



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2005-039

Morris National Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, March 9, 2007*

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IN THE MATTER OF an appeal heard on October 11, 2006, under subsection 67(1) of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Canada Border Services Agency dated October 31 and November 1, 2005, with respect to requests for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

MORRIS NATIONAL INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Elaine Feldman
Elaine Feldman
Presiding Member

Susanne Grimes
Susanne Grimes
Acting Secretary

Place of Hearing: Ottawa, Ontario
Date of Hearing: October 11, 2006
Tribunal Member: Elaine Feldman, Presiding Member
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Morris National Inc. (Morris) under subsection 67(1) of the *Customs Act*¹ with respect to decisions dated October 31 and November 1, 2005, made by the President of the Canada Border Services Agency (CBSA) under subsection 60(4) of the *Customs Act*.

2. Morris is claiming that the goods in issue, Christmas Advent calendars containing chocolates, should be classified as articles for Christmas festivities under tariff item No. 9505.10.00 of the schedule to the *Customs Tariff*.² The CBSA had refused this claim and classified the goods in issue as other chocolate and other food preparations containing cocoa under tariff item No. 1806.90.90.

3. The goods in issue are wrapped in plastic cellophane. They consist of a thin cardboard box decorated with Christmas themes. The box has 24 perforated openings, 1 for each calendar day from December 1 to 24. It is commonly known that Advent calendars are intended to count down the last 24 days until Christmas. Small pieces of chocolate are hidden behind each of the 24 openings. The chocolates are set in a plastic tray that is inserted into the box.

4. The goods in issue were imported between July 2001 and September 2004, with a total of 49 transactions.

5. The relevant nomenclature of the *Customs Tariff* that was in effect when the goods in issue were imported reads as follows:

...
18.06 **Chocolate and other food preparations containing cocoa.**
...
1806.90 **-Other**
...
1806.90.90 ---Other
95.05 **Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.**
9505.10.00 **-Articles for Christmas festivities**
...

6. The relevant *Explanatory Notes to the Harmonized Commodity Description and Coding System*³ are the *Explanatory Notes* to heading No. 95.05, which read as follows:

...

This 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) Festive decorations used to decorate rooms, tables, etc. (such as garlands, lanterns, etc.); decorative articles for Christmas trees (tinsel, coloured balls, animals and other figures, etc); cake decorations which are traditionally associated with a particular festival (e.g., animals, flags).

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

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

3. World Customs Organization, 4th ed., Brussels, 2007 [*Explanatory Notes*].

- (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees, nativity scenes, nativity figures and animals, angels, Christmas crackers, Christmas stockings, imitation Yule logs, Father Christmases.”

...

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.

...

This heading also **excludes**:

- (c) Packagings of plastics or of paper, used during festivals (classified according to constituent material, for example, **Chapter 39** or **48**.)]

...

7. Mr. Ossie Neumann, Chief Operating Officer at Morris, testified at the hearing. He explained that Morris carries two categories of product: items that it sells year-round, or day-to-day, and certain seasonal items. The day-to-day items vary from year to year, but typically comprise candies, cookies, chocolates and canned foods such as hearts of palm and artichoke. The seasonal items are typically various candies, chocolates and gift baskets, as well as certain novelty items, such as the goods in issue. Customers tend to buy both year-round and seasonal items. Mr. Neumann explained that Morris’s customers tend to merchandise their seasonal items in areas of their stores that are separate from those that are reserved for the sale of their year-round items. Mr. Neumann specified that all the Advent calendars that Morris sells contain chocolates and that he was not aware of any Advent calendars that are sold without chocolates.

8. Ms. Kathleen Smith also testified at the hearing in her capacity as Acting Senior Chemist at the Laboratory and Scientific Services Directorate of the CBSA. She performed various laboratory analyses on the goods in issue, as described in her report that was filed by the CBSA in this matter.⁴ She testified to the weight of each of the components of the goods in issue, namely, the cellophane wrap, the cardboard box, the chocolates and the plastic tray.

9. Mr. John Rowsome, President of the Confectionery Manufacturers Association of Canada (CMAC), also testified on behalf of the CBSA. He was qualified by the Tribunal as an expert in the marketing and distribution of confectionery. He explained that the CMAC membership consists of both multinational and national confectionery manufacturers. These manufacturers distribute through the four trade channels, namely, drugstores, grocery chains, convenience stores and mass merchandisers (such as Costco, Wal-Mart, the Hudson’s Bay Company, and Zellers).

10. Mr. Rowsome explained how chocolate confectionery is made and how seasonal packaging is used to market seasonal products. He submitted that such products are an important part of the confectionery business because they account for approximately one quarter of all chocolate sales in Canada. He added that there was no fixed ratio between the cost of chocolate and the cost of packaging across the industry. For example, high-end chocolatiers might produce small amounts of chocolate and use high-end packaging resulting in higher packaging costs while mass chocolate manufacturers buy larger quantities of boxes. He stated his members’ view that Advent calendars are seasonal chocolate products that help retailers to attract shoppers and drive other sales before Christmas.

4. Respondent’s brief, Tab 5.

11. Finally, Mr. Rowsome indicated that it was agreed during the International Confectionery Association's meeting, in June 2006, in Chicago, Illinois, that Advent calendars were properly classified as chocolates of heading No. 18.06 and that any change in their classification would have an impact on the confectionery industry because it relies on the accuracy of statistics gathered under that heading to make various business decisions.

12. The final witness that appeared on behalf of the CBSA was Ms. Jacqui Shone, General Manager Retail at Purdy's Chocolates (Purdy's). She stated that Purdy's had made Advent calendars for two seasons, but decided to discontinue producing them in light of the high packaging cost component of the overall cost of the product. Purdy's felt that such a product did not offer good value for their customers' money. Ms. Shone stated that the purpose of seasonal packaging was to sell chocolate.

ANALYSIS

13. For the purposes of this appeal, the Tribunal must follow section 10 of the *Customs Tariff*, which provides that the tariff classification of goods shall be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*⁵ and the *Canadian Rules*.⁶ Rule 1 of the *Canadian Rules* provides that "... the classification of goods in the tariff items of a subheading or of a heading ..." shall be determined according to the *General Rules*. The *General Rules* are comprised of six rules structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1 of the *General Rules*, then regard must be had to Rule 2 of the *General Rules* and so on, until classification is completed.

14. In addition, the Tribunal is guided by section 11 of the *Customs Tariff*, which provides that, in interpreting the headings and subheadings in the schedule, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*⁷ and the *Explanatory Notes*.

15. Morris's argument can be summarized as follows. It does not dispute that chocolates are properly classified in heading No. 18.06. What it contends however is that the goods in issue cannot be classified as such because they are presented in an Advent calendar, which includes puzzles, games and cut-outs, all of which are associated with the Christmas season. In support of this contention, Morris indicated that parents purchase this product for their children at the specific time of the year that marks the beginning of the Christmas season, not at any other time of the year. Morris's argument is that, pursuant to Rule 1 of the *General Rules*, the goods in issue have a "festive" nature that imparts upon the whole their essential character. It disagreed with the contention that they were merely chocolates in Christmas-themed packaging. In the alternative, Morris argued that the goods should be classified according to Rule 3 (b) or (c).

16. As well, Morris argued against the CBSA's application of Customs Notice N-179⁸ to the matter at hand. Customs Notice N-179 indicates that food products are excluded from classification in heading No. 95.05. In support of this view, Morris added that no notes contained in the schedule to the *Customs Tariff* or in the *Explanatory Notes* specifically exclude foodstuff of heading No. 18.06 or other headings from being classified in Chapter 95. Morris also argued that the Tribunal's decision in *Wilton Industries*

5. *Supra* note 2, schedule [*General Rules*].

6. *Supra* note 2, schedule.

7. World Customs Organization, 2d ed., Brussels, 2003.

8. Canada Border Services Agency, "The Administration of Heading 95.05" (3 November 1997).

*Canada Limited v. Commissioner of the Canada Customs and Revenue Agency*⁹ supported its views on this issue.

17. The Tribunal agrees that Rule 1 of the *General Rules* applies with respect to the classification of the goods in issue. Rule 1 reads as follows:

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.

18. In the Tribunal's view, the evidence before it shows that the goods in issue are predominantly (in weight and in number) an assortment of 24 food products made of chocolate.¹⁰ In addition to these considerations, the Tribunal finds that their essential character cannot be said to be derived from the packaging component, since the testimony that it heard confirmed that an Advent calendar is not sold on its own, i.e. without chocolates.¹¹ The Tribunal also notes that the weight indication on the packaging pertains to the chocolate only and the ingredients listed are those of the chocolate only.

19. The Tribunal therefore agrees with the position advanced by the CBSA that the goods are described in the terms of heading No. 18.06.

20. As indicated above, the Tribunal is of the view that the evidence clearly indicates that the goods in issue are not festive packaging, but chocolates put up in packages with a festive design. The Tribunal also notes that the *Explanatory Notes* to heading No. 95.05 do not allow goods to be classified in heading No. 95.05 based on "festive design" alone; on the contrary, certain goods presenting festive designs are expressly excluded from classification in that heading. Therefore, the Tribunal does not believe that the festive nature of the packaging of the chocolates makes the goods in issue anything else than what they are, i.e. chocolates in seasonally appropriate packaging used for marketing and sales purposes. The Tribunal notes that Mr. Rowsome testified that manufacturers make changes to their packaging throughout the year in order to respond better to seasonal demand requirements.

21. The Tribunal is also of the view that its conclusion with respect to the classification of the goods in issue pursuant to Rule 1 of the *General Rules* is supported by the provisions of Rule 5 (b), which reads as follows:

... packing materials and packing containers presented with the goods therein shall be classified with the goods if they are of a kind normally used for packing such goods. However, this provision is not binding when such packing materials or packing containers are clearly suitable for repetitive use.

22. Finally, the Tribunal recalls its decision in *Regal Confections Inc. v. Deputy M.N.R.*¹² in which it remarked that novelty packaging is not usually determinative of classification. In the Tribunal's view, the goods in issue are chocolates packaged in novelty Christmas Advent calendars.

9. (24 September 2002) AP-2001-081 (CITT).

10. Respondent's brief, Tab 5 at 2; *Transcript of Public Hearing*, 11 October 2006, at 33-34.

11. *Transcript of Public Hearing*, 11 October 2006, at 27.

12. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT).

DECISION

23. For the foregoing reasons, the goods in issue are properly classified under tariff item No. 1806.90.90, as other chocolate and other food preparations containing cocoa.

24. Consequently, the appeal is dismissed.

Elaine Feldman
Elaine Feldman
Presiding Member