Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2004-011

Decolin Inc.

v.

President of the Canada Border Services Agency

Decision and reasons issued Tuesday, September 13, 2005

Canada

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IN THE MATTER OF an appeal heard on January 10, 2005, 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 President of the Canada Border Services Agency dated April 20, 2004, with respect to a further re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

DECOLIN INC. **Appellant**

AND

THE PRESIDENT OF THE CANADA BORDER SERVICES AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 10, 2005
Tribunal Members:	Ellen Fry, Presiding Member Zdenek Kvarda, Member Meriel V. M. Bradford
Counsel for the Tribunal:	Michael Keiver Nick Covelli
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Michael Kaylor, for the appellant Yannick Landry, for the respondent

Please address all communications to:

The Secretary
Canadian International Trade Tribunal
Standard Life Centre
333 Laurier Avenue West
15th Floor
Ottawa, Ontario
K1A 0G7

Telephone: (613) 993-3595
Fax: (613) 990-2439
E-mail: secretary@citt-tcce.gc.ca

STATEMENT OF REASONS

1. This is an appeal under subsection 67(1) of the *Customs Act*[1] from a further re-determination dated April 20, 2004, of the President of the Canada Border Services Agency (CBSA) pursuant to subsection 60(4) of the *Act*. The decision concerns tablecloths, runners, placemats and napkins with a Christmas motif[2] that were imported on September 25, 2001 (the goods in issue). The goods in issue were classified under tariff item No. 6302.53.90 of the schedule to the *Customs Tariff*.[3] The CBSA maintained this classification following a re-determination on December 18, 2001, and a further re-determination on April 20, 2004.

2. The issue in this appeal is whether the goods in issue are properly classified in subheading No. 6302.53 as table linen of man-made fibres, as determined by the CBSA, or under tariff item No. 9505.10.00 as articles for Christmas festivities, as claimed by Decolin Inc. (Decolin).

3. The nomenclature concerning the CBSA's classification in Chapter 63 of the *Customs Tariff* reads as follows:

> 63.02 Bed linen, table linen, toilet linen and kitchen linen.
>
> 6302.53 --Of man-made fibres
>
> 6302.53.90 ---Other

4. Note 1 to Section XI of the *Customs Tariff*, which includes Chapter 63, entitled "Textiles and Textile Articles", reads in part as follows:

> This Section does not cover:
>
> . . . .
>
> (t) Articles of Chapter 95.
>
> . . . .

EVIDENCE

5. No samples of the goods in issue were tendered in evidence. Exhibits A-1 to A-4 were sample goods with Christmas motifs; however, they were made of cotton-polyester rather than polyester with metallic thread as indicated in the commercial invoice and the Canada Customs invoice.[4] Decolin therefore acknowledged that they were not the goods in issue, but indicated that they were goods currently sold that are similar to the goods in issue. Decolin also acknowledged that photographs from retail catalogues that it had filed[5] were not identical to the goods in issue because they featured goods imported subsequent to the importation date at issue. The Tribunal heard that the Christmas motifs change somewhat from year to year; thus, these physical exhibits were unlikely to have the same motif as the goods in issue. The Tribunal accepts the evidence that Exhibits A-1 to A-4 and the photographs from retail catalogues are goods similar to the goods in issue and also relies on the description of the goods that appears on the commercial invoice

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1. R.S.C. 1985 (2d Supp.), c. 1 [*Act*].
2. The use of the term "motif" here refers to Christmas illustrations rather than Christmas colours. Although the appeal originally included some goods without a Christmas motif, Decolin Inc. withdrew its appeal with respect to those goods.
3. S.C. 1997, c. 36.
4. Respondent's Brief, Tab 2.
5. Appellant's Brief, Tabs 24 and 25.

and the Canada Customs invoice for transaction No. 14183108585803: "DECK THE HALLS 99% POLYESTER + 1% METALLIC YARN-DYED WOVEN TABLECLOTHS, NAPKINS, RUNNERS, PLACEMATS, TABLECLOTHS".[6]

6. Mr. Allen Mendel, President of Decolin, testified on behalf of Decolin. He was responsible for the importation of various goods for home furnishing, including the goods in issue, and their subsequent distribution to major Canadian retailers for in-store and catalogue sales. He indicated that Christmas goods of this nature have a short selling season. Retailers require Christmas goods in early November of each year and attempt to sell them before Christmas because they are difficult, if not impossible, to sell after Christmas. He also explained that the goods in issue are not disposable and that the consumer may choose to use them again in subsequent seasons after laundering and storage. To keep track of these Christmas goods, Decolin assigns them marketing code "25", a code used only for Christmas goods, and tracks them through its computer system from purchase order through transit and eventual sales.

7. Mr. Murray Wall, a partner in Beddington's Bed & Bath, which purchased goods similar to the goods in issue, also testified on behalf of Decolin. He said that the regular sales season for Christmas goods of this nature is limited to the period from the beginning of December to Christmas. After Christmas, the goods are discounted or returned to the warehouse. In Mr. Wall's view, fabric tablecloths are "100 per cent decorative" or at least primarily decorative, rather than protective or utilitarian. He said that other products are sold to protect the wood surface of tables, such as protective table pads and vinyl liners.

8. Ms. Sheila Brady, the Home Section Editor for the Ottawa Citizen newspaper, also testified on behalf of Decolin. She testified that, in her opinion, the use of Christmas tablecloths and napkins is indeed seasonal.

9. Mr. Dan Halden, the Executive Chef at the Embassy West Hotel Conference Centre, testified on behalf of the CBSA. He testified that tablecloths are used in his restaurant and hotel for decorative purposes and to protect tables and offer a clean, useable surface. The tablecloths are laundered after use because of food spills, grease, wine, or anything else that might get on the table during a meal.

ARGUMENT

10. The CBSA argued that, based on Rule 1 of the *General Rules for the Interpretation of the Harmonized System*,[7] the goods are properly classified under tariff item No. 6302.53.90 as woven polyester table linen of other man-made fibres. It referred to the fact that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[8] to heading No. 63.02 indicate that the heading covers table linen, including tablecloths, table mats and runners, and napkins that are sometimes made of man-made fibres that are normally of a kind suitable for laundering. The CBSA also argued that the goods could not be properly classified in heading No. 95.05 because an amendment to the *Explanatory Notes* dated August 2003 indicates that the heading does not cover festive articles with a utilitarian function.

11. Decolin took the position that, based on Rule 1 of the *General Rules*, the goods are properly classified under tariff item No. 9505.10.00 as articles for Christmas festivities. It argued that the dominant feature of the goods is decorative and that the goods were bought for and used during the Christmas season.

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6. The Canada Customs invoice (Respondent's Brief, Tab 2) for transaction No. 14183108585803 indicates "vinyl" placemats; however, testimony by Mr. Allen Mendel indicates that the placemat had been classified as vinyl rather than cloth (*Transcript of Public Hearing*, 10 January 2005, at 39).
7. *Supra* note 3, schedule [*General Rules*].
8. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

Decolin also argued that the amendment to the *Explanatory Note*s to heading No. 9505 is not applicable because it was adopted in 2003, some time after the goods were imported, and that it is more than a clarification, in view of the fact that it implements a substantive change.

DECISION

12. Subsection 10(1) of the *Customs Tariff* reads as follows:

> 10.(1) Subject to subsection (2), the classification of imported goods under a tariff item shall, unless otherwise provided, be determined in accordance with the General Rules for the Interpretation of the Harmonized System and the Canadian Rules set out in the schedule.

13. Rule 1 of the *Canadian Rules*[9] reiterates that "the classification of goods in the tariff items of a subheading or of a heading shall be determined" according to the *General Rules*. Rule 1 of the *General Rules* provides that, "classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes".

14. The *General Rules* are structured in a cascading form. If the classification of a product cannot be determined in accordance with Rule 1, then each of the other rules should be applied in sequence until the heading or subheading that most precisely covers the product is identified.

15. Section 11 of the *Customs Tariff* reads as follows:

> 11. In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System and the Explanatory Notes to the Harmonized Commodity Description and Coding System, published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time.

16. In order to determine if the goods should be classified in heading No. 95.05, it is necessary to examine the terms of the heading and the corresponding *Explanatory Notes*.

17. The relevant nomenclature of Chapter 95 reads as follows:

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

18. According to the wording of the *Explanatory Notes* to heading No. 95.05 on the date of importation of the goods in issue, the heading covered:

> (A) **Festive, carnival or other entertainment articles**, which in view of their intended use are generally made of non-durable material. They include:
>
> (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees (these are sometimes of the folding type), nativity scenes, Christmas crackers, Christmas stockings, imitation yule logs.

19. The *Explanatory Notes* to heading No. 95.05 were amended in August 2003, a few years after the goods in issue were imported and after the CBSA's re-determination, but before its further re-determination. The amendment inserted the following exclusion:

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9. *Supra* note 3, schedule.

> The heading also excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

20. Subsection 45(3) of the *Interpretation Act*[10] provides that the "amendment of an enactment . . . shall not be deemed to be or to involve any declaration as to the previous state of law." Although the *Explanatory Notes* are not enactments within the meaning of subsection 2(1) of the *Interpretation Act*,[11] the Tribunal is directed explicitly by the *Customs Tariff* to have regard to them. Therefore, the Tribunal considers that amendments to the *Explanatory Notes* should be treated analogously to federal enactments and the 2003 amendment therefore shall not be deemed to involve any declaration as to the meaning of the *Custom Tariff* as it existed when the goods in issue were imported.

21. In order for the August 2003 amendment to have any effect on the goods in issue, it would need to operate retroactively. In *Benner v. Canada (Secretary of State)*,[12] the Supreme Court of Canada stated that a retroactive statute operates as of a time prior to its enactment, with the result being that it changes the law from what it was. Whether or not a statute or an amendment has retroactive effect depends on the intent of the legislature.[13]

22. An important way to try to discern Parliament's intention in this case is by reviewing the legislative scheme. In *Deputy M.N.R.C.E. v. Ferguson Industries Limited*,[14] the Supreme Court of Canada considered whether the former Tariff Board erred in law by finding that components of motors that entered Canada at different times should have been given the same tariff classification. Section 43 of the former *Customs Act* indicated that the time for determining tariff classification was at the time of entry of the goods into Canada. The Supreme Court of Canada set aside the Tariff Board's determination, holding that, as a result of this provision, it was proper to classify the goods separately in accordance with their nature at their respective dates of entry.

23. The Tribunal observes that section 58 of the current *Customs Act* has a similar provision, which provides that the time for determining tariff classification is at or before the time the goods are accounted for under subsection 32(1), (3) or (5). These subsections require that goods not be released by a customs officer until they have been accounted for, unless the goods will be accounted for within a prescribed time. Sections 7.1 to 10.1 of the *Regulations Respecting the Accounting for Imported Goods and the Payment of Duties*[15] indicate that the amount of time that may be prescribed for accounting is no more than a matter of days or weeks after the goods have been released through customs. Given that the goods in issue were imported in September 2001, the principle in *Ferguson* dictates that their tariff classification ought to be determined in accordance with the wording of the *Customs Tariff* as it existed in the fall of 2001 when they were accounted for, not August 2003 when the *Explanatory Notes* were amended.

24. The Tribunal finds further support for this conclusion in *Hornby*. In that case, the British Columbia Court of Appeal stated:

> A statute should not be given retroactive construction that has adverse effects, . . . unless it is clear that the legislature intended that the legislation should have such a construction. The reason is that

10. R.S.C. 1985, c. I-21.
11. "[A]n Act or regulation or any portion of an Act or regulation".
12. [1997] 1 S.C.R. 358.
13. *Hornby Island Trust Committee v. Stormwell* (1989), 53 D.L.R. (4th) 435 [*Hornby*].
14. [1973] S.C.R. 21 [*Ferguson*].
15. S.O.R./86-1062.

> the legislature should not be presumed to have enacted a statute that treats those it affects, or some of them, not just adversely, but unfairly, with respect to acts they have undertaken in the past.

Applying this principle to the facts in issue, the Tribunal is of the view that it would be unfair to give retroactive effect to the August 2003 amendment. Decolin imported the goods with a reasonable expectation that they would be classified in accordance with the terms of the *Customs Tariff*, including the relevant *Explanatory Notes*, at the time of importation. To impose retroactively a different tariff classification is, in the Tribunal's view, contrary to natural justice and principles of fairness.

25. Having concluded that the August 2003 amendment of the *Explanatory Notes* has no retroactive effect on the goods in issue, the Tribunal now turns to whether it has any relevance as an aid to interpreting the *Customs Tariff* as it existed in the fall of 2001. In *Metro-Can Construction Ltd. v. Canada*,[16] the Federal Court of Appeal held that a subsequent amendment may be relevant to interpreting an enactment as it previously read, but only insofar as it is part of the general legislative history of the enactment and not if it is too extensive.

26. For all these reasons, the Tribunal finds that the August 2003 amendment is not applicable to the goods in issue.

27. The CBSA did not argue that the goods in issue are not "articles" as referred to in heading No. 95.05, and the Tribunal considers that the goods are articles within the normal meaning of the word. Accordingly, the Tribunal must determine if these goods are "festive" within the meaning of heading No. 95.05 and "Articles for Christmas festivities" as referred to in subheading No. 9505.10. The *Oxford English Dictionary*[17] defines "festive" as being "[o]f a place or season: Appropriated to feasting. *the festive season:* spec. = 'Christmas-tide'."[18] "Christmas-tide" is defined as "the season of Christmas, Christmas-time."[19] In the Tribunal's view, because goods of this type are essentially sold only for the Christmas season these goods are "festive", are "traditionally used for Christmas festivities" as contemplated by the *Explanatory Notes*, and "Articles for Christmas festivities" as referred to in heading No. 9505.10.

28. The *Explanatory Notes* indicate that goods classified in heading No. 95.05 "are *generally* made of non-durable material" [emphasis added]. Given that the *Explanatory Notes* do not exclude goods that are made of durable material, the Tribunal does not need to determine whether the goods in issue are made of durable or non-durable material.

29. Therefore, pursuant to Rule 1 of the *General Rules*, the Tribunal finds that the goods in issue are festive articles that are properly classified in heading No. 95.05. More specifically, these goods are "[a]rticles for Christmas festivities" within the scope of subheading No. 9505.10.

30. Finally, in light of Note 1 to Section XI of the *Customs Tariff,* the goods in issue, being articles under Chapter 95, cannot be classified in Chapter 63.

16. [2000] F.C.J. No. 994.
17. Second ed.
18. *S.v.* "festive".
19. *S.v.* "Christmas".

31. For the foregoing reasons, the appeal is allowed. The goods in issue are properly classified in subheading No. 9505.10.

Ellen Fry
Ellen Fry
Presiding Member

Zdenek Kvarda
Zdenek Kvarda
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member