein.” The Explanatory Notes to heading No. 73.23 provide that the articles comprised under “[t]able, kitchen or other household articles and parts thereof” include articles for kitchen use, such as saucepans, steamers, pressure cookers, preserving pans, stew pans, casseroles, fish kettles, basins, frying pans, roasting or baking dishes and plates.

As the goods in issue are made of aluminum, and since they are accurately described by the terms of heading No. 76.15, as well as by the Explanatory Notes to this heading, the Tribunal finds that the goods in issue are properly classified under tariff item No. 7615.19.00.

In light of the foregoing, the appeal is dismissed.

Patricia M. Close
Patricia M. Close
Presiding Member