Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2007-014

Havi Global Solutions (Canada) Limited Partnership

v.

President of the Canada Border Services Agency

Decision and reasons issued Friday, October 10, 2008

Canada

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IN THE MATTER OF an appeal heard on June 11, 2008, 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 August 7, 2007, with respect to a request for re-determination under subsection 60(4) of the *Customs Act*.

BETWEEN

HAVI GLOBAL SOLUTIONS (CANADA) LIMITED PARTNERSHIP **Appellant**

AND

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

DECISION

The appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	June 11, 2008
Tribunal Member:	Ellen Fry, Presiding Member
Research Director:	Audrey Chapman
Counsel for the Tribunal:	Eric Wildhaber
Research Officer:	Simon Glance
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PARTICIPANTS:

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Respondent	**Counsel/Representative**
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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed by Havi Global Solutions (Canada) Limited Partnership (Havi) under subsection 67(1) of the *Customs Act*[1] from a decision made on August 7, 2007, by the President of the Canada Border Services Agency (CBSA) under subsection 60(4).

2. The issue in this appeal is whether "Pirates of the Caribbean" bandanas (the goods in issue) are properly classified under tariff item No. 6505.90.90 of the schedule to the *Customs Tariff*[2] as other headgear, as determined by the CBSA, or should be classified under tariff item No. 9503.90.00 as other toys, as submitted by Havi.

PROCEDURAL HISTORY

3. Havi submitted a request for an advance ruling on the tariff classification of the goods in issue under paragraph 43.1(1)(*c*) of the *Act*, on May 8, 2006. On September 6, 2006, the CBSA issued an advance ruling classifying the goods in issue under tariff item No. 6505.90.90 as other headgear. On December 1, 2006, Havi submitted a request for re-determination under subsection 60(1), requesting that the goods in issue be classified under tariff item No. 9503.90.00 as other toys. On August 7, 2007, the CBSA issued a re-determination under section 60(4), determining that the goods in issue are properly classified under tariff item No. 6505.90.90.

4. On August 16, 2007, the present appeal was filed with the Tribunal. The Tribunal held a public hearing in Ottawa, Ontario, on June 11, 2008.

GOODS IN ISSUE

5. The goods in issue are red bandanas, woven from polyester and cotton yarns with Velcro fastenings. The front of the bandanas is imprinted with a movie logo, being a pirate's head superimposed on two crossed swords, with the words "Disney Pirates of the Caribbean" printed below. A piece of fabric hangs from the bandana to cover the back of the neck.

6. The goods in issue were imported in plastic bags which also contained a pirate card.[3] The goods in issue were part of a promotion created for the McDonald's Corporation called the "Pirates of the Caribbean 2: Dead Man's Chest Happy Meal". The promotion consisted of eight different items that each had a different pirate card and when collected and put together, these cards formed a treasure map.[4]

1. R.S.C. 1985 (2d Supp.), c. 1 [the *Act*].
2. S.C. 1997, c. 36.
3 Tribunal Exhibit AP-2007-014-19A at para. 14.
4 *Ibid.* at paras. 14, 15.

7. On June 3, 2008, the following nine physical exhibits were filed by Havi:

AP-2007-014-A-01	Red "Pirates of the Caribbean" Bandana (in issue)
AP-2007-014-A-02	Black and White Bandana
AP-2007-014-A-03	Pirate Doll
AP-2007-014-A-04	Treasure Chest
AP-2007-014-A-05	The Aye Ball
AP-2007-014-A-06	Skeleton
AP-2007-014-A-07	Inflatable Pirate Sword
AP-2007-014-A-08	Skull Telescope
AP-2007-014-A-09	Pirate Adventure Journal

ANALYSIS

Law

8. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

9. The tariff nomenclature is set out in considerable detail in the schedule to the *Customs Tariff*, which is divided into sections and chapters. Each chapter of the schedule contains a list of goods categorized under a number of headings, subheadings and tariff items. Sections and chapters of the schedule can include notes concerning their interpretation. Sections 10 and 11 of the *Customs Tariff* prescribe the methodology that the Tribunal must follow when interpreting the schedule in order to arrive at the proper tariff classification.

10. Subsection 10(1) of the *Customs Tariff* reads as follows: ". . . 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[5] and the Canadian Rules[6] set out in the schedule."

11. The *General Rules* are comprised of six rules structured in sequence so that, if the classification of the goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, and so on.[7] Therefore, classification always begins with Rule 1, which reads as follows: ". . . 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."

5. S.C. 1997, c. 36, schedule [*General Rules*].
6. S.C. 1997, c. 36, schedule.
7. Rules 1 through 5 of the *General Rules* apply to classification at the heading level (i.e. to four digits). Pursuant to Rule 6 of the *General Rules*, Rules 1 through 5 are applicable to classification at the subheading level. Similarly, the *Canadian Rules* make Rules 1 through 5 of the *General Rules* applicable to classification at the tariff item level.

12. Section 11 of the *Customs Tariff* states the following: "In interpreting the headings and subheadings, regard shall be had to the Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System[8] and the Explanatory Notes to the Harmonized Commodity Description and Coding System,[9] published by the Customs Co-operation Council (also known as the World Customs Organization), as amended from time to time."

13. Once the Tribunal has used this process to determine the chapter and heading in which the goods should be classified, the next step is to determine the appropriate subheading and tariff item, applying Rule 6 of the *General Rules* in the case of the former and the *Canadian Rules* in the case of the latter.

Tariff Classification at Issue

14. In the present appeal, the dispute between the parties arises at the chapter level. The nomenclature of the *Customs Tariff*, which Havi claims should apply to the goods in issue, reads as follows:

> **95.03** **Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.**
>
> . . .
>
> **9503.90.00** **-Other**
>
> . . .

15. The nomenclature of the *Customs Tariff*, which the CBSA determined to be applicable to the goods in issue, reads as follows:

> **65.05** **Hats and other headgear, knitted or crocheted, or made up from lace, felt or other textile fabric, in the piece (but not in strips), whether or not lined or trimmed; hair-nets of any material, whether or not lined or trimmed.**
>
> . . .
>
> **6505.90** **-Other**
>
> . . .
>
> 6505.90.90 - - -Other
>
> . . .

16. Both parties submitted that the tariff classification of the goods in issue can be effected by reference to Rule 1 of the *General Rules*.

Tariff Item No. 9503.90.00, Other Toys

Applicable Law

17. As indicated above, Havi argued that the goods in issue should be classified as other toys under tariff item No. 9503.90.00.

8. World Customs Organization, 2d ed., Brussels, 2003.
9. World Customs Organization, 3d ed., Brussels, 2002 [*Explanatory Notes*].

18. The *Explanatory Notes* to heading No. 95.03 state the following:

> . . .
>
> This heading covers toys intended essentially for the amusement of persons (children or adults). . . . The heading includes:
>
> (A) All toys not included in **headings 95.01** and **95.02**. . . .
>
> . . .
>
> Certain toys (e.g., electric irons, sewing machines, musical instruments, etc.) may be capable of a limited "use"; but they are generally distinguishable by their size and limited capacity from real sewing machines, etc.
>
> Collections of articles, the individual items of which if presented separately would be classified in other headings in the Nomenclature, are classified in this Chapter when they are put up in a form clearly indicating their use as toys (e.g., instructional toys such as chemistry, sewing, etc., sets).
>
> . . .
>
> (C) Puzzles of all kinds.
>
> . . .

19. Havi and the CBSA cited the Tribunal's decisions in *Zellers Inc. v. Deputy M.N.R*[10] and *Regal Confections Inc. v. Deputy M.N.R.*[11] In these cases, the Tribunal gave regard to four factors in its determination as to whether the goods in issue were toys. These factors were collectability; marketing and distribution; design and best use; and appearance. Havi submitted that, individually and collectively, these factors are important in determining whether the goods in issue are toys.

20. Considering the first factor, i.e. collectability, Havi submitted that the goods in issue are part of a collection of eight toys marketed and distributed as part of a McDonald's Happy Meal program featuring the movie *Pirates of the Caribbean 2*. The collectability of all eight pirate items[12] was argued as being central to the Happy Meal program.

21. With respect to marketing and distribution, Havi submitted that the ongoing nature of the Happy Meal program is of a toy merchandising business, as well as a continuous marketing practice that promotes McDonald's fast food business. This program creates significant expectations that a toy will be given away, as with the other items in the Pirates of the Caribbean promotion and in other Happy Meal promotions.

22. With respect to design and best use, Havi submitted that the goods in issue were designed and best used for the amusement of children, namely, in pretending to be pirates. Havi submitted that the goods in issue have no real practical use. Any potential practical use would be secondary to that of a plaything. Havi argued that, in past cases, the Tribunal measured the practical use of a plaything by comparing it to the real thing. In doing so, it relied on the dictionary definition of a toy, which states that a toy is a ". . . thing meant rather for amusement than for serious use . . . ."[13]

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10. (29 July 1998), AP-97-057 (CITT).
11. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [*Regal*].
12. The collection of eight items were filed as Tribunal Exhibits AP-2007-014-A-01, AP-2007-014-A-03, AP-2007-014-A-04, AP-2007-014-A-05, AP-2007-014-A-06, AP-2007-014-A-07, AP-2007-014-A-08 and AP-2007-014-A-09.
13. *The Concise Oxford Dictionary of Current English*, 7th ed., *s.v.* "toy".

23. Havi argued that the "limited 'use'" criterion in the *Explanatory Notes* to heading No. 95.03 is not applicable in this case, because there is only one intent with respect to the goods in issue, specifically, that they were designed as role-play items.[14] In Havi's submission, even if the goods in issue were items of "limited 'use'", their main use would be as playthings or toys because the design intent is for role playing; any practical use would be limited.[15]

24. The CBSA submitted that the Tribunal specifically noted that ". . . merely because a product provides amusement value, [it does not mean however] that it should necessarily be classified as a toy . . . ."[16]

25. The CBSA submitted that the goods in issue came with instructions on how to wear them and not on how to play with them or otherwise use them. Nothing about the goods in issue suggests that a child would be able to manipulate the bandana as might be the case with a doll, a ball, building blocks or any of the other toys listed in the *Explanatory Notes* to heading No. 95.03. Furthermore, many commercially available bandanas and head wraps come with logos imprinted on them, and the movie logo imprinted on the goods in issue does not convey its use as a toy.

26. The CBSA submitted that, at the time of importation, the goods in issue were not in a Happy Meal. Goods are properly classified at the time of importation and not based on what is done with the goods subsequent to their importation.

27. The CBSA submitted that the question before the Tribunal is whether design intent supersedes the physical form and function of a product when dealing with classification for tariff purposes.[17] The CBSA submitted that "a hat is a hat" and that, because it is worn on the head, it is therefore headgear.

28. The CBSA referred to the *Canadian Oxford Dictionary*, which defines "headgear" as ". . . something worn on the head, as a hat, cap, or headdress . . . a protective covering for the head, as a helmet . . ."[18] and defines "bandana" as ". . . a coloured handkerchief or head scarf, usu. of cotton, and often having a figured design . . . ."[19] The CBSA submitted that the *Explanatory Notes* to Chapter 65 state that the chapter covers headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).

29. With respect to the "limited 'use'" criterion contained in the *Explanatory Notes* to heading No. 95.03, the CBSA submitted that the goods in issue were not cut-down or reduced versions of a bigger product. They are child-sized hats. Notwithstanding the fact that much effort had been put into the Happy Meal marketing scheme, this did not change the fundamental nature of the goods in issue, which is headgear.

14. *Transcript of Public Hearing*, 11 June 2008, at 48-49.
15. *Ibid.* at 50.
16. *Regal* at 8.
17. *Transcript of Public Hearing*, 11 June 2008, at 58.
18. Second ed., *s.v.* "headgear".
19. Second ed., *s.v.* "bandana".

30. As indicated in previous cases, the Tribunal is of the view that a toy is something from which one derives amusement or pleasure[20] and that the play value of an object is an identifying aspect of it being a toy.[21] The determination of whether an item constitutes a toy is a factual issue to be determined on a case-by-case basis.

31. It is not disputed that the goods in issue are to be worn on the head. The parties further agreed that the goods in issue were part of a line of toys that were distributed during a McDonald's Happy Meal promotion, a toy merchandising business and continuous marketing practice that promotes the McDonald's fast food business.[22] The sequential release of the toys and the advertising generated for the promotion encouraged customers to collect all eight items in the product line.[23]

32. The evidence indicated that the Happy Meal program is viewed as a premium toy business. It creates not only an expectation that children will receive a toy with their Happy Meal but also an incentive to go to McDonald's rather than another restaurant based on the exclusive toy offerings.[24] The toys made available through the Happy Meal program are specifically designed for children aged 3 to 12,[25] with recognized child play patterns, such as creative or fantasy play, in mind.[26] Since the promotional programs change frequently, typically monthly, McDonald's uses established toy brands, children's programming or theatrical events with high existing consumer awareness to encourage children to ask their parents to take them to McDonald's in order to receive the premium toy.[27]

33. The goods in issue were imported and sold in clear plastic bags labelled on the front with "PIRATE BANDANA TOY".[28] The back of the packaging was labelled as follows: "© Disney Safety-tested for children age 3 and over . . . Not intended for children under 3. ASK ABOUT SPECIAL TOYS FOR KIDS UNDER 3 . . . ."[29]

34. The evidence indicates that the goods in issue were specifically designed to be played with by children pretending to be pirates, based on the Pirates of the Caribbean characters. The Pirates of the Caribbean logo, which is printed on the bandana, is intended to associate the bandana with the movie, the movie character Jack Sparrow and pirate role playing.[30] The bandana was the eighth toy in the series, all of which were clearly identified as toys, and which together were intended to convey the image of a child engaging in fantasy play as the pirate Jack Sparrow.[31] The Tribunal notes that the Pirates of the Caribbean Happy Meal promotion was carefully planned to be launched at about the same time as the movie was released in theatres.[32]

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20. *N.C. Cameron & Sons Ltd. v. President of the Canada Border Services Agency* (14 June 2007), AP-2006-022 (CITT).
21. *Franklin Mint Inc. v. President of the Canada Border Services Agency* (13 June 2006), AP-2004-061 (CITT).
22. Tribunal Exhibit AP-2007-014-19A at para. 18.
23. *Ibid*. at paras. 7, 8.
24. *Transcript of Public Hearing*, 11 June 2008, at 39-43.
25. *Ibid.* at 35.
26. *Ibid.* at 70-72.
27. *Ibid.* at 43-46.
28. Tribunal Exhibit AP-2007-014-19A at para. 3.
29. *Ibid.* at para. 5.
30. *Transcript of Public Hearing*, 11 June 2008, at 118.
31. *Ibid.* at 120.
32. *Ibid.* at 119.

35. Based on the evidence, the Tribunal is satisfied that, although the goods in issue can be worn as hats, in their essence, they are things from which a child derives amusement and pleasure. They are items with play value. Therefore, they are classifiable under tariff item No. 9503.90.00 as toys.

36. The Tribunal notes that, although it would have been useful if Havi had produced more evidence concerning the goods in issue in particular, rather than Happy Meal premium business in general, the evidence did not suggest that the goods in issue were handled differently than any other item in the Happy Meal program.

37. The Tribunal also notes that the CBSA's decisions concerning the other Happy Meal Pirates of the Caribbean toy offerings, to which Havi referred, are not relevant to the Tribunal's decision. The Tribunal is required to look at the correct classification of the goods in issue alone, regardless of the correctness and/or consistency of any other CBSA decisions.

Tariff Item 6505.90.90, Other Headgear

38. As noted, the CBSA asserted that the goods in issue are properly classified under tariff item No. 6505.90.90 as other headgear. As discussed above, the Tribunal considers that, in their essence, the goods in issue are toys, not headgear.

Exclusions From Chapters 95 and 65

39. The notes to both Chapters 95 and 65 have relevant provisions that exclude goods from those chapters.

40. Note 1 to Chapter 65 states as follows:[33]

> 1 This Chapter does not cover:
>
> . . .
>
> (c) Dolls' hats, other toy hats or carnival articles of Chapter 95.

41. Similarly, the *Explanatory Notes* to Chapter 65 state as follows:

> . . .
>
> With the **exception** of the articles listed below this Chapter covers hat-shapes, hat-forms, hat bodies and hoods, and hats and other headgear of all kinds, irrespective of the materials of which they are made and of their intended use (daily wear, theatre, disguise, protection, etc.).

42. The relevant exception includes the following:

> (f) Doll's hats, other toy hats or carnival articles (**Chapter 95**).

43. The Tribunal considers that it is not clear whether the term "toy hats", in the English version of the *Customs Tariff*, encompasses items such as the pirate bandana that are "real hats" used essentially as toys, or is limited to items that are "toy hats" rather than "real hats". However, the French version clarifies this issue. The phrase "*ayant le caractère de jouets*" (having the nature of toys) makes it clear that items such as the goods in issue (i.e. "real hats" used essentially as toys) are intended to be covered by the exclusion from Chapter 65.

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33. The classification in dispute was based on the 2006 tariff schedule. The information presented here refers to the 2006 *Customs Tariff* and the *Explanatory Notes* in effect at that time.

44. The Tribunal also notes that note 1(o) to Section XI states as follows:

> 1. This Section does not cover:
>
> . . .
>
> (o) Hair-nets or other headgear or parts thereof of Chapter 65.

45. Headgear classifiable in Chapter 65 is excluded from Chapter 95, just as headgear having the nature of toys is excluded from Chapter 65. As indicated above, the Tribunal considers that the goods in issue are classifiable in Chapter 95 and not in Chapter 65, under Rule 1 of the *General Rules*, so that this exclusion is not operative. Had the Tribunal considered that the goods in issue were classifiable in both Chapters 65 and 95, these would have operated as equal and opposite exclusions, leading the Tribunal to consider classification of the goods in issue under Rule 3.

DECISION

46. For the foregoing reasons, the Tribunal concludes that the goods in issue are toys and should therefore be classified under tariff item No. 9503.90.00 as other toys.

47. Therefore, the appeal is allowed.

Ellen Fry
Ellen Fry
Presiding Member