CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Wednesday, August 31, 1994

Appeal No. AP-93-263

IN THE MATTER OF an appeal heard on March 16, 1994, under section 67 of the *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF decisions of the Deputy Minister of National Revenue dated July 20 and 21, 1993, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

WORLD FAMOUS SALES OF CANADA INC. **Appellant**

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed (Member Hines dissenting).

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

W. Roy Hines
W. Roy Hines
Member

Lise Bergeron
Lise Bergeron
Member

Nicole Pelletier
Nicole Pelletier
Acting Secretary

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CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-93-263

WORLD FAMOUS SALES OF CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

The appellant is an importer and distributor of outdoor and leisure products. The goods in issue are dome-style play tents designed for use by children. The appellant's product literature describes the goods in issue as "kids play tents." The issue in this appeal is whether the dome-style play tents imported by the appellant are properly classified under tariff item No. 6306.22.00 as "Tents [made] Of synthetic fibres," as determined by the respondent, or should be classified under tariff item No. 9503.90.00 as "Other toys" or under tariff item No. 9506.99.90 as "Other Articles and equipment for ... outdoor games," as claimed by the appellant.

HELD: *The appeal is allowed (Member Hines dissenting). The majority of the Tribunal is of the opinion that the goods in issue are products that are, essentially, smaller models of camping tents with which children can play and, as such, are toys. The testimony of the industry witnesses was clear that the goods in issue are distinguishable by their size because they are significantly smaller than tents normally offered for sale by camping and outdoor equipment stores. The other deficiencies such as the lack of sealing, the lightness of the poles and the lack of comfort due to improper ventilation further distinguish the goods in issue from "real" camping tents. The majority of the Tribunal, therefore, finds that the goods in issue should be classified in heading No. 95.03 as toys and, more specifically, under tariff item No. 9503.90.00 as "Other toys."*

Place of Hearing:	*Ottawa, Ontario*
Date of Hearing:	*March 16, 1994*
Date of Decision:	*August 31, 1994*
Tribunal Members:	*Robert C. Coates, Q.C., Presiding Member* *W. Roy Hines, Member* *Lise Bergeron, Member*
Counsel for the Tribunal:	*Hugh J. Cheetham*
Clerk of the Tribunal:	*Nicole Pelletier*
Appearances:	*Peter Kirby, for the appellant* *Anne Michaud, for the respondent*

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CANADIAN INTERNATIONAL TRADE TRIBUNAL | TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Appeal No. AP-93-263

WORLD FAMOUS SALES OF CANADA INC. **Appellant**

and

THE DEPUTY MINISTER OF NATIONAL REVENUE **Respondent**

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
W. ROY HINES, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*[1] (the Act) from decisions of the Deputy Minister of National Revenue[2] dated July 20 and 21, 1993, made under section 63 of the Act.

The appellant is an importer and distributor of outdoor and leisure products. The goods in issue are dome-style play tents designed for use by children. The appellant's product literature describes the goods in issue as "kids play tents."

The goods in issue originally entered under tariff item No. 9503.90.00 of Schedule I to the *Customs Tariff*[3] as "Other toys." The respondent reclassified the goods in issue under tariff item No. 6306.22.00 as "Tents [made] Of synthetic fibres." The appellant filed a request for re-determination and, by decisions dated July 20 and 21, 1993, the respondent maintained the classification of the goods in issue under tariff item No. 6306.22.00.

The issue in this appeal is whether the dome-style play tents imported by the appellant are properly classified under tariff item No. 6306.22.00 as "Tents [made] Of synthetic fibres," as determined by the respondent, or should be classified under tariff item No. 9503.90.00 as "Other toys" or under tariff item No. 9506.99.90 as "Other Articles and equipment for ... outdoor games," as claimed by the appellant.

The relevant portions of the headings at issue in this case are as follows:

> *63.06 Tarpaulins, sails for boats, sailboards or landcraft, awnings, sunblinds, tents and camping goods.*
>
> *95.03 Other toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds.*
>
> *95.06 Articles and equipment for .... outdoor games, not specified or included elsewhere in this Chapter.*

1. R.S.C. 1985, c. 1 (2nd Supp.).
2. See *An Act to amend the Department of National Revenue Act and to amend certain other Acts in consequence thereof*, S.C. 1994, c. 13, s. 7.
3. R.S.C. 1985, c. 41 (3rd Supp.).

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Counsel for the appellant called two witnesses. The first witness was Mr. Ian Mucher, Vice-President of World Famous Sales of Canada Inc., responsible for purchasing. Mr. Mucher testified that a camping tent has to have the following features: (1) be sealed so as to withstand the elements or keep out insects; (2) have some form of waterproofing; (3) have some form of ventilation; and (4) have a structure that will withstand the elements (here, he specifically referred to the poles of a tent, zippers, etc.). Mr. Mucher stated that the goods in issue do not meet these requirements because they are not sealed at the bottom; they are not waterproof because they do not have a flysheet; their poles are made of plastic and not aluminum, steel or fibreglass; and they are small. With regard to their size, Mr. Mucher stated that, as the goods in issue are only 4 ft. x 4 ft., no ordinary sleeping bag could be used in the goods in issue, and only a child under 4 ft. could actually lie in it. He noted that the smallest camping tent sold by the appellant is 5 ft. x 7 ft.

Mr. Mucher also testified that the appellant does not sell the goods in issue to the same buyers of camping goods. More specifically, the goods in issue are sold to two main customers, Consumers Distributing Inc. (Consumers Distributing) and Toys-R-Us Canada Ltd. (Toys-R-Us), and are also sold for promotions or giveaways as toys. He stated that the goods in issue are marketed by the appellant as toys as opposed to tents.

During cross-examination, Mr. Mucher confirmed that the floor of the goods in issue is made of the same material used in other tents. He also confirmed that the appellant calls these goods "dome tents" in its product literature and that they appear in this literature with other dome-style tents. Further, Mr. Mucher confirmed that the product literature for the goods in issue states that they are "[i]deal for outdoor use in good weather or indoor use year round" and that "kids love to play and sleep in tents." In response to questions from the Tribunal, Mr. Mucher stated that people in the trade refer to the goods in issue as tents with modifying words such as "play" and "play dome."

The appellant's second witness was Mr. Mike Besharah, Director of Sales for Sir Plus of Ottawa, a camping and outdoor equipment store. Mr. Besharah has held this position since 1972. He was also a cub and scout leader for approximately eight to ten years. He indicated that, as a leader, he had taken numerous groups on camping trips. Mr. Besharah stated that Sir Plus of Ottawa does not sell the goods in issue and that he would not consider stocking them unless he had a specific order for them. He also testified that he would not consider using the goods in issue for a camping trip involving cubs or scouts because the tents are too small and are not sealed. Mr. Besharah stated that he considered the goods in issue to be toys rather than pieces of camping equipment. Finally, Mr. Besharah discussed how a camping tent is made waterproof through the use of a flysheet. He stated that he did not sell flysheets that were small enough for the goods in issue. He also doubted that, because of the nature of the poles, the goods in issue could support the flysheets. During cross-examination, Mr. Besharah acknowledged that the goods in issue provide limited shelter.

The respondent's first witness was Mr. Jovan Rados, who has been a tariff administrator with the Department of National Revenue for about three years. Mr. Rados was the officer responsible for this file. Mr. Rados confirmed that he owned one of the goods in issue which he purchased for his son. He indicated that he purchased it from Toys-R-Us in part because the product tags on the tent described it as being water-resistant. Mr. Rados related that he and his son had spent a night in the tent "camping" and that his son also used it inside the house. During cross-examination, Mr. Rados indicated that the tent was not particularly comfortable for sleeping and that attempts to keep insects out of the tent were not successful.

The respondent's second witness was Mr. John P. Tsatsos, General Manager of Campmate Limited, a tent manufacturer. Mr. Tsatsos stated that he has been with the company for

25 years and had already been in the business for 10 years before joining Campmate Limited. Among his responsibilities as General Manager is the design of tents. Mr. Tsatsos stated that Campmate Limited manufactures dome-style tents similar in shape to the goods in issue. He confirmed that the company would use the same material out of which the goods in issue are made, in making its tents, as long as the material was treated for water repellency. He also stated that the tents made by the company are larger than the goods in issue.

Asked to compare the tents manufactured by Campmate Limited to the goods in issue, Mr. Tsatsos testified that the goods in issue seemed to have all the characteristics to be a tent in that they were water-repellent and had a zipper and a floor. He stated that all the goods in issue were missing was a doorstep. He also qualified his statement by indicating that he was concerned about the lightness of the poles. Counsel for the respondent asked Mr. Tsatsos if he had any problem saying that the goods in issue were, in fact, tents. He responded by saying that they looked like tents, but that one would have problems with them on a windy day. Although counsel rephrased her question, Mr. Tsatsos answered that the goods "had the shape of a tent," but indicated concerns about their size. Mr. Tsatsos repeated his concerns about the poles and indicated that, if they were changed, it would make a lot of difference.

During cross-examination, Mr. Tsatsos stated that, if the goods in issue were altered only by increasing their size, he would not be prepared to sell them as camping tents because other changes would be needed to make the goods in issue comfortable. In particular, he noted that changes to the roof of the tent would be needed to allow for condensation to escape because nylon does not breathe. With respect to a question about the dimensions of Campmate Limited's most popular tents, Mr. Tsatsos stated that these were between 6 ft. x 6 ft. and 7 ft. x 7 ft.

Mr. Mucher was recalled following Mr. Tsatsos' testimony to give rebuttal evidence relating to Mr. Rados' testimony about the safety labels and tags that are attached to the goods in issue when they are sold. Mr. Mucher stated that these types of instructions and information are attached to the goods in issue for product liability reasons.

In argument, counsel for the appellant submitted that Note 1(t) to Section XI of Schedule I to the *Customs Tariff* makes clear that articles of Chapter 95 are excluded from Section XI, which includes Chapter 63. In other words, if goods are classifiable in Chapter 95, they are excluded from Chapter 63 and, therefore, it is not a question of choosing between one or the other. If it is possible to classify the goods in issue in Chapter 95, that is where they are to be classified. Counsel also submitted that Note 1(u) to Chapter 95 of Schedule I to the *Customs Tariff*, which states that Chapter 95 does not include "tents or other camping goods," should be understood to make clear that Chapter 95 does not include tents and other camping goods.

Counsel for the appellant urged that, in determining whether the goods in issue are tents or toys, the Tribunal not focus strictly on reading and construing the *Customs Tariff*, but also focus on analysing the goods in issue. Counsel submitted that the Tribunal should consider the goods in issue to be toy replicas of an adult object in the same sense that a water pistol is a replica of a pistol and a plastic sword is a replica of a sword. While these things represent real objects, they are in fact something quite different. In the instant case, counsel submitted that, when witnesses referred to the goods in issue, they almost always used a word which modified the word "tent" such as "play," "child's" or "toy." This, counsel argued, is because the goods in issue are not tents in the generally accepted meaning of the word, i.e. a shelter used for camping.

Counsel for the appellant referred to the deficiencies of the goods in issue discussed in the testimony. He specifically mentioned the lack of adequate waterproofing and sealing and

the problems presented by using plastic poles. In addition, counsel urged the Tribunal to consider the inability of the respondent's trade witness to call the goods in issue tents without some form of qualification. Counsel submitted that a tent, within the meaning of Chapter 63, has a specific meaning that is linked to camping, i.e. a functional piece of equipment that is a shelter and not a replica or toy. In this regard, counsel stated that the evidence was that camping and outdoor equipment suppliers do not sell the goods in issue. Rather, they are distributed through Consumers Distributing and Toys-R-Us and are sold as toys.

Finally, counsel for the appellant drew the Tribunal's attention to Note (A) of the Explanatory Notes to the Harmonized Commodity Description and Coding System[4] (the Explanatory Notes) to heading No. 95.03, which states that this heading covers all toys not included in heading Nos. 95.01 and 95.02. After enumerating a number of toys that are covered by heading No. 95.03, the note continues: "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." This note, counsel submitted, should be applied to the goods in issue and lead to their classification in Chapter 95.

In response to questions from the Tribunal, counsel for the appellant acknowledged that, although the Notes to Chapter 95 exclude tents from the chapter, the real issue before the Tribunal is whether the goods in issue are tents. Counsel submitted that the weight of the evidence was that the goods in issue are not functional pieces of equipment for camping because they are not tents but toys. In reply, counsel reiterated this point, i.e. that the goods in issue are classifiable in Chapter 95 because they are toys. Counsel referred the Tribunal to a definition of the word "toy[5]" in the appellant's brief and suggested that, as the goods in issue are small models of real tents, they can be considered to be toys and, thus, classified as such. For purposes of clarification, counsel stated that his argument is not that the goods in issue are not tents because they are not meant for camping, rather that the goods in issue are not tents because they are toys intended to recreate the spirit of camping.

Counsel for the respondent began her argument by referring to the definition of the term "tents" found in the Explanatory Notes to heading No. 63.06, which reads as follows:

> *Tents are shelters made of lightweight to fairly heavy fabrics of man-made fibres, cotton or blended textile materials, whether or not coated, covered or laminated, or of canvas. They usually have a single or double roof and sides or walls (single or double), which permit the formation of an enclosure. The heading covers tents of various sizes and shapes, e.g., marquees and tents for military, camping (including backpack tents), circus, beach use. They are classified in this heading, whether or not they are presented complete with their tent poles, tent pegs, guy ropes or other accessories.*

Counsel submitted that there are no restrictions as to size or use in this definition and that goods can be called tents even if their ropes and poles are missing. Her position was that the goods in issue fall easily into this description. Counsel suggested that the goods in issue could be understood to be shelters made of lightweight fabrics of man-made fibres that are coated. They have a single roof and walls, which permit the formation of an enclosure. Counsel argued that there is nothing in the definition of the term "tents" which qualifies the nature of the shelter provided, i.e. that it be a strong shelter, as suggested by the appellant. Further, counsel submitted that the appellant's product literature referred to the goods in issue in a manner that is consistent with the definition of the term "tents."

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4. Customs Co-operation Council, 1st ed., Brussels, 1986.
5. Gage Canadian Dictionary (Toronto: Gage Publishing Limited, 1983) at 1189.

Counsel for the respondent also referred to the definition of the word "tent" in The Concise Oxford Dictionary of Current English, which reads as follows:

> *a portable shelter or dwelling of canvas, cloth, etc., supported by a pole or poles and stretched by cords attached to pegs driven into the ground.*[6]

Counsel argued that the goods in issue also fit this description.

With respect to the notes to Chapter 95 and heading No. 63.06, counsel for the respondent submitted that the exclusion of tents in paragraph (c) of the General Notes to Chapter 95 reinforces the view that not just camping tents, but all tents, are excluded from the chapter. Counsel put emphasis on this because, she submitted, the argument of counsel for the appellant is that the goods in issue are not tents because they are not made for camping. Counsel argued that, if it can be said that the goods in issue are tents, they, therefore, fall in heading No. 63.06, in which toys are excluded.

Finally, counsel for the respondent submitted that, if the Tribunal finds that the goods in issue can be classified in two headings, under Rule 3 (a) of the General Rules for the Interpretation of the Harmonized System[7] (the General Rules), the Tribunal should, therefore, classify the goods in issue as tents, as this is a more specific description than toys.

The majority of the Tribunal considers that the goods in issue should be classified under tariff item No. 9503.90.00 as "Other toys." The majority of the Tribunal comes to this conclusion bearing in mind that it is the legislation and the principles applicable to the interpretation of the legislation, including those set out in the General Rules, that must govern the classification of the goods in issue. The majority of the Tribunal is particularly cognizant of Rule 1 of the General Rules. As noted by the Tribunal in *York Barbell Co. Ltd. v. The Deputy Minister of National Revenue for Customs and Excise*,[8] Rule 1 of the General Rules is of the utmost importance when classifying goods under the Harmonized Commodity Description and Coding System.[9] Rule 1 of the General Rules states that classification is first determined by the wording of the headings and any relative Section or Chapter Notes.

The majority of the Tribunal agrees with the parties that, in the instant case, consideration of Rule 1 of the General Rules requires it to consider the Chapter and Section Notes to Chapters 63 and 95. The majority of the Tribunal also agrees with counsel for the respondent that the effect of Note 1(t) to Section XI of Schedule I to the *Customs Tariff* and Note 1(u) to Chapter 95 of Schedule I is to exclude not just camping tents, but all tents from Chapter 95. Therefore, if the goods in issue are to be classified in heading No. 95.03, it can only be on the basis that they are found to be toys and not tents. The majority of the Tribunal is so persuaded.

Toys are not specifically defined in the *Customs Tariff*. Counsel for the appellant offered the following definition of the word "toy" from the Gage Canadian Dictionary:

> *1 something for a child to play with; plaything. 2 (adjl.) made for use as a toy; especially, being a small model of a real thing.*[10]

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6. Eighth ed. (Oxford: Clarendon Press, 1990) at 1258.
7. *Supra,* note 3, Schedule I.
8. (1992), 5 T.C.T. 1150, Appeal No. AP-91-131, March 16, 1992.
9. Customs Co-operation Council, 1st ed., Brussels, 1987.
10. *Supra*, note 5.

The Concise Oxford Dictionary of Current English defines the term "toy" as:

> *1. n. [a] thing to play with, esp. for [a] child; [a] thing meant rather for amusement than for serious use.*[11]

The majority of the Tribunal finds these definitions particularly helpful in the instant case, when they are considered in light of the Explanatory Notes to heading No. 95.03 which state that "[c]ertain 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." The majority of the Tribunal is of the opinion that the goods in issue are things with which children play that are essentially smaller models of camping tents. The testimony of the industry witnesses was clear that the goods in issue are distinguishable by their size because they are significantly smaller than tents normally offered for sale by camping and outdoor equipment stores. The other deficiencies such as the lack of sealing, the lightness of the poles and the lack of comfort due to improper ventilation further distinguish the goods in issue from "real" camping tents. In this regard, the majority of the Tribunal was particularly struck by Mr. Tsatsos' inability to call the goods in issue tents without referring to one or another of the deficiencies mentioned. Mr. Tsatsos also clearly stated that he would not be prepared to sell the goods in issue as tents without significant changes to their structure. Further, the majority of the Tribunal is of the view that, as the list of examples of articles covered by heading No. 95.03 is introduced by the word "include," this list is inclusive rather than exhaustive. Finally, the majority of the Tribunal notes that the goods in issue are sold through channels of distribution distinct from those through which usual camping equipment is sold and that they are marketed as toys.

The majority of the Tribunal, therefore, finds that the goods in issue should be classified in heading No. 95.03 as toys and, more specifically, under tariff item No. 9503.90.00 as "Other toys."

Accordingly, the appeal is allowed.

Robert C. Coates, Q.C.
Robert C. Coates, Q.C.
Presiding Member

Lise Bergeron
Lise Bergeron
Member

11. Seventh ed. (Oxford: Clarendon Press, 1982) at 1133.

DISSENTING OPINION OF MEMBER HINES

All four witnesses continually referred to the goods in issue as "tents" using, at various times, modifying words such as "play," "toy," or "child's." The appellant's product literature also describes the goods in issue as "kids play tent," noting that it is "[i]deal for outdoor use in good weather or indoor use year round."

The Tribunal heard considerable testimony as to whether the goods in issue were waterproof, insect-proof or suitable for camping in rain, wind, etc. Clearly, the preponderance of the evidence was to the effect that the goods in issue could not be used under adverse conditions for any length of time and could not be regarded in the same way as normal camping equipment. At the same time, the evidence established that the goods in issue provided a "shelter," albeit only suitable for a child.

Counsel for the appellant argued that, since the goods in issue could not be regarded as "camping goods," they could not be classified under tariff item No. 6306.22.00. He maintained that the goods in issue were "toys" and, as such, should be classified in Chapter 95. In this connection, counsel argued that the process of tariff classification requires one to examine not only the product and what it is called but also the physical characteristics of the product and the context in which the product is used. In his view, the goods in issue are clearly toys and not tents.

Obviously, there are many products that are produced on a smaller scale as children's toys and sold as toys rather than as the full-sized adult product that they represent. The Explanatory Notes to heading No. 95.03 contemplate such a situation by incorporating an extensive, if not exhaustive, list of such products ranging from toy pistols to toy vehicles. Toy tents are not included in this list. Indeed, the Explanatory Notes to Chapter 95 specifically exclude "[t]ents and camping goods (generally heading 63.06)."

In my view, the goods in issue are clearly tents and, despite arguments to the contrary by counsel for the appellant, are used as tents. I fully accept that one may not be able to use the goods in issue in what may be perceived to be realistic camping situations. However, the goods in issue are described as tents in the appellant's product literature and were referred to as such in the evidence, and the physical exhibit set up in the hearing room was obviously a tent. As such, I agree with counsel for the respondent that, since tents are specifically provided for, without qualification as to their nature or use, in heading No. 63.06, the goods in issue are properly classified in that heading and, more specifically, under tariff item No. 6306.22.00. Moreover, even if one were to consider the goods in issue as toy tents, they would still, in my opinion, be tents and, as such, be specifically excluded from heading No. 95.03.

W. Roy Hines
W. Roy Hines
Member