

Ottawa, Friday, April 25, 1997

Appeal No. AP-96-080

IN THE MATTER OF an appeal heard on February 12, 1997,
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 June 21, 1996, with respect to a request
for re-determination under section 63 of the *Customs Act*.

BETWEEN

NICHOLSON EQUIPMENT LTD.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Patricia M. Close
Patricia M. Close
Presiding Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-96-080

NICHOLSON EQUIPMENT LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under subsection 67(1) of the *Customs Act* from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the *Customs Act*. The issue in this appeal is whether various imported products described as plastic, porcelain, textile and artificial flower cake top ornaments and statuettes are properly classified under tariff item Nos. 3926.40.10 and 3926.40.90 as other ornamental articles of plastic, under tariff item No. 6307.90.99 as articles of other textile materials, under tariff item No. 6702.90.00 as articles made of artificial flowers, foliage or fruit of other materials and under tariff item No. 6913.10.10 as statuettes of porcelain, as determined by the respondent, or should be classified under tariff item No. 9505.90.90 as festive or other entertainment articles, as claimed by the appellant.

HELD: The appeal is allowed. Heading No. 95.05 covers “[f]estive, carnival or other entertainment articles.” The word “festive” is an adjective meaning “for a feast, festival, or holiday; gay; joyous; merry: *A birthday or wedding is a festive occasion.*” Both “festive” and “festival” find their roots in the Latin word “*festum*” for feast. In the Tribunal’s view, it is clear from this common and ordinary meaning that weddings and anniversaries may be considered festive occasions.

The *Explanatory Notes to the Harmonized Commodity Description and Coding System* to heading No. 95.05 provide that “[f]estive, carnival or other entertainment articles” include, among other articles, “[c]ake and other decorations ... which are traditionally associated with a particular festival.” A “decoration” is generally defined as “anything used to add beauty: ornament,” and an “ornament” is defined as “something used to add beauty, especially a beautiful object or part that has no particular function in itself.” In the Tribunal’s view, the goods in issue, which sit on or beside wedding or anniversary cakes or which separate layers thereof, are decorations or ornaments associated with festive occasions, namely, weddings and anniversaries, and should, therefore, be classified in heading No. 95.05 as festive articles.

| | |
|---------------------------|--|
| Place of Hearing: | Ottawa, Ontario |
| Date of Hearing: | February 12, 1997 |
| Date of Decision: | April 25, 1997 |
| Tribunal Member: | Patricia M. Close, Presiding Member |
| Counsel for the Tribunal: | Shelley Rowe |
| Clerk of the Tribunal: | Anne Jamieson |
| Appearances: | Douglas J. Bowering, for the appellant Anne M. Turley, for the respondent |

Appeal No. AP-96-080

NICHOLSON EQUIPMENT LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

REASONS FOR DECISION

This is an appeal, heard by one member of the Tribunal,¹ under subsection 67(1) of the *Customs Act*² (the Act) from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in this appeal is whether various imported products described as plastic, porcelain, textile and artificial flower cake top ornaments and statuettes are properly classified under tariff item Nos. 3926.40.10 and 3926.40.90 of Schedule I to the *Customs Tariff*³ as other ornamental articles of plastic, under tariff item No. 6307.90.99 as articles of other textile materials, under tariff item No. 6702.90.00 as articles made of artificial flowers, foliage or fruit of other materials and under tariff item No. 6913.10.10 as statuettes of porcelain, as determined by the respondent, or should be classified under tariff item No. 9505.90.90 as festive or other entertainment articles, as claimed by the appellant. The following is the relevant tariff nomenclature:

| | |
|------------|---|
| 39.26 | Other articles of plastics and articles of other materials of headings Nos. 39.01 to 39.14. |
| 3926.40 | -Statuettes and other ornamental articles |
| 3926.40.10 | ---Statuettes |
| 3926.40.90 | ---Other ornamental articles |
| 63.07 | Other made up articles, including dress patterns. |
| 6307.90 | -Other |
| 6307.90.99 | ----Of other textile materials |
| 67.02 | Artificial flowers, foliage and fruit and parts thereof; articles made of artificial flowers, foliage or fruit. |
| 6702.90.00 | -Of other materials |
| 69.13 | Statuettes and other ornamental ceramic articles. |
| 6913.10 | -Of porcelain or china |
| 6913.10.10 | ---Statuettes |

1. Section 3.2 of the *Canadian International Trade Tribunal Regulations*, added by SOR/95-27, December 22, 1994, *Canada Gazette* Part II, Vol. 129, No. 1 at 96, provides, in part, that the Chairman of the Tribunal may, taking into account the complexity and precedential nature of the matter at issue, determine that one member constitutes a quorum of the Tribunal for the purposes of hearing, determining and dealing with any appeal made to the Tribunal pursuant to the *Customs Act*.

2. R.S.C. 1985, c. 1 (2nd Supp.).

3. R.S.C. 1985, c. 41 (3rd Supp.).

| | |
|------------|--|
| 95.05 | Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes. |
| 9505.90 | -Other |
| 9505.90.90 | ---Other |

Appearing as witness for the appellant, Mr. William H. George, General Manager of the Winnipeg, Manitoba, operation of Nicholson Equipment Ltd., testified that the goods in issue, which are described and illustrated in the *1996 Yearbook of Cake Decorating* published by Wilton Enterprises would not normally be used for any purpose other than to decorate wedding and anniversary cakes and would normally only be used once. He testified that some of the goods in issue⁴ are pillars or columns and separator plates which are used to make tiered wedding and anniversary cakes. He also testified that most of the goods in issue are made of plastic and a few of porcelain.

The appellant's representative argued that the goods in issue are not properly classified in Chapters 39, 63, 67 and 69 because the notes to these chapters specifically exclude articles of Chapter 95. On the other hand, he argued that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ (the Explanatory Notes) to heading No. 95.05 refer to festive entertainment articles such as "[c]ake and other decorations ... associated with a particular festival." He maintained that a wedding was a ceremony accompanied by festivities, that a wedding was "a time of celebration marked by special observances ... an occasion marked with religious ceremonies" and that a wedding falls within the definition of "festival," though not necessarily a festival holiday. Moreover, a festival should not be something that is merely archaic. Traditions are created continually. If not considered a festivity, he maintained that a wedding should at least be considered entertainment, which is also covered by heading No. 95.05. Furthermore, he argued that heading No. 95.05 refers to festive articles, not merely to articles associated with traditional religious festivals.

Counsel for the respondent argued that regard must be had to the Explanatory Notes and she cited two Tribunal decisions⁶ in support of her argument. She argued that the Explanatory Notes to heading No. 95.05 narrow the definition of festive articles because they refer to "[festive articles] traditionally associated with a particular festival." According to *The New Merriam-Webster Dictionary*,⁷ festival means "1 : a time of celebration marked by special observances; *esp* : an occasion marked with religious ceremonies 2 : a periodic season or program of cultural events or entertainment."⁸ Counsel went on further to quote *The Book of Festival Holidays*,⁹ where "festival" is defined as "the gathering together of people in a community to celebrate a holy or secular holiday. These days that are set aside from all other days on the year's calendar have come to mean a period of relaxation and a measure of freedom from work."¹⁰ *The Canadian Encyclopedia*¹¹ states the following: "**Festivals** began in antiquity as religious and ritual

4. See *1996 Yearbook of Cake Decorating* at 155-57.

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

6. See *Readi-Bake Inc. v. The Deputy Minister of National Revenue*, Appeal No. AP-95-044, December 2, 1996, at 3; and *Thinkway Trading Corporation v. The Deputy Minister of National Revenue*, Appeal No. AP-95-080, March 19, 1996, at 3.

7. (Springfield, Mass.: Merriam-Webster, 1989).

8. *Ibid.* at 279.

9. M. Ickis (New York: Dodd, Mead & Company, 1964).

10. *Ibid.* at 1.

11. Vol. I (Edmonton, Alta.: Hurtig, 1985).

observance of the seasons, often including sacred community meals or feasts. Today, festivals are held to commemorate, celebrate or re-enact events and seasons.^{12,}

Counsel for the respondent concluded from these definitions of “festival” that weddings and birthdays were personal celebrations, not traditional festivals such as Christmas, Thanksgiving and Easter, and, therefore, that the goods in issue could not be classified in heading No. 95.05. Rather, counsel argued that the goods in issue should be classified in accordance with Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*¹³ (the General Rules) under the four different tariff items that describe respectively the essential material character of the goods in issue. Rule 3 (b) of the General Rules provides, in part, that composite goods consisting of different materials shall be classified as if they consisted of the material which gives them their essential character. The bulk of the goods in issue are, therefore, properly classified under tariff item No. 3926.40.90 as plastic statuettes and other ornamental articles.

The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*. Rule 1 of the General Rules provides that classification is to 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 provisions set out in Rules 2 through 6, as well as the *Canadian Rules* which follow. The Tribunal is further directed by section 11 of the *Customs Tariff* to consider the Explanatory Notes as a guide to the interpretation of the headings and subheadings in Schedule I to the *Customs Tariff*. Thus, the Tribunal must first consider whether the goods in issue fall in heading No. 95.05 or heading Nos. 39.26, 63.07, 67.02 and 69.13, as interpreted with the aid of the relative Section and Chapter Notes and the Explanatory Notes.

Heading No. 95.05 covers “[f]estive, carnival or other entertainment articles.” According to the *Gage Canadian Dictionary*,¹⁴ festive is an adjective meaning “for a feast, festival, or holiday; gay; joyous; merry: *A birthday or wedding is a festive occasion.*”¹⁵ Both “festive” and “festival” find their roots in the Latin word “*festum*” for feast. “Festive” is not derived from the word “festival” as was suggested by counsel for the respondent. In the Tribunal’s view, it is clear from this definition that weddings and anniversaries may be considered festive occasions or festivals.

The Explanatory Notes to heading No. 95.05 provide that “[f]estive, carnival or other entertainment articles” include, among other articles, “[c]ake and other decorations ... which are traditionally associated with a particular festival.” A “decoration” is generally defined as “anything used to add beauty: ornament,¹⁶” and an “ornament” is defined as “something used to add beauty, especially a beautiful object or part that has no particular function in itself.”¹⁷ In the Tribunal’s view, the goods in issue, which sit on or beside wedding or anniversary cakes, are decorations or ornaments associated with particular festive occasions or festivals, namely, weddings and anniversaries. With respect to the columns or pillars and separator plates, in particular, the Tribunal notes that they are, in part, a structural element of the cake and, for that reason, have a function, in themselves. However, the Tribunal believes that the physical appearance of these products is decorative such that they may also be considered to be decorations or ornaments of cakes.

12. *Ibid.* at 625.

13. *Supra* note 3, Schedule I.

14. (Toronto: Gage, 1997).

15. *Ibid.* at 574.

16. *Ibid.* at 406.

17. *Ibid.* at 1042.

Accordingly, the appeal is allowed, and the goods in issue should be classified under tariff item No. 9505.90.90.

Patricia M. Close

Patricia M. Close
Presiding Member