

Ottawa, Monday, September 14, 1998

Appeal Nos. AP-97-017, AP-97-053, AP-97-102 and AP-97-118

IN THE MATTER OF appeals heard on January 19, 1998, 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 with respect to requests for re-determination under section 63 of the *Customs Act*.

BETWEEN

PET VALU CANADA INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeals are allowed in part.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Pierre Gosselin

Pierre Gosselin
Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-97-017, AP-97-053, AP-97-102 and AP-97-118

PET VALU CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue made under section 63 of the *Customs Act*. The appellant imported into Canada a number of toys which it sold through its retail outlets. It seeks to have the toys classified in heading No. 95.03 as “[o]ther toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.” The respondent classified the toys in five different headings.

HELD: The appeals are allowed in part. The Tribunal is of the view that Chapter 95, generally, and heading No. 95.03, in particular, contemplate toys for the amusement of humans as opposed to animals. The Tribunal is not persuaded that, because a human obtains pleasure from watching a pet play with a toy, in effect, that toy becomes a toy for the amusement of humans. The Tribunal is persuaded, however, that the goods in issue, identical versions of which are sold into the “human” toy market, may be classified in heading No. 95.03.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 19, 1998
Date of Decision:	September 14, 1998
Tribunal Members:	Charles A. Gracey, Presiding Member Pierre Gosselin, Member Peter F. Thalheimer, Member
Counsel for the Tribunal:	John L. Syme
Clerk of the Tribunal:	Anne Jamieson
Appearances:	Donald J. Goodwin, for the appellant M. Kathleen McManus, for the respondent

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PET VALU CANADA INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
PIERRE GOSSELIN, Member
PETER F. THALHEIMER, Member

REASONS FOR DECISION

INTRODUCTION

These are appeals under section 67 of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue made under section 63 of the Act. In a series of importations in 1995 and 1996, the appellant imported into Canada a number of toys which it sold through its retail outlets. The appellant seeks to have the toys classified in heading No. 95.03 of the schedule to the *Customs Tariff*² as “[o]ther toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.” The respondent classified the toys in five different headings, as set out in Appendix A to these reasons.³

EVIDENCE

Three witnesses gave evidence on behalf of the appellant. Mr. Denis McLaughlin, Director, Nutrition & Product Development at Pet Valu Canada Inc., testified that the appellant is a specialty retailer of pet food and supplies. Mr. McLaughlin presented the results of the 1997 American Pet Products Manufacturers Association National Pet Owners Survey. The survey confirms that the major reasons cited for keeping pets are companionship and amusement. In the case of dog owners, for example, 76 percent of respondents indicated that they found pets “fun to watch.” Forty-five percent of dog owners indicated that they bought toys for their pets, and, in the case of cat owners, over half of those who bought toys bought “interactive” toys. Mr. McLaughlin explained that an interactive toy is one that requires human involvement in the play.

Through Mr. McLaughlin, representative samples of the toys were introduced into evidence. They included items such as:

- a “Soft Bite Floppy Disc” designed to be used interactively in play with a dog;
- “Soft Bite” and plush-type toys;
- a “Clutch Ball”;

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

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

3. In his introductory remarks, the appellant’s representative advised the Tribunal that the appellant was not proceeding with its appeal in respect of the “Fundanna,” which the appellant had sought to have classified in heading No. 96.50.

- certain rope-like articles used for tugging between a pet and a human;
- “Tuff Bite” chew toys; and
- “Feline Flyers,” which consist of a plastic wand attached to a length of string with a feather or fabric attached to the end, and a similar product called a “Kitty Kaster.”

Mr. McLaughlin testified that these toys had been designed for human enjoyment and distinguished them from such items as a dog’s chewing bone or a scratch pole for cats. He also noted that certain toys, most notably the “Look Who’s Talking” figures and the “Clutch Ball,” were also sold through other retail outlets as “human” toys. Under cross-examination, Mr. McLaughlin indicated that the appellant did carry some children’s toys, such as stuffed animals. Asked how one would know if the goods were children’s toys, he replied that they would be so labelled.

Mr. Robert J. Kirch, President of Aspen Pet Products, Inc., the supplier of the majority of the goods in issue, was the appellant’s second witness. He explained that Aspen Pet Products, Inc. is a marketing company that designs toys and then contracts for their manufacture and that the purpose of the toys, as designed, was the entertainment and amusement of humans. The appellant’s third witness, Mr. Mark G. Hirschberg, is associated with Vo-Toys, Inc., a US “pet toy” firm, and is also the owner and founder of Multipet International, one of the appellant’s suppliers. He testified that Vo-Toys, Inc. imports pet toys from manufacturers in the People’s Republic of China and Mexico that produce both pet and human toys.

Counsel for the respondent called as a witness Ms. Marie C. Levine, Communications and Programs Manager for the Canadian Toy Testing Council. Ms. Levine was qualified by the Tribunal as an expert in toy use and “playability.” Ms. Levine indicated that the Canadian Toy Testing Council would not test most of the goods in issue because their packaging indicates that they are pet toys. She also noted that the packaging failed to indicate the appropriate age group or to present warning signs or assurances regarding the safety of the goods. The essence of Ms. Levine’s testimony was that the absence of such indications, combined with the fact that the goods were packaged and marked as being for use with pets, precluded their consideration as toys for people.

Ms. Levine stated that a mobile suspended over an infant’s crib would be considered an infant’s toy notwithstanding it would be necessary for an adult to purchase it, install it and set it in motion. She testified that there were other examples of toys that required the intervention of an older person, such as crib activity centres, which would nonetheless be considered children’s toys. She testified that adults often enjoy or are amused by watching a child play with a toy, but that the toy was still intended exclusively for a child.

ARGUMENT

The appellant’s representative submitted that, in determining the classification of the goods in issue, the Tribunal must have regard to the headings, as well as to the Section and Chapter Notes. However, he submitted that the Tribunal should only have regard to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ (the Explanatory Notes) if a heading or subheading must be interpreted. He submitted that, even if the Tribunal were to rely on the Explanatory Notes to heading No. 95.03, they support the appellant’s case. The representative summarized the testimony of appellant’s witnesses, noting that they all testified that the goods in issue were designed, at least in part, for human amusement, such amusement being derived from the purchase of a toy, interactive play between pets and humans and, in certain cases, play between humans. In his submission, heading No. 95.03 provides for toys. It does not qualify them as “human toys” or “pet toys.”

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

Counsel for the respondent submitted that section 11 of the *Customs Tariff* provides that the Tribunal shall have regard to the Explanatory Notes in interpreting the headings and subheadings. Counsel then argued that it was possible, by reference to design, shape or constituent material, to determine that the goods in issue were intended exclusively as pet toys. She added that the toys were found in pet stores where one would not go in search of children's toys. Counsel argued that the necessity for human involvement did not alter the fact that the goods in issue are intended for pets.

DECISION

The appellant contends that the goods in issue should be classified in heading No. 95.03. In argument, counsel for the respondent and the appellant's representative offered differing views as to the use that the Tribunal should make of the Explanatory Notes. In the Tribunal's view, section 11 of the *Customs Tariff* is clear. It provides that, in interpreting the headings and subheadings, regard "shall" be had to the Explanatory Notes.

Explanatory Notes

Heading No. 95.03 covers "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds."

The General Explanatory Notes to Chapter 95 apply to all the headings in that chapter. The relevant portion of the General Explanatory Notes, in English and in French, is as follows:

This Chapter covers toys of all kinds whether designed for the amusement of children or adults.

Le présent Chapitre comprend les jouets et les jeux pour l'amusement des enfants et la distraction des adultes.

Heading No. 95.03 must be read bearing in mind the words of those General Explanatory Notes. The words "[o]ther toys; reduced-size ("scale") models and similar recreational models, working or not; puzzles of all kinds" are, therefore, in effect, qualified by the phrase "whether designed for the amusement of children or adults."

When the goods in issue were imported, the Explanatory Notes to heading No. 95.03 provided, in part, as follows:

This heading covers:

- (A) All toys **not included** in headings **95.01** and **95.02**. Many of the toys of this heading are mechanically or electrically operated.
- (B) Reduced-size ("scale") models and similar recreational models.
- (C) Puzzles of all kinds.

Under paragraphs (A) and (B), examples of toys falling within heading No. 95.03 are listed. They include such things as toy animals, toy guns, construction sets, toy steam engines, tin soldiers, toy sewing machines, dolls' houses and scale models of boats, aircraft and trains.

In February 1997, the preamble to the Explanatory Notes to heading No. 95.03 was amended to read as follows in English and in French:

This heading covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading.

La présente position comprend les jouets destinés essentiellement à l'amusement des personnes (enfants ou adultes). Par contre, les jouets qui, par leur conception, leurs formes ou leurs matières constitutives, sont reconnaissables comme étant exclusivement destinés aux animaux, les jouets pour animaux familiers, par exemple, ne sont pas classés dans la présente position, mais suivent leur régime propre.

Except for the foregoing amendment to the preamble, the Explanatory Notes to heading No. 95.03 remain the same (i.e. they still contain paragraphs (A), (B) and (C) and the accompanying examples).

Analysis

The Tribunal is of the view that, whether it considers the Explanatory Notes as they were at the time of import or as amended, the result in these appeals is the same.

Prior to the amendment, the Explanatory Notes to heading No. 95.03 simply provided for the three general types of toys covered by the heading and gave examples of each type. Reviewing the types of toys listed and the examples thereof reveals, in the Tribunal's view, that what is contemplated by heading No. 95.03 are clearly toys for children and, perhaps, adults. This view is consistent with the General Explanatory Notes set out earlier.

The evidence indicates that virtually all of the goods in issue were manufactured and individually packaged in the People's Republic of China. They were imported into Canada in that state. The words and pictures carried on the product packaging make it clear that the goods in issue were intended to be sold as pet toys. For example, the packaging of the "Soft Bite" toys features an illustration of a dog biting the item in question and the words "Dog Toy." The "Feline Flyer" packaging features an illustration of a cat and the words "Interchangeable Cat Activity Toy System." This packaging is typical of that used for the goods in issue generally. The evidence also indicates that the goods in issue were displayed and marketed within the appellant's stores in an area devoted to pet toys. Finally, the design of the toys indicates that they were intended for pets. For example, the "Feline Flyer" is a device with a wand to which may be attached feathers, a "Monkey Tail" or a kitty plume. Once attached, the wand is waved about and the cat "bats" the attachment.

The Tribunal is of the view that the evidence indicates clearly that the goods in issue are pet toys. The Tribunal has already concluded that the heading and Explanatory Notes, as they existed at the time that the goods in issue were imported, make it clear that heading No. 95.03 contemplates toys for humans. Taken together, these views lead to the conclusion that the goods in issue cannot be classified in heading No. 95.03.

However, the appellant bases its case, at least in part, on the amendments to the Explanatory Notes to heading No. 95.03. Following the amendment to the Explanatory Notes, the preamble provides that heading No. 95.03 covers toys "intended essentially for the amusement of persons." The Explanatory Notes go on to provide that toys "which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading." This brings the Tribunal to the central thrust of the appellant's case. The appellant maintains that the goods in issue are primarily for the amusement of humans. It submits that humans derive pleasure from purchasing the pet toys, watching their pets play with the toys and using the toys in play with their pets.

During the hearing, the correct characterization of an infant's mobile was discussed. The Tribunal has no difficulty with the notion that an adult purchasing a mobile, or any other children's toy, and watching a child play with a toy or actively playing with the child and the toy is likely to be amused or to derive some pleasure. The Tribunal agrees with the appellant that the same comment could be made with respect to pets and the goods in issue. However, in the Tribunal's view, it requires a leap in logic to conclude that this fact alters the fundamental nature of the toy. Does a mobile become a toy essentially for the amusement of adults because an adult gets pleasure from buying it and watching a child play with it? Clearly not. In the Tribunal's view, a mobile is essentially a child's toy. By the same token, it cannot be said that, since a person may be amused by watching a pet play with a toy, it becomes essentially for the amusement of humans; in the Tribunal's view, it remains a pet toy.

As noted, the second part of the new preamble to the Explanatory Notes to heading No. 95.03 reads as follows: "However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading."

The appellant's representative argued that toys which, on account of their design, shape or constituent material, are not identifiable as intended exclusively for animals should be included in heading No. 95.03. The Tribunal does not agree. In the Tribunal's view, the second part of the new preamble does not limit the scope of the first part, nor are they contiguous. The expression "*par contre*" used in the second part of the preamble is the equivalent of the expression "on the other hand." The fact that a particular pet toy, for example, a toy from the "Tuff Bite" series, may not be identifiable as intended exclusively for animals does not mean that it necessarily falls in heading No. 95.03. In the Tribunal's view, the Explanatory Notes to heading No. 95.03, the General Explanatory Notes and, indeed, the terms of the heading itself must be viewed together. Taking all of these into account, in the Tribunal's view, it is clear that pet toys, such as the goods in issue, are not classifiable in heading No. 95.03.

Among the goods in issue imported by the appellant are a "Clutch Ball" and certain "Look Who's Talking" figures. The Tribunal heard evidence that an identical ball and identical figures are sold through retail outlets as human toys. Given this fact, the Tribunal is persuaded that these goods, more specifically described in Appendix B to these reasons, can be classified in heading No. 95.03.

For the above reasons, the appeals are allowed in part.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Pierre Gosselin

Pierre Gosselin
Member

Peter F. Thalheimer

Peter F. Thalheimer
Member

APPENDIX A

39.26	Other articles of plastics and articles of other materials of heading Nos. 39.01 to 39.14.
3926.90	-Other
3926.90.90	---Other
4110.00.00	Parings and other waste of leather or of composition leather, not suitable for the manufacture of leather articles; leather dust, powder and flour.
5609.00.00	Articles of yarn, strip or the like of heading No. 54.04 or 54.05, twine, cordage, rope or cables, not elsewhere specified or included.
63.07	Other made up articles, including dress patterns.
6307.90	-Other
6307.90.99	---Of other textile materials
6701.00	Skins and other parts of birds with their feathers or down, feathers, parts of feathers, down and articles thereof (other than goods of heading No. 05.05 and worked quills and scapes).
6701.00.90	---Other

APPENDIX B

Item	Transaction No.
V.I.P. Clutch Ball	13367-600189603
Look Who's Talking Pig	13367-401403450
Look Who's Talking Monkey	13367-401403450
Look Who's Talking Horse	13367-401403450
Look Who's Talking Cow	13367-401403450
Look Who's Talking Dog	13367-401403450
Look Who's Talking Duck	13367-401403450
Look Who's Talking Tiger	13367-401403450
Look Who's Talking Elephant	13367-401403450