



Ottawa, Wednesday, August 30, 2000

**Appeal No. AP-99-074**

IN THE MATTER OF an appeal heard on March 22, 2000, 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 July 30, 1999, with respect to a request for redetermination under section 63 of the *Customs Act*.

**BETWEEN**

**AVON CANADA INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

**Respondent**

**DECISION OF THE TRIBUNAL**

The appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member

Michel P. Granger  
Michel P. Granger  
Secretary

UNOFFICIAL SUMMARY

Appeal No. AP-99-074

AVON CANADA 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), dated July 30, 1999, pursuant to section 63 of the *Customs Act*. The issue in this appeal is whether imported goods described as “Holiday Melody Clocks” are properly classified under tariff item No. 9105.99.90 as other clocks, as determined by the respondent, or should be classified under classification No. 9505.10.00.10 as articles for Christmas festivities, as claimed by the appellant.

**HELD:** The appeal is dismissed.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	March 22, 2000
Date of Decision:	August 30, 2000
Tribunal Member:	Patricia M. Close, Presiding Member
Counsel for the Tribunal:	Gerry Stobo
Clerk of the Tribunal:	Margaret Fisher
Appearances:	Raylene Van Vliet, for the appellant Louis Sébastien, for the respondent

**Appeal No. AP-99-074**

**AVON CANADA INC.**

**Appellant**

**AND**

**THE DEPUTY MINISTER OF NATIONAL REVENUE**

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TRIBUNAL: PATRICIA M. CLOSE, Presiding Member

### **REASONS FOR DECISION**

This is an appeal under section 67 of the *Customs Act*<sup>1</sup> from decisions of the Deputy Minister of National Revenue (now the Commissioner of the Canada Customs and Revenue Agency), dated July 30, 1999, pursuant to section 63 of the Act. The issue in this appeal is whether imported goods described as “Holiday Melody Clocks” are properly classified under tariff item No. 9105.99.90 of Schedule I to the *Customs Tariff*<sup>2</sup> as other clocks, as determined by the respondent, or should be classified under classification No. 9505.10.00.10 as articles for Christmas festivities, as claimed by the appellant.

The goods in issue, referred to as “Holiday Melody Clocks”, are in the shape of a snow-covered Victorian period house decorated in a Christmas motif. The decoration includes human figures, standing in front of a house, that appear to be carolling. The timepiece dial of the clock is set in the middle of a large Christmas wreath on the front of the house. Each of the 12 hours on the time dial are shown — 4 Roman numerals, 4 golden dots and 4 lights. The clock has hour, minute and seconds hands.

The goods in issue contain a music box that plays different Christmas tunes every hour on the hour and, at the same time, the lights in the wreath flash. The music can be turned off without affecting the timing operation.<sup>3</sup>

According to the analysis of the Laboratory and Scientific Services Directorate, Department of National Revenue (now the Canada Customs and Revenue Agency), the goods in issue are electronically operated and regulated by a piezo-electric quartz crystal (more commonly known as a quartz crystal).<sup>4</sup> The goods in issue run on three AA batteries.

The relevant tariff nomenclature is as follows:

91.05 Other clocks.  
-Alarm clocks:  
9105.11.00 --Electrically operated  
9105.19 --Other  
-Wall clocks:  
9105.21 --Electrically operated

1. R.S.C. 1985 (2d Supp.), c. 1.
2. R.S.C. 1985 (3d Supp.), c. 41.
3. Respondent’s brief at tab 1.
4. *Ibid.* at tab 2.

9105.29.00	--Other
	-Other:
9105.91	--Electrically operated
9105.99	--Other
9105.99.90	---Other
95.05	Festive, carnival or other entertainment articles, including conjuring tricks and novelty jokes.
9505.10.00	-Articles for Christmas festivities
9505.90	-Other
9505.90.90	---Other

The appellant submits that the goods in issue cannot be classified according to Rule 1 of the *General Rules for the Interpretation of the Harmonized System*<sup>5</sup> because the articles are, in fact, a composite of two products: a Christmas decoration and a timekeeping device.<sup>6</sup> Consequently, no one heading properly describes the goods in issue. Rather, the appellant states that the goods in issue should be classified as festive decorations or ornaments according to Rule 3 (b), which directs the Tribunal to look at the “essential character” of the goods in issue when dealing with products that are mixtures or composite goods consisting of different materials or made up of different components,<sup>7</sup> which, in this case, according to the appellant, consist of the clock and its decorative housing.<sup>8</sup>

There is support for the appellant’s position that the goods in issue have qualities that might bring them within the ambit of heading No. 95.05. Reference was made to the *Explanatory Notes to the Harmonized Commodity Description and Coding System*<sup>9</sup> to heading No. 95.05 which indicate the type of goods that this heading is intended to cover, which are the following:

- (A) Festive, carnival or other entertainment articles, which in view of their intended use are generally made of non-durable material. They include:
- (1) Decorations such as festoons, garlands, Chinese lanterns, etc., as well as various decorative articles made of paper, metal foil, glass fibre, etc., for Christmas trees (e.g., tinsel, stars, icicles), artificial snow, coloured balls, bells, lanterns, etc. Cake and other decorations (e.g., animals, flags) which are traditionally associated with a particular festival are also classified here.
  - (2) Articles traditionally used at Christmas festivities, e.g., artificial Christmas trees (these are sometimes of the folding type), nativity scenes, Christmas crackers, Christmas stockings, imitation yule logs.

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5. R.S.C. 1985 (3d Supp.), c. 41, Schedule I [hereinafter General Rules].

6. The Tribunal is directed by section 10 of the *Customs Tariff* to classify goods in accordance with the General Rules and the *Canadian Rules*.

7. Rule 3 (b) of the General Rules states: “Mixtures, composite goods consisting of different materials or made up of different components, and goods put up in sets for retail sale, which cannot be classified by reference to 3 (a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable”.

8. The appellant cited several decisions in support of its position, including *Nicholson Equipment v. DMNR* (25 April 1997), AP-96-080 (CITT); *Outils Royal Tools v. DMNRCE* (17 September 1993), AP-92-151 (CITT); and *N.C. Cameron & Sons v. DMNR* (11 February 2000), AP-98-047 (CITT).

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

To further support its argument, the appellant referred the Tribunal to Customs Notice N-179<sup>10</sup> which provides administrative guidance as to how the respondent interprets heading No. 95.05. According to that notice, goods classified in heading No. 95.05 “must be decorative in nature or provide entertainment value during the holiday season”.<sup>11</sup> Examples include “animated and/or illuminated figurines, dressed in festive outfits with accessories celebrating the Christmas season, for consumer use with the primary value to entertain”,<sup>12</sup> and “ornamental articles decorated with seasonal themes such as wreaths, garlands, holly, snow, or figures engaging in seasonal activities or playing seasonal music”.<sup>13</sup> At one level, these examples would cover the goods in issue.

That said, it is also important to note that Customs Notice N-179 goes on to state that decorative goods included for classification in heading No. 95.05 must not have a utilitarian function.<sup>14</sup> Articles with a utilitarian function that have design or ornamentation appropriate to a specific holiday, or articles which are themselves not specifically holiday-related and can be used year round, should be classified in their specific heading<sup>15</sup> and not in heading No. 95.05. Goods that should be excluded from this heading would include those “goods in which the **utilitarian function predominates** and designed in a variety of patterns (which may be festive, amusing, or unusual), such as bathroom coordinates, dishes, mugs, glassware”.<sup>16</sup>

The goods in issue certainly carry a decorative or ornamental quality, particularly relevant to the Christmas season. That said, they are marketed as clocks, albeit festive ones. The appellant’s marketing literature features the seasonal nature of the clocks. It states:

NEW  
Holiday Melody Clock  
Add to the holiday fun with  
this unique and festive time piece<sup>17</sup>

As noted above, the words in the advertising literature published by the appellant make it clear that the phrase “Holiday Melody” modifies the noun “Clock”. Furthermore, the advertising literature goes on to state that these “unique and festive timepiece[s]”<sup>18</sup> add to the enjoyment of the holiday season. The goods in issue are described in the appellant’s catalogue as a “real clock[s]”.<sup>19</sup> Although the goods in issue have a decorative or ornamental role during the Christmas season, they also serve a very utilitarian function. In the Tribunal’s view, the predominant feature of the goods in issue is the timekeeping component.

While the appellant’s arguments have some merit, it is the Tribunal’s view that the goods in issue can be classified according to Rule 1 of the General Rules and that it is unnecessary to resort to Rule 3 (b). Rule 1 is of critical importance in the classification of goods within the *Customs Tariff*. The General Rules are designed in a hierarchical manner and are expected to be applied in the order in which they are set out. In other words, if goods cannot be classified according to Rule 1, regard must then be had to Rule 2 (a). If the classification of goods cannot be done according to Rule 2 (a), then regard must be had to Rule 2 (b), and so on until the classification exercise is completed.

10. Department of National Revenue, “The Administration of Heading 95.05” (3 November 1997).

11. *Ibid.* at 5.

12. *Ibid.*

13. *Ibid.*

14. *Ibid.*

15. *Ibid.*

16. *Ibid.* at 7.

17. *Supra* note 3.

18. *Ibid.*

19. Appellant’s brief at para. 10.

In considering whether Rule 1 of the General Rules can be used to classify the goods in issue, one must look at the Explanatory Notes. They provide a commentary on the scope of each heading (and, where applicable, each subheading) and give illustrative examples of goods that are included in and excluded from that heading or subheading. The Explanatory Notes also provide technical descriptions of the products whenever necessary. Therefore, if the Tribunal can, taking into account the headings and subheadings along with the applicable Explanatory Notes, arrive at a classification using Rule 1, that concludes the matter. It is only when reliance on one of the General Rules will not suffice that the subsequent rules are considered.

The Explanatory Notes to Chapter 91 indicate that products included in the chapter are “designed **mainly** for measuring time” (emphasis added). This wording presupposes that a time-measuring apparatus may serve other functions. The Explanatory Notes to this chapter specifically exclude “(c) Toy clocks and watches and Christmas tree accessories in the form of clocks or watches, such as those without clock or watch movements (**heading 95.03 or 95.05**)”, which the goods in issue are clearly not.<sup>20</sup>

The Tribunal is of the view that the goods in issue are properly classified in heading 91.05 and, more particularly, under tariff item No. 9105.99.90, as timekeepers that are “essentially constructed for indicating the time of day”. The Explanatory Notes provide examples of the kinds of clocks included in this heading. These include period clocks, special regional forms of fancy clocks, alarm clocks, electronic clocks and piezo-electric quartz crystal clocks, this latter type being similar to the goods in issue.

The Christmas season motif of the clock housing does not detract from the fact that the goods in issue are timekeeping devices regulated by a piezo-electric quartz crystal. It is these products that Chapter 91 was intended to cover. The Explanatory Notes acknowledge that clocks may come in many different forms and styles. They may have functions other than just providing the time of day. They may be dressed up in a unique manner, such as cuckoo clocks or Westminster chiming clocks, in order to make them more interesting and appealing to consumers. The Explanatory Notes acknowledge the wide variety of shapes, sizes and motifs in which clocks might be housed. The scope of the Explanatory Notes in relation to the goods in issue is broad enough to include Holiday Melody Clocks.

The Tribunal finds support for its position taking into account Customs Notice N-179 which provides a comprehensive explanation of the manner in which the respondent interprets heading No. 95.05. While the Tribunal is not bound to follow customs notices, it does have regard to their contents. In this case, the respondent’s interpretative approach is helpful in setting out the type of products that should and should not be included in this heading. While it is not specifically enumerated in Customs Notice N-179, the Tribunal believes that the holiday clock in issue would fall into the category of goods that are excluded because its predominant function is a utilitarian one, i.e. as a timekeeping device.

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20. Goods classified in heading No. 95.03 include toys that may be reduced in size or be replicas of larger “working” model appliances, implements and tools. The goods covered by this heading may be mechanically or electrically operated. However, the products covered by heading No. 95.03 are “generally distinguishable by their size and limited capacity from [the real goods]” that they replicate, although the toy may be capable of some “use”. Even though the toys can be used to a limited extent in the same manner as the object that they replicate, they are not intended to be replacements for the real goods. For example, it is possible that a play tea set, with cups, saucers and a tea pot could be used to serve a beverage. However, its design and construction material would not render it suitable for household use in place of a real tea set designed and constructed to hold and serve hot beverages. The type of goods covered by heading No. 95.03, according to the Explanatory Notes, includes toys. Admittedly, the goods in issue have some amusement value as a seasonal decoration, but they have an obvious utilitarian function as a clock. Simply put, the goods in issue are not toys. Therefore, heading No. 95.03 is not an appropriate heading in which to classify the goods in issue (watches and clocks alongside other play items, such as toy sewing machines, dolls’ houses and furniture, etc.).

Taking into account all of the above factors, the appeal is dismissed.

Patricia M. Close  
Patricia M. Close  
Presiding Member