

Ottawa, Monday, July 25, 1994

Appeal No. AP-93-278

IN THE MATTER OF an appeal heard on February 4, 1994,
under section 67 of the *Customs Act*, R.S.C. 1985, c. 1
(2nd Supp.);

AND IN THE MATTER OF a decision of the Deputy Minister of
National Revenue dated October 22, 1993, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

VIEWMASTER (CANADA) INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-93-278

VIEWMASTER (CANADA) INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

The appellant imported into Canada a product called "Magna Doodle." The issue in this appeal is whether the goods imported by the appellant are properly classified under tariff item No. 9503.90.00 as "[o]ther toys," as determined by the respondent, or should be classified under tariff item No. 9610.00.00 as "[s]lates and boards, with writing or drawing surfaces, whether or not framed," as claimed by the appellant.

HELD: *The appeal is dismissed. Both the appellant and the respondent agree that the goods in issue are toys. In the Tribunal's view, the goods in issue should not be classified under tariff item No. 9610.00.00, as they are neither "slates" nor "boards" within the meaning of that tariff item.*

Place of Hearing: Ottawa, Ontario

Date of Hearing: February 4, 1994

Date of Decision: July 25, 1994

Tribunal Members: W. Roy Hines, Presiding Member

Charles A. Gracey, Member

Lise Bergeron, Member

Counsel for the Tribunal: John L. Syme

Clerk of the Tribunal: Janet Rumball

Appearances: Michael Kaylor, for the appellant

Anne Michaud, for the respondent

Appeal No. AP-93-278

VIEWMASTER (CANADA) INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: W. ROY HINES, Presiding Member
CHARLES A. GRACEY, Member
LISE BERGERON, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ (the Act) from a decision of the Deputy Minister of National Revenue² dated October 22, 1993.

On September 16, 1991, the appellant imported into Canada a product called "Magna Doodle." The issue in this appeal is whether the goods imported by the appellant are properly classified under tariff item No. 9503.90.00 of Schedule I to the *Customs Tariff*³ as "[o]ther toys," as determined by the respondent, or should be classified under tariff item No. 9610.00.00 as "[s]lates and boards, with writing or drawing surfaces, whether or not framed," as claimed by the appellant.

Mr. Victor J. Turnbull, Vice-President of Marketing for Tyco Toys (Canada) Inc., testified on behalf of the appellant. He affirmed that the goods in issue are composed of two sheets of clear plastic and a metal screen, which is manufactured in a honeycomb design. The two sheets of plastic are placed on either side of the screen to form the basic unit. A liquid containing metal particles is placed in the unit, and the unit is sealed. When a magnetic pen is drawn across the plastic surface, the liquid containing the metal particles is drawn upward within the unit, forming an image.

Mr. Turnbull attested that the goods in issue are marketed to all major Canadian retailers and are generally merchandised in their toy departments. Finally, Mr. Turnbull testified that the goods in issue can be used by children for drawing, doodling or writing. Children can use them, for example, to learn the alphabet, to practice writing or to draw pictures. They can also be used by adults as message centres and, for that purpose, can be mounted on a wall.

Ms. JoAnne St-Gelais testified on behalf of the respondent. She is Executive Director of the Canadian Toy Testing Council (the Council), an organization whose mandate it is to promote the design, manufacture and distribution of good toys that meet children's needs. In fulfilling its mandate, the Council tests a wide variety of toys and publishes an annual toy report. Her

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.).

testimony was that the Council only tests toys and that it had tested the Magna Doodle because it considered, as did Ms. St-Gelais, that the unit was a toy. She described the characteristics, such as shape, colour, accessories, etc., that led her to conclude that the Magna Doodle was a toy, but admitted that the Council does not have any written standard or definition as to what constitutes a toy.

The appellant claimed that the goods in issue should be classified under tariff item No. 9610.00.00 as "[s]lates and boards, with writing or drawing surfaces, whether or not framed." Since this tariff item represents the totality of heading No. 96.10, there are no subheadings to consider. Counsel for the appellant argued that heading No. 96.10 is sufficiently broad to include the goods in issue. Counsel argued that due regard should be had to the Explanatory Notes to the Harmonized Commodity Description and Coding System⁴ (the Explanatory Notes) to heading No. 96.10, but that they should not be determinative and should explain rather than restrict the meaning of the tariff item. In this regard, counsel pointed out that, while the Explanatory Notes to heading No. 96.10 contemplate that certain types of writing instruments may be employed with the slates and boards, tariff item No. 9610.00.00 itself makes no mention of writing instruments. Counsel argued that the fact that the magnetic pen, used in conjunction with the goods in issue, was not among the writing instruments listed in the Explanatory Notes to heading No. 96.10 should not be used as a basis for determining that the goods in issue should not be classified under tariff item No. 9610.00.00.

Counsel for the appellant conceded that the goods in issue are toys, but argued that heading No. 96.10 does not expressly, or by necessary implication, exclude toys. Counsel argued that, notwithstanding the fact that the goods in issue are toys, they are also boards for writing or drawing and, thus, should be classified under tariff item No. 9610.00.00.

Counsel for the respondent made three arguments. First, since the goods in issue are toys, they must be classified in heading No. 95.03. Second, although the goods in issue may be used for writing or drawing, they do not conform to the Explanatory Notes to heading No. 96.10, in that they do not employ one of the writing instruments listed in those notes. Finally, while counsel conceded that the goods in issue could be used for writing or drawing, she submitted that they are not slates or boards and, therefore, do not fall within heading No. 96.10.

In reaching its decision, the Tribunal acknowledges that there may well be a grey area between what is and what is not a "toy," particularly in respect of goods that are targeted to young children, as in the present case. Many toys have an educational value, while many educational items have a certain built-in "play value."

Both the appellant and the respondent agree that the goods in issue are toys. In determining this matter, the Tribunal is bound to have regard to the General Rules for the Interpretation of the Harmonized System⁵ (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." In addition, section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the Explanatory Notes.

4. Customs Co-operation Council, 1st ed., Brussels, 1986.

5. *Supra*, note 3, Schedule I.

Both counsel are of the view that the goods in issue are toys, a view with which the Tribunal agrees. Therefore, the goods in issue could be classified in heading No. 95.03. However, the question of whether the goods in issue should be classified in heading No. 96.10 remains. The goods in issue are clearly not "slates." However, counsel for the appellant argued that the goods in issue can be considered "boards, with writing or drawing surfaces."

Both counsel provided the Tribunal with several dictionary definitions of the word "board." Simply put, based on those definitions, the Tribunal is not persuaded that the goods in issue can be considered "boards" within the meaning of tariff item No. 9610.00.00. In reaching this conclusion, the Tribunal has regard to the Explanatory Notes to heading No. 96.10. Those notes refer to slates and boards that are "clearly designed to be used for writing or drawing with slate pencils, chalks, felt or fibre tipped markers (e.g., school children's slates, blackboards and certain notice boards)" (emphasis added).

It is the appellant's position that Note (ij) of the Explanatory Notes to heading No. 95.03 specifically excludes from that heading "[s]lates and blackboards, of heading 96.10." In the Tribunal's view, as the goods in issue are neither slates nor blackboards, this note cannot be relied upon to exclude the goods in issue from heading No. 95.03.

For the foregoing reasons, the appeal is dismissed.

W. Roy Hines
W. Roy Hines
Presiding Member

Charles A. Gracey
Charles A. Gracey
Member

Lise Bergeron
Lise Bergeron
Member