



Ottawa, Wednesday, July 29, 1998

Appeal No. AP-97-057

IN THE MATTER OF an appeal heard on March 12, 1998, 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 May 9, 1997, with respect to a request for re-determination under section 63 of the *Customs Act*.

BETWEEN

ZELLERS INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

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

Arthur B. Trudeau
Arthur B. Trudeau
Member

Charles A. Gracey
Charles A. Gracey
Member

Michel P. Granger
Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-97-057

ZELLERS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from a decision of the Deputy Minister of National Revenue dated May 9, 1997, made under section 63 of the *Customs Act*.

The issue in this appeal is whether Pillow Buddies are properly classified under tariff item No. 9404.90.20 as articles of bedding and other similar furnishings, such as a pillow or cushion, as determined by the respondent, or should be classified under tariff item No. 9503.41.00 as stuffed toys representing animals, as claimed by the appellant.

Pillow Buddies, the goods in issue, are articles consisting of a 100 percent polyester plush covering stuffed with 100 percent polyester filling. They are stylized miniature models or replicas of various animals such as: Style No. 60008 (dog); Style No. 60011 (cow); Style No. 60001 (grey rabbit); (Style No. 60012 (purple dinosaur); and Style No. 60015 (lion). They are irregularly shaped to form the impression of the animals that they represent.

HELD: The appeal is allowed. The evidence indicates that Pillow Buddies have many, if not all, of the characteristics of a pillow or cushion. Pillow Buddies have a filling density and soft fuzzy covering which make them ideal for children to hold when sitting, resting or sleeping. In many ways, their shape also resembles a pillow or cushion despite their appearance as animal or toy cartoon characters. However, Pillow Buddies also have many, if not all, of the characteristics of a toy. Their bright colouring and cuddly feel are particularly attractive to children who often hold them during a car ride or when watching television. In this regard, it is obvious that Pillow Buddies provide amusement.

The Tribunal is unable to conclude that the Pillow Buddies can be classified according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System* because they have characteristics and uses common to both heading Nos. 94.04 and 95.03. As well, the Tribunal could not conclude that the descriptions in heading Nos. 94.04 and 95.03 were more specific and accurate in one than in the other and, therefore, resorting to Rule 3 (a) did not resolve the matter.

Consequently, the Tribunal resorted to Rule 3 (c) of the *General Rules for the Interpretation of the Harmonized System* which directs that the goods in issue be classified in the heading which appears last in numerical order, which, in this case, is heading No. 95.03.

Place of Hearing: Ottawa, Ontario
Date of Hearing: March 12, 1998
Date of Decision: July 29, 1998

Tribunal Members: Robert C. Coates, Q.C., Presiding Member
Arthur B. Trudeau, Member
Charles A. Gracey, Member

Counsel for the Tribunal: Gerry Stobo

Clerk of the Tribunal: Margaret Fisher

Appearances: Darrel H. Pearson and Jeffery D. Jenkins, for the appellant
Louis Sébastien and Mélanie Vincent, for the respondent

Appeal No. AP-97-057

ZELLERS INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ROBERT C. COATES, Q.C., Presiding Member
ARTHUR B. TRUDEAU, Member
CHARLES A. GRACEY, 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 Revenue dated May 9, 1997, made under section 63 of the Act.

The issue in this appeal is whether Pillow Buddies are properly classified under tariff item No. 9404.90.20 of Schedule I to the *Customs Tariff*² as articles of bedding and other similar furnishings, such as a pillow or cushion, as determined by the respondent, or should be classified under tariff item No. 9503.41.00 as stuffed toys representing animals, as claimed by the appellant.

The appellant is a national chain of discount department stores engaged in the retail sale of a wide variety of merchandise. It sells both national and private brands of merchandise to its budget-minded customers. It operates almost 300 stores nationally. The products sold by the appellant are actively promoted through aggressive advertising in both print and electronic media.

Pillow Buddies, the goods in issue, are articles consisting of a 100 percent polyester plush covering stuffed with 100 percent polyester filling. They are stylized miniature models or replicas of various animals such as: Style No. 60008 (dog); Style No. 60011 (cow); Style No. 60001 (grey rabbit); (Style No. 60012 (purple dinosaur); and Style No. 60015 (lion). They are irregularly shaped to form the impression of the animals that they represent.

Pillow Buddies have readily distinguishable heads, ears, eyes, forelimbs, hind limbs and tails which are fully sculpted, movable and distinct from the torsos. In terms of dimensions, for example, the Pillow Buddy cow has a total length of 60 cm and a width of 39 cm. Measuring 17 cm, the forelimbs of the cow constitute a full 28 percent of the total length of the product. The tail is 29 cm long, or 48 percent of the total length of the article. The hind limbs are 19 cm long, or 32 percent of the total length of the article. The head is 24 cm long, or 40 percent of the total length, and 20 cm wide, or 33 percent of the total width.

The head, the tail and the limbs of the cow possess a significant amount of detailing. The limbs, for instance, end in a hoof-like shape. The face is identifiable by the stitching which indicates two eyes, two nostrils and a mouth. The tail has cloth detailing which resembles a tassel.

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1. R.S.C. 1985, c. 1 (2nd Supp.).
 2. R.S.C. 1985, c. 41 (3rd Supp.).

Pillow Buddies are manufactured by Shi Wan Nakumura Plush Toys Mfg., a specialty manufacturer and wholesaler of stuffed toy animals located in Guangdong, People's Republic of China. They were purchased by the appellant from The International Marketing Group Limited (International) of Hong Kong. International invoices the appellant directly, describing the goods in issue as stuffed toys.

Danawares Corp. (Danawares), of Saint-Laurent, Quebec, holds licence rights to the name "Pillow Buddies." Danawares assists in the sale of Pillow Buddies to the appellant and other Canadian retailers, such as Toys "R" Us, Wal Mart, The Bay, etc.

The goods in issue were imported by the appellant on October 16, 1995, and classified under tariff item No. 9503.41.00 as stuffed toys representing animals. On February 21, 1996, the appellant received a decision, in the form of a detailed adjustment statement, indicating that the goods in issue had been reclassified under tariff item No. 9404.90.20, pursuant to section 61 of the Act.

Pursuant to paragraph 63(1)(a) of the Act, the appellant filed an adjustment request with the respondent on April 10, 1996, by which it sought a re-determination of the classification under tariff item No. 9503.41.00.

In a detailed adjustment statement dated May 9, 1997, which constitutes the respondent's decision in this appeal, it was determined that the goods in issue were to be classified under tariff item No. 9404.90.20 for the following reasons:

The Pillow Buddies are designed to appeal to children but [the] predominant function is utilitarian. Pillows [and] cushions can be designed with various themes and can be used for decoration, lounging and travel comfort as the advertising states for the goods in question.

The Pillow Buddies are being sold by Zellers (Herongate, Ottawa) as pillows not as toys.

For the purposes of this appeal, the following is the relevant tariff nomenclature:

94.04	Mattress supports; articles of bedding and similar furnishing (for example, mattresses, quilts, eiderdowns, cushions, pouffes and pillows) fitted with springs or stuffed or internally fitted with any material or of cellular rubber or plastics, whether or not covered.
9404.90.20	---Pillows, cushions and similar furnishings, of cotton; quilts, eiderdowns, comforters and similar articles of textile material containing less than 85% by weight of silk or silk waste
9404.90.20.23	-----Cushions
95.03	Other toys; reduced-size ("scale") models and similar recreational models, working or not, puzzles of all kinds. -Toys representing animals or non-human creatures:
9503.41.00	--Stuffed
9503.41.00.10	-----Plush-covered

The appellant's first witness was Ms. Maya Sassoon, Director of Specialty Stores at Zellers Inc. Before assuming that position, she had been the appellant's department merchandise manager for home furnishings and window coverings and buyer in the bedding department. Ms. Sassoon testified that, although the head office directs general merchandising strategy and promotion, the appellant's store managers have the discretion to locate goods in their store where they deem most advantageous.

Ms. Sassoon explained that the home furnishings department began purchasing Pillow Buddies when they were offered to the appellant. Although Pillow Buddies are purchased by that department, and not the toy department, Ms. Sassoon stated that they may be offered for sale in more than one location at any one time. They are, in her view, an excellent cross-selling item and, as such, may be sold with the juvenile bedding products, in the toy department, in a promotional display aisle or in a combination of locations. Ms. Sassoon stated that Pillow Buddies attract customers because they are “cute” to look at and have a nice touch. She remarked that Pillow Buddies are primarily sold during the Christmas season when most of the appellant’s toy sales occur. She said that they are a great value, as they sell for about \$30 compared to, for example, stuffed animals and stuffed toys, which usually retail for about \$50.

Ms. Sassoon commented on a recent survey conducted with the appellant’s 296 stores across Canada. The purpose of the survey was to collect information about the merchandising of Pillow Buddies in the individual stores. Of the 194 stores that responded, 55 percent carried the Pillow Buddies in a promotional display aisle, 39 percent in the toy department, 73 percent in the home furnishings department and 34 percent in other locations. It is evident, she noted, that the product may be sold in more than one location within a store at any one time.

Ms. Sassoon noted that the “Pillow Buddies” line has been age graded by an independent testing laboratory which indicated that the recommended age category is between 19 and 96 months. According to government regulations, all toys must be age graded to ensure that the products are appropriate for their respective age group. She also noted that “Junior Pillow Buddies,” a smaller, yet identical, version of the larger ones, have recently been introduced as a product line in the appellant’s stores.

Ms. Sassoon mentioned that Pillow Buddies do not compete for sales with pillows. In fact, according to her, Pillow Buddies enhance sales of regular pillows and other home furnishings because they attract customers into those departments due to their bright, attractive features. According to her, Pillow Buddies more accurately compete for sales with stuffed animals and toys.

The appellant’s next witness was Ms. Sheryl Temple who, from 1992 to December 1997, was the department merchandise manager and buyer for the appellant’s toy department. In her capacity as department merchandise manager, she was responsible for overseeing the nationwide toy purchases for the appellant. As a toy buyer, it was her function to purchase products that would appeal to children and, in her view, Pillow Buddies fit the bill. She stated:

The key feature, as a toy buyer, is that it’s cute, it’s cuddly, that it’s a model or a replica of an animal – and we all know that children love plush toys – and that they have certain appendages, the tail, the feet, the arms, the face, that are a fairly large portion of the actual piece.³

She went on to say that Pillow Buddies were, in some respects, more appealing than stuffed animals, which, she noted, have a harder feel. Pillow Buddies are softer and likely to be carried around the house and cuddled by a child when sitting and watching television, for example. According to her, Pillow Buddies, by any definition, would be a toy because they are appealing replicas of animals and provide amusement. In her view, the play value of the Pillow Buddies and that of stuffed toys and animals were identical.

Ms. Temple explained that, although the Pillow Buddies had first been offered as a product line by Danawares to the toy department, it was rejected because the appellant feared that the Pillow Buddies would

3. *Transcript of Public Hearing*, March 12, 1998, at 83.

adversely affect the sales of stuffed animals and toys to which the toy department had already heavily committed itself for that particular season.

Ms. Temple and Ms. Sassoon introduced samples of the goods in issue and stuffed animals, a plush-style backpack and a “Junior Pillow Buddy” designed to replicate Winnie-the-Pooh.

The President of Danawares, Mr. Peter Lewis, was the appellant’s next witness. He indicated that Danawares is a general merchandiser acting as a wholesaler and selling agent for overseas companies, such as International. Danawares is the selling agent of Pillow Buddies to the appellant and other large department stores throughout Canada.

Mr. Lewis stated that some Pillow Buddies which represent Disney Enterprises Inc. (Disney) and Warner Brothers Inc. characters, such as Bugs Bunny, the Tasmanian Devil and a Dalmatian, cannot, according to the terms of the Disney licence agreement, be marketed in the toy department of stores where Disney plush or stuffed toys are sold because Pillow Buddies detract from their sales. Although the goods in issue do not represent Disney characters, they all have the same construction, feel and appearance.

Mr. Lewis noted that, in K-Mart, Pillow Buddies were sold in the toy department; in Wal-Mart, they were for sale in a promotional aisle; in Price Costco and Toys “R” Us, they were sold beside plush toys. He also presented snapshots of Pillow Buddies being sold in the toy department of The Bay.

Mr. Lewis explained that Danawares tried to sell Pillow Buddies to the appellant’s toy department, but, because of that department’s pre-existing commitment to other stuffed toys, it could not accommodate more of the same kind of product. Rather than give up, Danawares tried other departments within the appellant’s stores and was successful in selling to the linen and home furnishings departments, to which Danawares continues to sell to this day.

When asked, in cross-examination, why some literature used to promote Pillow Buddies to retailers refers to them as a “soft, cuddly (yet durable) pillow in shapes of friendly animals,” Mr. Lewis explained that those words were chosen by the US firm which developed the idea for the product. He did not agree that a pillow or cushion is the primary marketing goal of Pillow Buddies. In his view, the essential character of the goods in issue is a toy, not a pillow. Mr. Lewis stated:

In a couple of cases [in the product literature] it does use the word “pillow,” but basically they’re soft, cuddly animals more than anything.⁴

Moreover, according to Mr. Lewis, they have greater play value than stuffed toys because the Pillow Buddies are much softer and cuddlier than the stiffer stuffed animals or cartoon characters.

The appellant’s last witness, Mr. Lewis Rudy, President of Aerated Home Furnishings, a manufacturer of bed pillows and cushions, explained how Pillow Buddies differ in size, fill and function from traditional bed pillows, cushions and pads. Mr. Rudy explained that Pillow Buddies are made with a regenerated fibre which has a slippery, hence soft, feel which is quite different from the fibres used to fill bed pillows and cushions. Whereas the feel of Pillow Buddies is intended to be malleable, supple and cuddly, a pillow or cushion must have a higher level of support and fill density to prevent it from losing its shape and ability to provide support.

4. *Ibid.* at 114.

Mr. Rudy noted that Pillow Buddies are hand-stuffed, while a blow-filled method is used for bed pillows and cushions. This latter method produces a higher density fill than can be achieved by hand. He stated that, to the best of his knowledge, there are no pillows specifically manufactured for children. When asked about the use of Pillow Buddies as a pillow or a cushion, he stated that they would not provide adequate support for the head and neck. He concluded by testifying that Pillow Buddies would be “fine” as a toy.

Counsel for the respondent called three witnesses, the first of whom was Mr. André Morin, a product development consultant. He discussed how a newly developed product is promoted in order to gain access to the intended market. He stated that one must first consider what the product is intended to be and what market it wants to penetrate. In the case of Pillow Buddies, Mr. Morin stated that, although he did not know whether the product creators intended to develop a toy or a pillow, based on the catalogue information that they distributed, it seemed to him that Pillow Buddies were intended to be sold as toy pillows. He did acknowledge, however, that Pillow Buddies could also be marketed as a toy, even though they might be too big for some smaller children to carry. In his view, the smaller “Junior Pillow Buddies” were more likely the sort of object that could be carried around solely as a toy.

The respondent’s next witness was Ms. Stéphanie Rouiller, a selling agent and product developer of pillows. She commented that, in her view, although there were more exacting specifications for the manufacture of cushions and pillows, Pillow Buddies were like a pillow and, notwithstanding their flatter construction, were roughly similar to a traditional bed pillow in dimension. She noted several times that comfort is a matter of personal taste and that pillows and cushions are made to suit those preferences. Despite the flatness of the Pillow Buddies and the fact that one can feel one’s fingers through the body form, a child could use it to sleep. In Ms. Rouiller’s view, the flatness and unusual shape of the Pillow Buddies should not exclude them from being considered a pillow or cushion, both of which can, upon a customer’s request, be manufactured to any weight or fill density.

The respondent’s final witness was Ms. Elizabeth Udell, who, the Tribunal learned when she was cross-examined by counsel for the appellant, is an employee of the Department of National Revenue (Revenue Canada). She testified that her daughter received a Pillow Buddy as a child and has used it extensively up to now as a cushion. Her daughter also took it on car trips to cuddle and on which to rest. To the best of her recollection, the Pillow Buddy was never used as a pillow on which her daughter’s head rested when sleeping.

Ms. Udell indicated that she works in the Revenue Canada division which deals with the importation and classification of toys. She was asked about the National Customs Ruling (NCR) which was issued by Ms. Julie Bédard, a regional official with Revenue Canada, on July 16, 1997. This NCR stated:

The “Pillow Buddies” fall under chapter 95 because the only difference between them and stuffed animals (as we know them) is that they are relatively flatter in the middle to allow the child to rest its head (or body). The general shape is non-rectangular or irregularly rectangular to allow for the animal’s limbs. We must then recognize that even though this merchandise had a dual function (utilitarian and amusement), its essential character is that of a stuffed toy with which the child will play.

According to Ms. Udell, NCRs which are issued by regional officers must receive approval from Revenue Canada’s head office before they are properly considered an NCR. In this case, Ms. Bédard’s “ruling” was brought to the attention of head office only after it was distributed to the importer. Claiming that

Ms. Bédard was acting on insufficient evidence, head office withdrew the NCR on September 23, 1997, and Pillow Buddies were classified in heading No. 94.04 as pillows or cushions.

The Tribunal must decide whether the respondent erred in classifying the goods in issue as articles of bedding, such as cushions or pillows, under tariff item No. 9404.90.20.

Pillow Buddies are soft, bright and slightly fuzzy in texture, made into the shapes of animals and cartoon characters. Some of these, such as the Winnie-the-Pooh, are manufactured and sold under licence with Disney, and some, like the goods in issue, are not. While the individual Pillow Buddies have roughly the same dimensions, they differ in shape depending on what they are intended to replicate. Therefore, the Pillow Buddy dog has appendages which are different from the Pillow Buddy purple dinosaur.

Although the promotional literature written by the creators of Pillow Buddies refers to them as “soft, cuddly pillows,” it is clear that the designers intended them to be something more than a utilitarian object such as a typical bed pillow or cushion. The advertising material and oral testimony indicate that Pillow Buddies have been promoted and marketed in different locations within stores across Canada.

The appellant’s survey results and the evidence presented by Mr. Lewis indicate that Pillow Buddies, being good cross-over items, are sometimes sold in more than one department in a store at a given time. The evidence from the appellant indicates that these goods are sold primarily around Christmas time when, not surprisingly, stores such as the appellant do their biggest sales volume in toys. Other evidence indicates that the sale of Pillow Buddies in the toy department has resulted in reduced sales of stuffed animals partly because of the \$20 difference in price between them and the stuffed toy versions of the same animals or cartoon characters. A physical comparison of a “Winnie-the-Pooh” Pillow Buddy and a “Winnie-the-Pooh” stuffed animal was instructive. In many ways, they were very similar in appearance. They were both brightly coloured and felt soft to the touch, although the stuffed toy was stiffer. Shoppers looking to buy a gift for a child would no doubt conclude that there was little difference between the two versions, except for the flatter, more malleable shape and feel of the Pillow Buddies.

The evidence suggests that the play value of a stuffed toy animal and that of a Pillow Buddy are very similar. They are both intended to be companions for small children and would be carried around by them. Admittedly, the Pillow Buddies, because of their larger size, may at first be awkward for toddlers to carry, but this awkwardness would not last. The Pillow Buddies’ toy-like characteristics were noted in a letter from the Canadian Toy Testing Council, which provided the following opinion on the Pillow Buddies:

The item in question possess such characteristics as, being soft-bodied, having facial features and extremities, together with being produced in many colorful combinations, and themes - thus, all the qualities of a stuffed toy. Children would interact with ‘pillow buddies’ as they would play with stuffed toys, usually through imaginative play sessions or see their ‘pillow buddies’ as a special friend.

The Pillow Buddie could essentially be classified as a ‘stuffed toy’ and have the dual purpose of functioning as a pillow.⁵

It is clear that a Pillow Buddy can be used as a pillow, but, given the evidence about the difference between the construction of a bed pillow and the construction of Pillow Buddies, their primary use is likely not as a pillow. Indeed, the evidence indicates that pillows are intended to give support to the head when

5. Appellant’s Brief, Tab 3 at 3.

resting and, in order to do so, they must be filled to a certain density, otherwise they would not maintain their integrity or shape. Accepting that a bed pillow or cushion need not be of a fixed dimension or even of a certain thickness, it must, however, offer support which endures over time. The Pillow Buddies simply do not offer that support. When Pillow Buddies are squeezed, it is quite possible to feel the tips of one's fingers through the material. Some children undoubtedly fall asleep with their Pillow Buddies under their heads. Interestingly, Ms. Udell, whose daughter had a Pillow Buddy, indicated that it was used more as a cushion on which to rest or as something that her daughter would carry with her on car trips.

It appears to the Tribunal that the same would hold true for cushions. One expects that a cushion will give support and largely retain its integrity when somebody is resting on it. To maintain this integrity, the filling must be sufficiently dense and the fibres must have particular properties. Simply put, the fibre used in the construction of Pillow Buddies is intended to give them a feel and degree of softness different from those of a cushion. They are hand-stuffed, while the blow-filled method is used to make cushions. There is no doubt that Pillow Buddies do not provide the support that a cushion would typically have, nor do they retain the integrity of their shape when put under pressure or load.

In essence, a toy is something from which one derives amusement or pleasure. Toys can replicate things or animals or have forms of their own. They can be of hard or stiff construction, or be soft and cuddly. They can be designed for manipulation or for display on a shelf. They can be cute and friendly in presentation, or be fierce and frightening. They can be designed for rough and tumble use or require careful handling. Their value is often small in cash terms, although some toys, such as miniature electric train sets, can easily cost thousands of dollars. This is all to say that toys cover a world of products, some of which are readily identified as toys and some of which are recognizable as toys only upon closer inspection.

It is apparent that cushions and pillows, as they are commonly understood, have a different purpose. Having noted this, there are products which do appear to be cross-over items. Therefore, an item that is designed to be a toy, i.e. something for amusement or play, may have features which make it appropriate for resting. Conversely, an item designed and intended for use as a pillow or cushion may, because of its design or colouring, have some play or amusement value for a child.

Much of the debate centered on the definition of several words: toy, pillow and cushion. While different dictionary definitions were offered by counsel, the essence of these words is easy to extract. In the Tribunal's view, a toy is an object which is intended to amuse and with which to play.⁶

A pillow is a case filled with natural or man-made fibres designed to support the head, usually when resting or sleeping.⁷ As well, cushions have natural or man-made fibres inserted into a cloth case in order to give comfort or support to someone when kneeling, resting or sitting.⁸

The Pillow Buddies have some characteristics of each of these items. The evidence shows that they are used for play, sleep and comfort when sitting or sleeping. As with many other objects intended for use by

6. See, for example, the definition of "toy," *Gage Canadian Dictionary* (Toronto: Gage Educational Publishing, 1997) at 1549.

7. See, for example, definitions of "pillow," *ibid.* at 1115; *Webster's New World Dictionary*, 3rd College Edition (New York: Simon & Shuster, 1988) at 1024; and *Funk & Wagnalls New Standard Dictionary* (New York: Funk & Wagnalls, 1964) at 1876.

8. See for example, definitions of "cushion," *supra* note 6 at 386; and *Funk & Wagnalls New Standard Dictionary* (New York: Funk & Wagnalls, 1964) at 637.

children, the use of Pillow Buddies is limited only by the child's imagination. They are, by their feel, soft and cuddly, more so than some of the other stuffed toys presented in evidence at the hearing. The feel created by the "slippery" filler in the Pillow Buddies along with the "fuzzy" outer fabric is a pleasing tactile sensation for children. The added appeal is given by their bright colours and friendly animal faces. It is not surprising that Pillow Buddies compete with other plush or stuffed toys for sales, particularly because of their highly competitive price advantage.

The Tribunal notes that the creators of Pillow Buddies promoted them as cuddly pillows. The labelling of these products also suggests that they were considered as part of the pillow family. They are advertised for sale in the same department in the appellant's stores as the one which sells pillows and cushions, although they are considerably thinner and less firm than what one traditionally considers a pillow or cushion to be. Clearly, they do give some support to children while resting, sleeping or playing.

Counsel for the appellant urged the Tribunal to classify the Pillow Buddies as stuffed toys on the basis of Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁹ (the General Rules). Rule 1 requires the Tribunal to classify goods according to the terms of the headings and subheadings in the *Customs Tariff*. According to counsel, classification No. 9503.41.00.90, which covers stuffed toys representing animals or non-human creatures, adequately describes the goods in issue. Consequently, counsel says that one need not look at classification No. 9404.90.20.23, which covers pillows and cushions, in order to arrive at the proper classification.

Counsel for the appellant urged the Tribunal to decide this matter by reference to three observational approaches or tests within the context of Rule 1 of the General Rules.¹⁰ They described those tests as follows:

1. The first approach may be called the "Appearance Test". It asks the tariff administrator to make a physical inspection of the goods in question noting the differences and the similarities between the object in question and the descriptive terminology used in the [*Customs*] *Tariff*. It also asks the administrator to note the differences between the object in question and other goods which are held to be normally classified under the tariff items which are under consideration.
2. The second approach used commonly under Rule 1 might be called the "Design and Best Use Test." It asks the administrator to take into consideration evidence as to the intended use and, most importantly, the actual use of the product under examination.
3. The third of the Rule 1 tests may be called the "Marketing and Distribution Test." This approach involves examination of how the product is packaged, how it is advertised, the groups of products with which the object in question, and the primary characteristics of the companies involved in manufacturing, distributing and retailing the good.¹¹

This series of tests is a useful starting point for the Tribunal. By applying the first test, counsel for the appellant says that it should be readily apparent that Pillow Buddies are stuffed toys and not cushions. Clearly, they appear to be animal or cartoon-like characters and not how one expects a typical pillow to look. Whether it is their brightly coloured features, cute faces and appendages, or their soft fuzzy feel, the fact is,

9. *Supra* note 2, Schedule I.

10. See, for example, Canadian International Trade Tribunal, *World Famous Sales of Canada Inc. v. The Deputy Minister of National Revenue*, Appeal No. AP-93-263, August 31, 1994.

11. Appellant's Brief at 11-12.

counsel maintains, that they are different from a pillow or cushion and, as such, they are closer relatives of the toy family than they are of the pillow or cushion family.

Counsel for the respondent submitted that, although the Pillow Buddies have novel designs, they still resemble pillows or cushions on which to sit, lie or kneel to provide comfort. Therefore, they should be classified accordingly.

The second test suggested by counsel for the appellant is the “Design and Best Use Test.” Although the designer’s promotional literature refers to Pillow Buddies as a “soft, cuddly pillow,” the evidence suggests that their intended use is as a stuffed toy or a play thing.

Counsel for the respondent countered this argument by submitting that not everything that amuses is a toy. In counsel’s view, Pillow Buddies are not necessarily distinguishable by their size and use from a typical pillow or cushion. According to counsel, Pillow Buddies can have a “serious” purpose by acting as a pillow or cushion for a small child or as a “security blanket” for children to carry. Counsel submitted that the primary or best use of Pillow Buddies is as a pillow or cushion. Moreover, the promotional literature from the product designers suggests that they are “cuddly pillows.”

The last “test” referred to by counsel for the appellant was the “Marketing and Distribution Test.” They stated that it was clear from the testimony of Ms. Sassoon, Ms. Temple and Mr. Lewis that Pillow Buddies are marketed in the appellant’s toy department, as well as in its home furnishings department and in promotional display aisles. According to their evidence, Pillow Buddies detract from sales of other stuffed toys and animals in the toy department and, for that reason, Disney licence agreements prohibit the marketing of the licensed Pillow Buddies in the toy departments of stores also carrying Disney animal or cartoon characters.

Counsel for the respondent submitted that the marketing literature shows Pillow Buddies in the home furnishings and bedding departments. In support of this, they referred to one recent home furnishings ad section which stated that kids love to snuggle up with these friendly loveable pillows.

In considering the evidence relative to the above tests, the Tribunal is unable to conclude that the goods in issue can be classified according to Rule 1 of the General Rules. The overlap between the pillows, cushions and Pillow Buddies in terms of their appearance, design, function and marketing is simply too much to allow the Tribunal to conclude that they should be classified in heading No. 94.04 or 95.03. As stated in *McGoldrick’s “Canadian Customs Tariff, “Harmonized System,” Volume 1:*

It will not always be possible to arrive at a single and correct classification by using only the text of the heading and section and chapter notes. In some cases, we may find a number of classifications which seem equally applicable. In these cases, we must apply other rules... It should be stressed that these other rules are applied only if the text of the heading and the notes do not give you an exact classification.¹²

In this case, the Tribunal cannot come to an exact classification using Rule 1. Hence, resort must be had to other rules.

Counsel for the appellant next referred to Rule 3 (a) of the General Rules, indicating that Rule 2 was irrelevant for the purposes of this case. Counsel stated that heading No. 95.03, which covers other toys, is a

12. Classification Method for the Harmonized System (Ottawa: McMullin Publishers, 1998) at 16.

more specific description than heading No. 94.04, which covers articles of bedding and other similar furnishings. Counsel did acknowledge, however, that, while the more specific description was as a toy, Pillow Buddies could also be described as a pillow. The difficulty in pinning this classification down was evidenced by the NCR issued by Revenue Canada's regional office and later withdrawn. It appears to the Tribunal that Ms. Bédard, the author of the NCR, had carefully applied her mind to the goods in issue and the classification criteria. In doing so, she concluded that Pillow Buddies were properly classified in heading No. 95.03. Nevertheless, this NCR did not receive the sanction of head office and was later withdrawn because it was based on insufficient evidence. Therefore, it is obvious that there is confusion as to the proper classification of Pillow Buddies.

Although the Tribunal's analysis of the evidence leads it to conclude that the goods in issue are more like a toy than a pillow or a cushion, one description is no more specific or no more accurate than the other. On balance, therefore, the Tribunal cannot resort to Rule 3 (a) of the General Rules to resolve this matter. By agreement with the parties, Rule 3 (b) is not relevant.

Counsel for the appellant concluded by saying that, if they fail to persuade the Tribunal on the points raised above, then the appellant's position should still prevail, based on Rule 3 (c) of the General Rules, because heading No. 95.03 follows heading No. 94.04 in numerical order. Rule 3 (c) directs the Tribunal to choose the heading which appears last in numerical order where the competing classification numbers seem to apply in equal merit.

Consequently, the Tribunal concludes that the respondent erred when classifying the Pillow Buddies under tariff item No. 9404.90.20. The correct classification is tariff item No. 9503.41.00.

For these reasons, the appeal is allowed.

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Presiding Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Charles A. Gracey

Charles A. Gracey
Member