

Ottawa, Monday, May 29, 2000

Appeal No. AP-98-102

IN THE MATTER OF an appeal heard on October 26, 1999,
under section 67 of the *Customs Act*, R.S.C. 1985 (2d Supp.), c. 1;

AND IN THE MATTER OF decisions of the Deputy Minister of
National Revenue dated November 20, 1998, with respect to a
request for re-determination under section 63 of the *Customs Act*.

BETWEEN

CALEGO INTERNATIONAL INC.

Appellant

AND

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

DECISION OF THE TRIBUNAL

The appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Patricia M. Close

Patricia M. Close
Member

Michel P. Granger

Michel P. Granger
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-98-102

CALEGO INTERNATIONAL INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

This is an appeal under section 67 of the *Customs Act* from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the *Customs Act*. The issue in this appeal is whether certain plush articles imported by the appellant are properly classified under tariff item No. 4202.92.11 as tool bags, haversacks, knapsacks, packsacks and rucksacks, with an outer surface of textile materials, as determined by the respondent, or should be classified under tariff item No. 9503.41.00 as other stuffed toys representing animals or non-human creatures, as claimed by the appellant.

HELD: The appeal is allowed. The Tribunal finds that the goods in issue are *prima facie* rucksacks of heading No. 42.02. The Tribunal also finds that the goods in issue are *prima facie* other toys of heading No. 95.03. Because the description in each of the two headings under consideration relates to only one of the two functions of the goods in issue, the Tribunal considers that both headings are equally descriptive for the purposes of Rule 3 (a) of the *General Rules for the Interpretation of the Harmonized System*. The Tribunal finds that the goods in issue consist of different materials, but that, regardless of whether the essential character of the goods is found to be a rucksack or a toy, no single material gives the goods either character. Therefore, the Tribunal finds that Rule 3 (b) does not apply. The Tribunal is, therefore, directed by Rule 3 (c) to classify the goods in issue in the heading which occurs last in numerical order among those which equally merit consideration. The Tribunal finds that the goods in issue should be classified under tariff item No. 9503.41.00 as other stuffed toys representing animals or non-human creatures.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	October 26, 1999
Date of Decision:	May 29, 2000
Tribunal Members:	Arthur B. Trudeau, Presiding Member Raynald Guay, Member Patricia M. Close, Member
Counsel for the Tribunal:	Tamra Alexander John Dodsworth
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Michael Kaylor, for the appellant Claude Morissette, for the respondent

Appeal No. AP-98-102

CALEGO INTERNATIONAL INC.

Appellant

and

THE DEPUTY MINISTER OF NATIONAL REVENUE

Respondent

TRIBUNAL: ARTHUR B. TRUDEAU, Presiding Member
RAYNALD GUAY, Member
PATRICIA M. CLOSE, Member

REASONS FOR DECISION

This is an appeal under section 67 of the *Customs Act*¹ from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency) made under section 63 of the Act on November 20, 1998. The issue in this appeal is whether certain plush articles imported by the appellant are properly classified under tariff item No. 4202.92.11 of Schedule I to the *Customs Tariff*² as tool bags, haversacks, knapsacks, packsacks and rucksacks with an outer surface of textile materials, as determined by the respondent, or should be classified under tariff item No. 9503.41.00 as other stuffed toys representing animals or non-human creatures, as claimed by the appellant.³ The relevant tariff nomenclature is as follows:

- 42.02 Trunks, suit-cases, vanity-cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.
-Other:
- 4202.92 --With outer surface of sheeting of plastics or of textile materials
- 4202.92.11 ----Tool bags, haversacks, knapsacks, packsacks and rucksacks
- 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

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1. R.S.C. 1985 (2d Supp.), c. 1 [hereinafter Act].
 2. R.S.C. 1985 (3d Supp.), c. 41.
 3. The appellant commenced the hearing by stating that it was withdrawing the appeal with respect to the plush handbags and scarves. The appeal is only in respect of the plush backpacks.

EVIDENCE

Mr. Stephen Rapps, President, Calego International Inc., and Ms. Dawn Hilton, Buyer, Toys “R” Us (Canada) Ltd., testified on behalf of the appellant. Mr. Rapps testified that the appellant is an importer of handbags, packsacks, lunch kits and novelty items. He stated that the appellant has a licence from Disney for backpacks, luggage, lunch kits, kiddie bags, wallets, belt bags and other bags or holders. Mr. Rapps testified that the appellant does not have and would never get a licence to produce a toy. The appellant sells to retailers throughout Canada.

Mr. Rapps described the goods in issue as being composed of the plush body of a character with shoulder straps and a pouch of varying sizes. The plush body of the character is modelled on the licensed plush toy and is made of a tricot material filled with wadding to give it shape. The character’s appendages move. The straps are securely affixed to the plush body and cannot be removed. The size of the pouches ranges from those that can carry only very small items, like lipstick or a phone card, to larger pouches that can carry a bit more. Mr. Rapps testified that the largest pouch size is that contained in the plush body of the Winnie the Pooh character.

Mr. Rapps testified that the goods in issue are plush toys. He stated that the only differences between the goods in issue and the licensed toy versions are the straps and zipper and that there is a bit more wadding in the head or stomach of the licensed toy versions because there are no pouches. Although he would not recommend that a child take the goods in issue to bed, because of the straps, the goods have play value. He stated that children play with the goods in issue and that they are bought as an inexpensive alternative to the licensed toy versions. Mr. Rapps testified that the goods in issue are also fashion items. Mr. Rapps stated that the goods in issue were never designed to hold things for a purpose and that the straps and zipper on the goods in issue are there, in part, to permit the appellant to market plush toys without violating its licensing agreements.

Mr. Rapps testified that the goods in issue are manufactured by a toy factory and by a trading house that manufactures all different items in the People’s Republic of China. He stated that the goods in issue are tested according to toy standards and that this testing is done by “ACTS” and “ITLS”. A “Not recommended for children under 3” warning is placed on all the goods. Mr. Rapps stated that there was very little additional production cost associated with the straps, buckle and zipper, which are the materials that differentiate the goods in issue from the licensed toy versions.

Mr. Rapps testified that how the goods in issue are merchandized depends on who buys them. Mr. Rapps starts by offering the goods to his lead buyer at a particular retailer, who is usually the handbag buyer. If the lead buyer does not want the goods, Mr. Rapps will show them to other buyers at the retailer. If the handbag buyer buys the goods, they will be located in the handbag department. If the toy buyer buys the goods, they will be located in the toy department. Mr. Rapps stated that, in the last year, the goods in issue have basically moved from the handbag department to the toy department. Mr. Rapps testified that the goods in issue are sold to the toy buyer at Zellers, Sears and The Bay and to the backpack buyer at Toys “R” Us. Mr. Rapps indicated that merchandizing lines are blurring. By way of example, he stated that Bentley, a luggage and handbag store, now sells “Teletubbies” slippers.

Mr. Rapps testified that the goods in issue are unlike “traditional” backpacks, as backpacks have a larger capacity and can hold books, shoes, lunch kits, etc. A backpack also has padded shoulder straps. In cross-examination, Mr. Rapps acknowledged that backpacks currently come in a wide range of sizes, some of which are very small.

Ms. Hilton testified that the goods in issue are carried, are used for play and can carry small items, but not books. Ms. Hilton also testified that the goods in issue are bought as an economic alternative to the licensed toy versions. Ms. Hilton stated that there is a lot of overlap between the commodity areas at Toys “R” Us. She stated that the goods in issue are sold both in the backpack department and together with plush toys and other items, on special event islands. Ms. Hilton stated that she advertises the traditional backpack during back-to-school time because the customer is looking for something in which to carry books and that she advertises the goods in issue during the Christmas season because the customer is buying more toy products.

Mr. Luc Villeneuve, Tariff and Values Administrator, Customs Assessment Division, and Mr. Manmahipal Ahara, Tariff Administrator, Trade Administration and Dispute Resolution Division, both with the Department of National Revenue (now the Canada Customs and Revenue Agency), testified on behalf of the respondent. Mr. Villeneuve testified that the goods in issue are plush characters with a zippered opening and a compartment in which one can put various items. He indicated that there are adjustable straps on the goods which cannot be removed.

Mr. Villeneuve testified that the goods in issue are backpacks. He stated that the hang tags on the goods describe them as “plush backpacks”. He stated that he has seen the goods in issue in use as backpacks and that a great number of items can be put in some of them, depending on the size of the pouch. He testified that his nephew has a plush backpack and that he had never seen his nephew play with it. Mr. Villeneuve also conveyed the results of a survey of stores which he conducted. He stated that he did not see the goods in issue merchandized in the toy section of any of the stores that he visited and that none of the sales clerks, department managers or store managers that he interviewed thought the goods were toys. In cross-examination, Mr. Villeneuve acknowledged that he did not talk to any of the buyers.

Mr. Ahara testified that the goods in issue are advertised in luggage and leather goods flyers and that Sears advertised the goods in its back-to-school commercial.

ARGUMENT

In argument, the appellant stated that the goods in issue are toys. They are derived from existing licensed toy products and differ from those products only in that they have straps so that they can be carried on the shoulders and a zippered compartment that can carry a limited number of items. The appellant stated that the merchandizing of the goods in issue has more to do with the structure of the retailer and the appellant’s traditional distribution channels than the character of the goods. The appellant stated that the goods in issue have a strong amusement, entertainment and fun value and a very minor utilitarian carrying feature.

The appellant submitted that the goods in issue should be classified in heading No. 95.03 and that they are not adequately described in heading No. 42.02. The appellant submitted that the only item in heading No. 42.02 that could remotely describe the goods in issue is “rucksacks”. The appellant accepted the respondent’s definition of rucksack and provided the Tribunal with other definitions. The appellant submitted that these definitions demonstrated that, in order to be a “rucksack”, the goods in issue must be capable of carrying a significant amount of equipment or supplies. The appellant submitted that the compartment in the goods in issue is too small for them to be considered “rucksacks”. The appellant also submitted that the goods in issue could not be considered to be “similar containers” to a rucksack because they do not closely

resemble rucksacks, as required by *Crupi v. Canada Employment and Immigration Commission*.⁴ In particular, the primary purpose of the goods in issue is not to carry things, but to amuse people. In the alternative, the appellant submitted that, if the goods are “similar containers”, this is no more specific a description than “other toys” of heading No. 95.03.

The appellant submitted that the goods in issue are toys despite their limited utilitarian function. The appellant submitted that the *Explanatory Notes to the Harmonized Commodity Description and Coding System*⁵ to heading No 95.03 make it evident that toys can have a limited utilitarian function.

In the event that the Tribunal determines that the goods in issue are *prima facie* classifiable in both heading Nos. 42.02 and 95.03, the appellant submitted that neither heading provided a more specific description of the goods and that the goods could not be classified pursuant to Rule 3 (b) of the *General Rules for the Interpretation of the Harmonized System*⁶ because they are not mixtures or composite goods. The appellant submitted that the goods in issue are not made up of two materials or components, each of which give the goods a separate quality or separate usefulness. Therefore, they are not composite goods. In the alternative, if the Tribunal finds that the goods are composite goods, the appellant submitted that no single material gives the goods their “essential character”. Thus, pursuant to Rule 3 (c), the appellant submitted that the goods in issue should be classified in the heading which occurs last in numerical order, that being heading No. 95.03.

In argument, the respondent stated that the goods in issue are backpacks or rucksacks. Mr. Rapps referred to the goods in issue as backpacks in his testimony, and the appellant is a luggage company. The goods are marketed and advertised as backpacks, and one of the biggest buyers of these goods from the appellant is Bentley, a luggage store.

The respondent submitted that the goods in issue should be classified in heading No. 42.02 and that they are not toys of heading No. 95.03. The respondent submitted *The Concise Oxford Dictionary* definition of “rucksack” as “a bag slung by straps from both shoulders and resting on the back”, and of “backpack” as “a rucksack”.⁷ The respondent submitted that the size or carrying capacity of the goods is not referred to in the definitions. The respondent submitted that the appearance, design, marketing and distribution of the goods in issue all suggest that they are backpacks or rucksacks.

The respondent submitted that the goods in issue were not toys, as they were not safe to sleep with. The respondent also submitted that there was no clear evidence of the amusement value of the goods. Further, the respondent submitted that Disney and Mattel do not think that the goods are toys. However, should the Tribunal determine that the goods in issue are toys, the respondent submitted that the goods are more specifically described in heading No. 42.02 as rucksacks, since the description “stuffed toys” appears only at the subheading level. Therefore, pursuant to Rule 3 (a) of the General Rules, the goods in issue are properly classified in heading No. 42.02.

In the alternative, should the Tribunal determine that the goods in issue are not described more specifically in heading No. 42.02, the respondent submitted that the goods should be classified pursuant to Rule 3 (b) of the General Rules, according to the material or component that gives the goods their essential

4. [1986] 3 F.C. 3 (FCA).

5. Customs Co-operation Council, 2d ed., Brussels, 1996 [hereinafter Explanatory Notes].

6. *Supra* note 2, Schedule I [hereinafter General Rules].

7. 1990, s.v. “rucksack” and “backpack”.

character. The respondent submitted that the backpack components, the straps, zipper and buckles, give the goods their essential character, which is that of a backpack. Therefore, the goods are properly classified in heading No. 42.02.

On November 11, 1999, the Tribunal received written submissions from the parties concerning a U.S. Customs decision with respect to the classification of a transformable novelty backpack.⁸

DECISION

The first issue which the Tribunal must determine is whether the goods in issue are *prima facie* classifiable in two headings. Section 10 of the *Customs Tariff* provides that the classification of imported goods under a tariff item shall be determined in accordance with the General Rules and the *Canadian Rules*.⁹ Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings in Schedule I, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*¹⁰ and the Explanatory Notes.

The General Rules are structured in cascading form. If the classification of goods cannot be determined in accordance with Rule 1, then regard must be had to Rule 2, etc. Rule 1 provides the following:

The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall 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 [subsequent rules].

The competing headings in this case are as follows:

- 42.02 Trunks, suit-cases, vanity-cases, executive-cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; travelling-bags, toilet bags, rucksacks, handbags, shopping-bags, wallets, purses, map-cases, cigarette-cases, tobacco-pouches, tool bags, sports bags, bottle-cases, jewellery boxes, powder-boxes, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fibre or of paperboard, or wholly or mainly covered with such materials or with paper.
- 95.03 Other toys; reduced-size (“scale”) models and similar recreational models, working or not; puzzles of all kinds.

The Notes to Chapter 42 provide that the Chapter does not cover articles of Chapter 95. Similarly, the Notes to Chapter 95 provide that the Chapter does not cover sports bags or other containers of heading No. 42.02. Therefore, the competing headings are mutually exclusive.

The Tribunal finds that the goods in issue are *prima facie* rucksacks of heading No. 42.02. As noted by the respondent and accepted by the appellant, *The Oxford Concise Dictionary* defines a rucksack as “a bag slung by straps from both shoulders and resting on the back”, and a “backpack” as “a rucksack”.¹¹ It is clear from the evidence that the goods in issue include a bag or carrying compartment as well as shoulder straps that permit the bag to be slung from both shoulders and rest on the back. The Tribunal acknowledges

8. (7 November 1995), Ruling No. HQ 958308.

9. *Supra* note 2, Schedule I.

10. Customs Co-operation Council, 1st ed., Brussels, 1987.

11. *Supra* note 7.

that many of the goods in issue have a very limited carrying capacity. However, the Tribunal finds that the definition of rucksack does not require that the goods carry a certain minimum quantity, volume or weight of articles. Therefore, the Tribunal is of the view that the goods in issue are *prima facie* classifiable as rucksacks in heading No. 42.02.

The Tribunal also finds that the goods in issue are *prima facie* other toys of heading No. 95.03. The Explanatory Notes to Chapter 95 provide that the Chapter covers “toys of all kinds whether designed for the amusement of children or adults”. The Explanatory Notes to heading No. 95.03 provide that the heading covers “toys intended essentially for the amusement of persons (children or adults)”. The Explanatory Notes to heading No. 95.03 also provide that goods remain “toys” even if they are capable of a limited “use”. A toy is distinguished from the “real” item generally by its size and limited capacity. In *Zellers v. DMNR*¹² and in *Regal Confections v. DMNR*,¹³ the Tribunal stated that, in essence, a toy is something from which one derives pleasure or amusement. A toy is “an object which is intended to amuse and with which to play”.¹⁴

The Tribunal notes that the goods in issue are derived from existing licensed toy products and that they differ from these products only in that they have straps, a zippered compartment and less wadding to accommodate the zippered compartment. The Tribunal finds that the goods in issue were designed to “mimic” the licensed toy products and, therefore, were designed for the amusement of children. The Tribunal finds that, in light of the terms of the Explanatory Notes which acknowledge that a toy may have some limited “use”, the limited utilitarian function of the goods in issue of carrying some small items does not prevent the goods in issue from being classifiable as toys. Therefore, the Tribunal is of the view that the goods in issue are *prima facie* classifiable as other toys of heading No. 95.03.

Since the goods in issue are *prima facie* classifiable in two headings, Rule 3 (a) of the General Rules must be applied. The first sentence of Rule 3 (a) states that “[t]he heading which provides the most specific description shall be preferred to headings providing a more general description”. As indicated above, the Tribunal is of the view that the goods in issue function both as rucksacks, having a carrying function, and as toys, having an amusement function. Because the description in each of the headings under consideration mentions only one of these functions, the Tribunal considers that both headings are equally descriptive for the purposes of Rule 3 (a). Therefore, the Tribunal must proceed to Rule 3 (b).

Rule 3 (b) of the General Rules applies to mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale. The goods in issue are clearly not mixtures, nor are they goods put up in sets for retail sale. Therefore, the Tribunal must determine whether the goods in issue are composite goods. It is the Tribunal’s view that the goods in issue are not made up of different components. Although the goods in issue have two different functions relating to their characterization as rucksacks and toys, these functions are carried out by overlapping elements in the goods. There are no distinct components which, separately, perform each function. For example, in *Regal*, the baby bottles and the candy were distinct components which, separately, performed the function of a toy (the bottle) and candy (the candy). Similarly, in *Proctor-Silex Canada v. DMNR*,¹⁵ the heater and electric motor and fan were distinct components which, separately, performed an electro-thermic function (the heater) and an electro-mechanical function (the electric motor and fan). With respect to the goods in issue, the compartment which forms a key element of the rucksack function is also the stuffed toy body which forms a key element of

12. (29 July 1998), AP-97-057 (CITT).

13. (25 June 1999), AP-98-043, AP-98-044 and AP-98-051 (CITT) [hereinafter *Regal*].

14. *Zellers*, *supra* note 12 at 7.

15. (11 January 1994), AP-92-225 (CITT).

the toy function. Therefore, the Tribunal is of the view that the goods in issue are not made up of different components for the purposes of tariff classification.

However, the goods in issue do consist of different materials: the plush, the wadding, the zipper, the straps and the buckles. Rule 3 (b) of the General Rules then requires the goods to be classified “as if they consisted of the material . . . which gives them their essential character, insofar as this criterion is applicable”. The Tribunal finds that, regardless of whether the essential character of the goods is found to be the rucksack or the toy, no single material gives the goods either character. Therefore, Rule 3 (b) does not apply.

In light of this determination, the Tribunal is directed by Rule 3 (c) of the General Rules to classify the goods in issue in the heading which occurs last in numerical order among those which equally merit consideration. Therefore, the Tribunal finds that the goods in issue should be classified in heading No. 95.03 as “other toys”.

In conclusion, the Tribunal is of the view that the goods in issue should be classified under tariff item No. 9503.41.00 as other stuffed toys representing animals or non-human creatures. Consequently, the appeal is allowed.

Arthur B. Trudeau

Arthur B. Trudeau
Presiding Member

Raynald Guay

Raynald Guay
Member

Patricia M. Close

Patricia M. Close
Member