



Ottawa, Wednesday, September 2, 1998

Appeal Nos. AP-97-110 and AP-97-113

IN THE MATTER OF appeals heard on May 8, 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 dated September 5 and 6, 1997, 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 appeals are allowed.

Charles A. Gracey

Charles A. Gracey
Presiding Member

Raynald Guay

Raynald Guay
Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal Nos. AP-97-110 and AP-97-113

NICHOLSON EQUIPMENT LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

These are appeals 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 these appeals is whether various imported products described as plastic ornaments and statuettes are properly classified under tariff item Nos. 9502.10.00, 9503.49.00, 9503.70.00, 9503.70.10 and 9503.90.00 as dolls and toys, as determined by the respondent, or should be classified under tariff item No. 9505.90.90 as other festive, carnival or other entertainment articles, as claimed by the appellant.

HELD: The appeals are allowed. Following its reasoning in a previous decision, the Tribunal is of the view that a birthday is a festive occasion. Other joyous events in a child's life can also be considered festive occasions. Furthermore, the goods in issue, which are used exclusively on birthday cakes or cakes to celebrate such other joyous occasions, are decorations or ornaments associated with particular festive occasions. The Tribunal is of the view that the goods in issue are described in heading No. 95.05. The Tribunal is also of the view that the goods in issue are not dolls or toys and, therefore, cannot be classified in heading No. 95.02 or 95.03. As a result, the Tribunal finds that the goods in issue should be classified under tariff item No. 9505.90.90.

Place of Hearing:	Vancouver, British Columbia
Date of Hearing:	May 8, 1998
Date of Decision:	September 2, 1998
Tribunal Members:	Charles A. Gracey, Presiding Member Raynald Guay, Member Robert C. Coates, Q.C., Member
Counsel for the Tribunal:	Joël J. Robichaud
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Douglas J. Bowering, for the appellant Jan Brongers, for the respondent

Appeal Nos. AP-97-110 and AP-97-113

NICHOLSON EQUIPMENT LTD.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: CHARLES A. GRACEY, Presiding Member
RAYNALD GUAY, Member
ROBERT C. COATES, Q.C., Member

REASONS FOR DECISION

These are appeals under subsection 67(1) of the *Customs Act*¹ (the Act) from decisions of the Deputy Minister of National Revenue made under subsection 63(3) of the Act. The issue in these appeals is whether various imported products described as plastic ornaments and statuettes are properly classified under tariff item Nos. 9502.10.00, 9503.49.00, 9503.70.00, 9503.70.10 and 9503.90.00 of Schedule I to the *Customs Tariff*² as dolls and toys, as determined by the respondent, or should be classified under tariff item No. 9505.90.90 as other festive, carnival or other entertainment articles, as claimed by the appellant. For purposes of these appeals, the relevant nomenclature reads as follows:

95.02	Dolls representing only human beings.
9502.10.00	-Dolls, whether or not dressed -Parts and accessories:
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:
9503.49.00	--Other
9503.70	-Other toys, put up in sets or outfits
9503.70.10	---Of plastics
9503.90.00	-Other
95.05	Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.
9505.90	-Other

At the hearing, Mr. Rick Robson, Sales Manager for Nicholson Equipment Ltd., testified on behalf of the appellant. He explained that the appellant manufactures bakery equipment and distributes cake decorations and a variety of other small items to bakeries. He was presented with one of the items in issue, which he identified as an “R2-D2” figurine. He said that other figurines include the “Simba” and “The Lion King.” He testified that the appellant considers such products to be cake decorations and not toys. He explained that the appellant has a licence agreement with DecoPac, a Division of McGlynn Bakeries,

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

Incorporated, which manufactures these products on behalf of such companies as Disney and Lucas Productions, to only sell them to bakeries as cake decorations. Mr. Robson explained that the goods in issue would not normally be used for any purpose other than to decorate a child's birthday cake. He testified that, in his view, a child's birthday or a child's soccer party is a festive occasion. He also testified that some of the figurines in issue can be used on wedding or anniversary cakes. He said that none of the goods in issue are mechanical.

In cross-examination, Mr. Robson testified that most of the goods in issue are made of durable plastic and that they are not edible. He said that, after the cake is finished, a child could play with the figurine. He testified that the goods in issue cannot be purchased in ordinary stores. He said that they are much smaller than the toys normally found in stores. Mr. Robson testified that none of the goods in issue are imported with miniature signs stating, for example, "Happy Birthday." He said that, theoretically, the figurines could be reused, but that a child would not be too impressed if they were. Finally, he testified that the figurines may be used on cakes to celebrate other types of festive occasions, such as a child obtaining a good report card.

The appellant's representative argued that the goods in issue should be classified under tariff item No. 9505.90.90 as festive or other entertainment articles. He noted that the goods in issue are purchased by the appellant under an agreement with the vendor that they be resold exclusively to bakeries. They cannot be resold to other distributors. Based on the definitions of the words "festive," "decoration" and "ornament" adopted by the Tribunal in *Nicholson Equipment Ltd. v. The Deputy Minister of National Revenue*,³ the representative argued that the goods in issue, which have no function other than to be used as decorations on children's birthday cakes or cakes used to celebrate other joyous occasions, meet the requirements of tariff item No. 9505.90.90. He argued that the fact that the goods in issue could be used more than once should not negate the fact that they are used for festive occasions. Furthermore, with respect to the use of the word "traditionally" in the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁴ (the Explanatory Notes) to heading No. 95.05, he argued that traditions are created continuously. He explained that characters which are popular this year may be popular for a few years before becoming unpopular and eventually being replaced by other characters. Hence, the use of the word "traditionally" should not stop the goods in issue from being classified in heading No. 95.05.

The appellant's representative argued that, if the goods in issue cannot be classified in heading No. 95.05 in accordance with Rule 1 of the *General Rules for the Interpretation of the Harmonized System*⁵ (the General Rules), then they should be classified in that heading in accordance with Rule 3 (c), which provides that, "[w]hen goods cannot be classified by reference to 3 (a) or 3 (b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration." He argued that the goods cannot be classified in heading No. 95.02 or 95.03 in accordance with either Rule 1, 3 (a) or 3 (b) because they are not dolls or toys. With respect to the issue of durability, the representative noted that, in *Nicholson*, the Tribunal classified goods which were made of plastic and ceramics, all durable products, in heading No. 95.05. Furthermore, he argued that the use of the word "generally" in the Explanatory Notes to heading No. 95.05 means that goods do not necessarily have to be made of non-durable material in order to be classified in that heading.

3. Appeal No. AP-96-080, April 25, 1997.

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

5. *Supra* note 2, Schedule I.

Counsel for the respondent argued that the goods in issue are properly classified under tariff item Nos. 9502.10.00, 9503.49.00, 9503.70.00, 9503.70.10 and 9503.90.00 as dolls and toys. Counsel argued that the goods in issue are simply plastic figurines which represent human, animal or other non-human creatures, such as R2-D2. He argued that they serve a function in and of themselves and that they can entertain a child, even some adults, without being placed on a cake. In light of the Tribunal's decision in *Nicholson*, counsel conceded that a birthday is a festive occasion and that, as such, traditional birthday cake decorations would be classified in heading No. 95.05. However, counsel argued that the appellant has not shown that the goods in issue are traditional birthday cake decorations, rather than cake decorations in general, which, he argued, cannot be classified in heading No. 95.05. In counsel's view, this heading provides for the classification of such items as the number "6" for a child's sixth birthday or a sign that reads "Happy Birthday Billy." He argued that none of the goods in issue are those types of goods. They are simply figurines which happen to be used as cake decorations.

Next, counsel for the respondent submitted that only products which are made of non-durable material, such as paper, are intended to be classified in heading No. 95.05. In his view, the evidence shows that children could play with and be entertained by the goods in issue for quite a while. Finally, counsel submitted that the Tribunal should not give any weight to the licence agreement between the appellant and the vendor, as the proper classification must be determined at the time of importation. The use to which the goods will eventually be put is irrelevant.

When classifying goods in Schedule I to the *Customs Tariff*, the application of Rule 1 of the General Rules is of the utmost importance. This rule states that classification is first determined according to the terms of the headings and any relative Chapter Notes. Therefore, the Tribunal must determine whether the goods in issue are named or generically described in a particular heading. If they are, then they must be classified therein subject to any relative Chapter Note. Section 11 of the *Customs Tariff* provides that, in interpreting the headings or subheadings, the Tribunal shall have regard to the Explanatory Notes.

The issue is whether the goods in issue should be classified under tariff item No. 9505.90.90 as other festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes. 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."

The Tribunal considered a similar issue in *Nicholson*. In that case, the Tribunal determined that various plastic, porcelain, textile and artificial flower cake top ornaments and statuettes should be classified under tariff item No. 9505.90.90. The Tribunal held that these goods, which sat on or beside wedding or anniversary cakes were decorations or ornaments associated with particular festive occasions or festivals, namely, weddings and anniversaries. The Tribunal relied on the following definition of the word "festive" in the *Gage Canadian Dictionary*⁶ in reaching its decision: "for a feast, festival, or holiday; gay; joyous; merry: *A birthday or wedding is a festive occasion.*"⁷ The Tribunal also noted that a "decoration" is generally

6. (Toronto: Gage, 1997).

7. *Ibid.* at 574 and *supra* note 3 at 3.

defined as “anything used to add beauty: ornament⁸” and that an “ornament” is defined as “something used to add beauty, especially a beautiful object or part that has no particular function in itself.”⁹”

Following its reasoning in *Nicholson*, the Tribunal, in the present case, is of the view that a birthday is a festive occasion. The Tribunal is also of the view that other joyous events in a child’s life, of the type referred to in evidence, can also be considered festive occasions. Furthermore, the goods in issue, which are used exclusively on birthday cakes or cakes to celebrate such other joyous occasions, are decorations or ornaments associated with particular festive occasions. With respect to the use of the word “traditionally” in the Explanatory Notes to heading No. 95.05, the Tribunal agrees that traditions are created continuously. As a result, cake decorations which may be associated with a birthday one year may not necessarily be associated with such an event the following year. Furthermore, in the Tribunal’s view, there are many factors which could influence what cake decorations are traditionally associated with a birthday, for example, religion. As such, the Tribunal agrees with the appellant’s representative that the use of the word “traditionally” cannot stop the goods in issue from being classified in heading No. 95.05.

Furthermore, the Tribunal agrees that the use of the word “generally” in the Explanatory Notes to heading No. 95.05 means that goods do not necessarily have to be made of non-durable material in order to be classified in that heading. Accordingly, the Tribunal is of the view that the goods in issue are described in heading No. 95.05. The Tribunal is also of the view that the goods in issue are not dolls or toys and, therefore, cannot be classified in heading No. 95.02 or 95.03. As a result, relying on Rule 1 of the General Rules, the Tribunal finds that the goods in issue should be classified under tariff item No. 9505.90.90.

Accordingly, the appeals are allowed.

Charles A. Gracey

Charles A. Gracey

Presiding Member

Raynald Guay

Raynald Guay

Member

Robert C. Coates, Q.C.

Robert C. Coates, Q.C.

Member

8. *Supra* note 6 at 406 and *supra* note 3 at 3.

9. *Supra* note 6 at 1042 and *supra* note 3 at 3.