



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

Ottawa, Wednesday, March 3, 2004

Appeal No. AP-2003-013

IN THE MATTER OF an appeal heard on November 24, 2003,
under subsection 67(1) of the *Customs Act*, R.S.C. 1985
(2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Commissioner of
the Canada Customs and Revenue Agency with respect to a
request for re-determination under subsection 60(4) of the
Customs Act.

BETWEEN

FRANKLIN MINT INC.

Appellant

AND

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

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

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UNOFFICIAL SUMMARY

Appeal No. AP-2003-013

FRANKLIN MINT INC.

Appellant

AND

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

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) made under subsection 60(4) of the *Customs Act*. The issue in this appeal is whether the goods in issue, i.e. the “The Life of Christ” articles, should be entitled to the benefit of tariff item No. 9986.00.00 as plaques or figures. The Commissioner argued that the goods in issue are neither plaques nor figures, but rather that they are plates, which are not covered by tariff item No. 9986.00.00.

HELD: The appeal is dismissed. The Tribunal finds that the goods in issue are plates, not plaques or figures as contended by Franklin Mint Inc. The Tribunal is of the view that the plaques listed under tariff item No. 9986.00.00 are articles that are distinct from plates. Furthermore, since plates, other than Seder plates or plates included in communion sets, are not specifically mentioned in tariff item No. 9986.00.00, the Tribunal is of the view that they are not classifiable under this tariff item. The Tribunal is also not convinced that the goods in issue are figures. The Tribunal is satisfied that the goods contain a pictorial representation of the life of Christ. However, in light of the *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 69.13, which associate the term “figures” with stand-alone three-dimensional articles, the Tribunal is of the view that such a representation by way of a picture on a plate does not convert the plate into a figure.

Place of Hearing: Ottawa, Ontario
Date of Hearing: November 24, 2003
Date of Decision: March 3, 2004

Tribunal Member: Richard Lafontaine, Presiding Member

Counsel for the Tribunal: Roger Nassrallah

Clerk of the Tribunal: Anne Turcotte

Appearances: Michael A. Sherbo and Ken Mathewson, for the appellant
Elizabeth Kikuchi, for the respondent



Appeal No. AP-2003-013

FRANKLIN MINT INC.

Appellant

AND

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

Respondent

TRIBUNAL: RICHARD LAFONTAINE, Presiding Member

REASONS FOR DECISION

This is an appeal pursuant to subsection 67(1) of the *Customs Act*¹ from decisions of the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) made under subsection 60(4). The issue in this appeal is whether the goods in issue, i.e. “The Life of Christ” articles, described by Franklin Mint Inc. (Franklin) as circular plates decorated with religious pictures, which illustrate the life of Christ, should be entitled to the benefit of tariff item No. 9986.00.00 of the schedule to the *Customs Tariff*² either as plaques or figures.

Note 3 to Chapter 99 states:

3. Goods may be classified under a tariff item in this Chapter and be entitled to the Most-Favoured-Nation Tariff or a preferential tariff rate of customs duty under this Chapter that applies to those goods according to the tariff treatment applicable to their country of origin *only after classification under a tariff item in Chapters 1 to 97 has been determined* and the conditions of any Chapter 99 provision and any applicable regulations or orders in relation thereto have been met. [Emphasis added]

The goods in issue were initially classified under tariff item No. 6913.10.00 as other ornamental ceramic articles of porcelain or china. The parties agree that the goods in issue are properly classified under this tariff item.

EVIDENCE

The Commissioner called two expert witnesses: Ms. Tanya Lewis and Mr. Richard Gill. The Tribunal qualified Ms. Lewis as an expert in chemistry, in particular the analysis of inorganic products, and qualified Mr. Gill as an expert in the production of plaques and/or plates, as these terms are generally understood in the industry.

Ms. Lewis indicated that she has a Bachelor of Science in Chemistry, that she has worked in the laboratory of the Canada Customs and Revenue Agency for two and a half years and that, for the past year, she has been working in the inorganic area of the laboratory where she analyses inorganic products using

1. R.S.C. 1985 (2d Supp.), c. 1.

2. S.C. 1997, c. 36.

different scientific techniques and gives technical advice on the *Customs Tariff*. She testified that she had tested the goods in issue to determine the leachability of lead and cadmium, based on the *Hazardous Products (Glazed Ceramics and Glassware) Regulations*,³ which limit the amount of lead and cadmium that can be leached from a product in order for it to be safe for serving food.

Ms. Lewis indicated that the goods in issue fall within the definition of “flatware” provided in the *Regulations*, which state that “flatware” means “a product having an internal depth not exceeding 25 mm, measured vertically from the lowest interior point to a horizontal plane passing through the point of overflow.” In this context, she indicated that the goods in issue had a depth of 20 mm and, thus, fell within the definition of “flatware” for the purposes of the *Regulations*.

Ms. Lewis also testified that the results of her analysis determined that there were 2.8 mg per litre of lead and no cadmium in the goods in issue and that both results are below the limits prescribed in the *Regulations*. On this basis, she concluded that the goods in issue were safe for preparing, serving and storing food.

Under cross-examination, Ms. Lewis testified that the inscription on the back of the plate read: “A decorative accessory. Not to be used for food consumption. Pigments used for color may be toxic.” She also indicated that the standards for her analysis were taken from the *Hazardous Products Act*⁴ and the *Regulations* and that these standards had been revised in 1998. She confirmed that a reference manual of the Product Safety Bureau of the Department of Health, which was put before her by Franklin, provided a methodology for performing the analysis that calls for a sampling of six identical goods. She also confirmed that, based on this procedure, it is possible that a variance may exist from product to product. In this context, she testified that her analysis was performed on one sample of the goods and that she was not familiar with this sampling methodology, nor had she heard of it.

Mr. Gill, the Commissioner’s second expert witness, testified that he received a Bachelor of Architecture degree from Pennsylvania State University and a Diploma of Applied Arts in ceramics from Sheridan College in Oakville, Ontario. He indicated that he has operated his own studio, predominantly making wall plaques, for the past 31 years and that he previously made pottery, which included the production of plates. He also taught the making of plaques for the past 20 years at many colleges throughout Ontario, including at Haliburton School of The Arts and at his own school in Burnstown, Ontario.

Mr. Gill testified that, in his experience, he would absolutely characterize the goods in issue as plates based on their form, in that they have a raised rim that is capable of containing food. He also stated that their shiny glaze finish is also capable of preventing the growth of bacteria and, therefore, concluded that they were capable of containing food in some way. He indicated that the goods were round in shape and stated that, as soon as he sees a round-dished form that has a gloss glaze, in his mind and within the industry, the goods would be characterized as plates. In terms of the plates being decorative, he testified that the decoration does not take away from the original function of the goods, which he indicated, in this case, was to serve food.

Mr. Gill indicated that the goods in issue did not have any “relief” and clarified that this term refers to a “forced shortened” third dimension. He stated that the height and width provide two dimensions and that the third dimension would be “forced shortened” or “squished down”. Regarding the goods in issue, he

3. S.O.R./98-176 [*Regulations*].

4. R.S.C. 1985, c. H-3.

stated that there is absolutely nothing that would interfere with them functioning as plates. Whereas, when asked to describe the Commissioner's exhibit,⁵ which he described as a plaque, he testified that he would not be able to eat from it nor serve food on it due to the raised relief of the object. He further stated that its function is obviously just to depict a scene as a decoration and nothing else.

Under cross-examination, Mr. Gill agreed that the goods in issue are both decorative and commemorative in nature. He also agreed that a plate may be used for food and that a plaque would not have that same function. He clarified that the phrase "[n]ot to be used for food consumption", inscribed on the back of the goods in issue, was not self-explanatory, on the basis that a plate is used not only for consuming food but also for serving it. He also stated that he would not eat anything acidic served on the goods in issue, but that he may eat certain non-acidic items served on them (e.g. cookies).

In reply to a hypothetical question from the Tribunal, Mr. Gill testified that, if he were presented with a totally flat object (i.e. no relief) that pictured the "Life of Christ" representations, he would describe that object as a plaque. In this context, he clarified that, if that same flat object had turned up edges, even if it were rectangular in shape, he would consider it a plate.

In reply to a question from the Tribunal, both parties confirmed that they had reached an agreement with respect to the three other items that had initially been under appeal (i.e. crosses, rosaries and statuettes) and also confirmed that those items were no longer at issue. Both parties also confirmed that they had agreed that the goods in issue are of a religious nature.

Franklin did not call any witnesses.

ARGUMENT

Franklin submitted that the term "plaque" is defined by the Commissioner as a "flat plate, slab, or disk that is ornamented or engraved for mounting, as on a wall for decoration".⁶ Thus, in its view, the goods in issue fall within the meaning of the term "plaque". According to Franklin, if a very strict definition of the term "flat" were chosen, it would then be difficult to characterize anything as a plaque. In this context, if there is a difference between a plate and a plaque, Franklin suggested that it lies in the fact that a plate is for serving food, while a plaque is not.

Franklin submitted that the goods in issue have a statement inscribed on the back that clearly states: "Not to be used for food consumption" and "Pigments used for color may be toxic." As a result, Franklin argued that the goods in issue are not designed, marketed, sold or meant to be used with food. As the goods in issue do not have a utilitarian function, Franklin suggested that there is no basis to conclude that they are not plaques. Franklin further submitted that a plaque could be a plate that is not for food; therefore, such a plate cannot be excluded by reason of Seder plates and communion sets being specifically included under tariff item No. 9986.00.00, as those plates are specifically for food.

Franklin submitted that the goods in issue also fall within the meaning of the term "figure". Dictionary definitions of the term "figure" on which it relied include: "a representation of a human being in a picture or sculpture"; "a representation, pictorial or sculptured, esp. of the human form"; "[t]he

5. Exhibit B-1, "The Last Supper" religious plaque.

6. Commissioner's brief, para. 37.

representation of any form, as by drawing, painting, modeling, carving, embroidering, etc.”⁷ In referring to a definition provided by the Commissioner, Franklin submitted that the definition includes “a graphic representation of a form”⁸ and that the goods in issue are clearly a graphic representation of the form of Christ, in that they are a picture, and fall within the term “figure”.

The Commissioner submitted that the practical issue for the Tribunal to determine is whether the goods in issue are plates.

The Commissioner relied on the testimony of its witnesses and on dictionary definitions and submitted that the goods in issue are plates, as they are shallow circular vessels capable of containing food. The fact that they are decorative does not interfere with the fact that they have all the functions of a plate. The Commissioner further submitted that Franklin itself refers to the goods as plates, both in its literature and on the back of the goods themselves. A plate, he submitted, is a distinct article from a plaque and a figure. According to the Commissioner, tariff item No. 9986.00.00 applies to a specific list of articles, including Seder plates and communion plates. The Commissioner submitted that the inclusion of specific plates excludes plates in general.⁹

The Commissioner submitted that the goods in issue are not plaques. Under this line of argument, he contended that, with respect to shape, the goods in issue are clearly concave and that the term “flat” refers to something that has no upturned edges.

The Commissioner further submitted that the goods in issue are not “figures”. Relying on a dictionary definition of the terms “figure” and “form”, and on the interpretation rules relating to associated words found in *Sullivan and Driedger*, the Commissioner submitted that the definition of “figure” encompasses a three-dimensional aspect. He submitted that the articles contained in tariff item No. 9986.00.00, that are modified by the term “[r]eligious”, have a common characteristic of all being three-dimensional objects. Had the framers of the *Customs Tariff* intended this benefit to extend to paintings and pictures, they would have expressly said so.

DECISION

The issue in this appeal is whether the goods in issue should be entitled to the benefit of tariff item No. 9986.00.00 as plaques or figures. In accordance with Note 3 to Chapter 99, goods may be classified in this chapter only after classification under a tariff item in Chapters 1 to 97 has been determined. The goods in issue were initially classified under tariff item No. 6913.10.00 as other ornamental ceramic articles of porcelain or china. The parties agree that the goods in issue are properly classified under this tariff item. Therefore, for the purposes of this appeal, the Tribunal is of the view that this condition has been met.

Tariff item No. 9986.00.00 covers:

Religious statues, statuettes, medals, crosses, *figures*, *plaques* or ancestral shrines, and communion sets, oil stocks, crosiers, benitiers, sprinklers, incensers, incense boats, baptismal shells or fonts, scapulars, chapelets, rosaries, Scroll sets, Chanuka candlesticks, Kiddush sets, Mezuzah boxes, Havdalah sets or Seder plates; Parts of all the foregoing. [Emphasis added]

7. Franklin’s supplemental brief, Tab III.

8. Commissioner’s supplemental brief, Tab 5.

9. See the principles set out in Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) [*Sullivan and Driedger*].

The Tribunal notes that, in order to be classifiable under this tariff item, the goods must be both “religious” and listed under the tariff item. As agreed by both parties, the goods in issue are religious in nature. Having met the first criterion, the remaining issue is whether the goods in issue are listed under the tariff item. In this connection, the Tribunal is of the view that the goods in issue are plates, not plaques or figures as contended by Franklin, and, therefore, should not be classified under this tariff item.

The juxtaposed use of the terms plaques and plates in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*¹⁰ to heading No. 69.13 is an indication to the Tribunal that these are different articles. In this regard, the Tribunal does not accept Franklin’s contention that the difference between a plate and a plaque is that a plate is used for food and a plaque is not and that a plaque could be a plate that is not used for food. In this connection, the Tribunal notes that the *Explanatory Notes* to heading No. 69.13 include both plaques and plates with articles that have no utility value and are wholly ornamental.¹¹ The Tribunal is also not convinced by Franklin’s argument that the goods in issue are “flat” plates on the basis of a definition provided by the Commissioner and that they are, therefore, plaques. *The Concise Oxford Dictionary* refers to “flat” as “horizontally level”,¹² and it is the Tribunal’s view that the goods in issue are not. In light of the foregoing, the Tribunal is of the view that the plaques listed under tariff item No. 9986.00.00 are articles that are distinct from plates.

The evidence shows that the goods in issue are marketed as collector plates.¹³ One of the Commissioner’s expert witnesses, Mr. Gill, characterized the articles as plates by reason of their form.¹⁴ Furthermore, the inscription on the back of the articles themselves describes them as plates. Therefore, the Tribunal is of the view that the goods in issue are plates. Since plates, other than Seder plates or plates included in communion sets, are not specifically mentioned in tariff item No. 9986.00.00, the Tribunal is of the view that the goods in issue are not entitled to the benefit of that tariff item.

The Tribunal is also not convinced that the goods in issue are figures. The Tribunal is satisfied that the goods contain a pictorial representation of the life of Christ. However, this does not make the goods themselves figures, as in the case of sculptures or busts. In this regard, the Tribunal is assisted by paragraph 1 of Note A of the *Explanatory Notes* to heading No. 69.13, which associates the term “figures” with statues, statuettes, busts and haut or bas reliefs. In the Tribunal’s view, these goods are all stand-alone three-dimensional articles that, in their own right, can be referred to as figures. They do not include the representation of a human form by way of a picture on a plate. Therefore, the Tribunal is of the view that such a pictorial representation does not convert the plate into a figure.

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

11. For instance, Note (A) of the *Explanatory Notes* to heading No. 69.13 states that this heading covers:

(A) **Articles which have no utility value but are wholly ornamental, and articles whose only usefulness is to support or contain other decorative articles or to add to their decorative effect, e.g.:**

(1) Statues, statuettes, busts, haut or bas reliefs, and other figures for interior or exterior decoration; ornaments (including those forming parts of clock sets) for mantelpieces, shelves, etc., (animals, symbolic or allegorical figures, etc.); sporting or art trophies; wall ornaments incorporating fittings for hanging (plaques, trays, plates); medallions; firescreens; artificial flowers, fruit, leaves, etc.; wreaths and similar ornaments for tombs; knick-knacks for shelves or domestic display-cabinets.

12. Ninth ed., s.v. “flat”.

13. Commissioner’s brief, Tab 16.

14. *Transcript of Public Hearing*, 24 November 2003 at 53.

In light of the above, the Tribunal is of the view that the goods in issue are plates and, consequently, are not entitled to the benefit of tariff item No. 9986.00.00.

Therefore, the appeal is dismissed.

Richard Lafontaine
Richard Lafontaine
Presiding Member