



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Appeals

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## DECISION AND REASONS

Appeal No. AP-2016-002

Premier Gift Ltd.

v.

President of the Canada Border  
Services Agency

*Decision and reasons issued  
Tuesday, February 21, 2017*

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IN THE MATTER OF an appeal heard on October 20, 2016, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 20, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

**BETWEEN**

**PREMIER GIFT LTD.**

**Appellant**

**AND**

**THE PRESIDENT OF THE CANADA BORDER SERVICES  
AGENCY**

**Respondent**

**DECISION**

The appeal is allowed.

Ann Penner  
Ann Penner  
Presiding Member

Place of Hearing: Ottawa, Ontario  
Date of Hearing: October 20, 2016  
Tribunal Panel: Ann Penner, Presiding Member  
Support Staff: Eric Wildhaber, Counsel  
Dustin Kenall, Counsel  
Stéphanie Desjardins, Student-at-law

**PARTICIPANTS:****Appellant**

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## STATEMENT OF REASONS

### INTRODUCTION

1. Premier Gift Ltd. (Premier Gift) filed this appeal with the Canadian International Trade Tribunal (the Tribunal) pursuant to subsection 67(1) of the *Customs Act*<sup>1</sup> from a re-determination of tariff classification by the President of the Canadian Border Services Agency (CBSA) dated January 20, 2016, made pursuant to subsection 60(4) of the *Act*.

2. The issue in this appeal is whether garden flags printed with various themes and pictures (the goods in issue) are properly classified under tariff item No. 6307.90.99 of the schedule to the *Customs Tariff*<sup>2</sup> as other made-up articles of textiles, as determined by the CBSA, or should be classified under tariff item No. 4911.91.90 as other printed matter, including pictures, designs and photographs, as claimed by Premier Gift.<sup>3</sup>

### PROCEDURAL HISTORY

3. The goods in issue were imported in multiple transactions between 2011 and 2015 under tariff item No. 6307.90.99 as other made-up articles of textiles.

4. On May 25, 2015, Premier Gift applied for a refund of duties under section 74 of the *Act*, requesting that the goods in issue be classified under tariff item No. 4911.99.90. The CBSA denied the request. On October 20, 2015, Premier Gift challenged the denial to the CBSA under section 60 of the *Act*.<sup>4</sup> The CBSA confirmed the denial on January 20, 2016.<sup>5</sup>

5. On April 18, 2016, Premier Gift appealed the CBSA's decision to the Tribunal, pursuant to section 67 of the *Act*.

6. Both parties filed briefs as well as pictures and physical samples of the goods in issue. Premier Gift filed forty-eight images of the goods in issue from its online catalogue on June 17, 2016, and six physical samples of the goods in issue on September 23, 2016. On October 14, 2016, the CBSA submitted 33 physical exhibits of flags depicting various Canadian historical events, provincial flags and other matters.

7. On October 20, 2016, the Tribunal held a public hearing, during which neither party called any witnesses.

8. During the hearing, the Tribunal requested further submissions on the potential applicability of tariff item No. 4911.91.90 (other printed matter, including pictures, designs and photographs), in the event that it were to conclude that the goods in issue should be classified under Chapter 49 instead of Chapter 63. This request was formalized by a letter dated October 24, 2016. Premier Gift and the CBSA provided submissions on November 7, 2016, and November 14, 2016, respectively, as will be explained more fully below.

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1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].

2. S.C. 1997, c. 36.

3. As will be explained below, the parties agreed that to the extent the goods in issue are properly classifiable under Chapter 49 rather than Chapter 63, the proper tariff item number is 4911.91.90 as opposed to 4911.99.90, as Premier Gift originally submitted. The Tribunal's analysis will proceed accordingly.

4. Exhibit AP-2016-002-04A, Appendix 2-1, Vol. 1.

5. *Ibid.*, Appendix 2-8.

## DESCRIPTION OF THE GOODS IN ISSUE

9. The goods in issue are garden flags made of a textile material of 100 percent polyester fabric. They are hemmed on four edges, with varying dimensions, but generally 31 cm in width and 45 cm in length. The garden flags are designed to hang from small poles in the home or garden. All feature printed thematic or seasonal images; some also feature greetings such as “Welcome”, “Merry Christmas”, or “Happy Easter”. The images are printed onto both sides of the garden flags by a screen-printing process.<sup>6</sup>

## LEGAL FRAMEWORK

10. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).<sup>7</sup> The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and under tariff items.

11. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*<sup>8</sup> and the *Canadian Rules*<sup>9</sup> set out in the schedule.

12. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that 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 other rules.

13. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*<sup>10</sup> and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,<sup>11</sup> published by the WCO. While *Classification Opinions* and *Explanatory Notes* are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.<sup>12</sup>

14. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant *Classification Opinions* and *Explanatory Notes*. It is only where Rule 1 does not conclusively determine the classification of the goods that the other General Rules become relevant to the classification process.<sup>13</sup>

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6. *Ibid.*, Appendix 1.

7. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.

8. S.C. 1997, c. 36, schedule [*General Rules*].

9. S.C. 1997, c. 36, schedule.

10. World Customs Organization, 2nd ed., Brussels, 2003.

11. World Customs Organization, 5th ed., Brussels, 2012 [*Explanatory Notes*].

12. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131 (CanLII) at paras. 13, 17, where the Federal Court of Appeal interpreted section 11 of the *Customs Tariff* as requiring that explanatory notes be respected unless there is a sound reason to do otherwise. The Tribunal is of the view that this interpretation is equally applicable to classification opinions.

13. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38 (CanLII) at para. 21.

15. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to determine the proper subheading. Rule 6 of the *General Rules* provides that “. . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . .” and that “. . . the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

16. Finally, the Tribunal must determine the proper tariff item classification. Rule 1 of the *Canadian Rules* provides that “. . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . .” and that “. . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires.” Classification opinions and explanatory notes do not apply to classification at the tariff item level.

## TERMS OF RELATIVE HEADINGS AND LEGAL AND EXPLANATORY NOTES

### Relevant Classification Provisions Concerning Heading No. 49.11

17. The relevant tariff nomenclature concerning heading No. 49.11 provides as follows:

#### SECTION X

**PULP OF WOOD OR OF OTHER FIBROUS CELLULOSIC MATERIAL;  
RECOVERED (WASTE AND SCRAP) PAPER OR PAPERBOARD;  
PAPER AND PAPERBOARD AND ARTICLES THEREOF**

...

#### Chapter 49

**PRINTED BOOKS, NEWSPAPERS, PICTURES  
AND OTHER PRODUCTS OF THE PRINTING INDUSTRY;  
MANUSCRIPTS, TYPESCRIPTS AND PLANS**

...

**49.11 Other printed matter, including printed pictures and photographs.**

...

**- Other:**

**4911.91 - - Pictures, designs and photographs**

...

4911.91.90 - - - - - Other

...

**4911.99 - - Other**

...

4911.99.90 - - - - - Other

18. The relevant explanatory notes to Chapter 49 provide as follows:<sup>14</sup>

**GENERAL**

With the *few exceptions* referred to below, this Chapter covers all printed matter of which the *essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial representations*.

On the other hand, besides the goods of **heading 48.14** or **48.21**, paper, paperboard or cellulose wadding, or articles thereof, in which the printing is merely incidental to their primary use (e.g., printed wrapping paper and printed stationery) fall in **Chapter 48**. Also, printed textile articles such as scarves or handkerchiefs, in which the printing is *mainly* for decorative or novelty purposes and does not affect the essential character of the goods, embroidery fabrics and prepared tapestry canvases bearing printed designs fall in **Section XI**.

Goods of **heading 39.18, 39.19, 48.14** or **48.21** are also **excluded** from this Chapter, even if they are printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods.

For the purposes of this Chapter, the term “printed” includes not only reproduction by the several methods of ordinary hand printing (e.g., prints from engravings or woodcuts, other than originals) or mechanical printing (letterpress, offset printing, lithography, photogravure, etc.), but also reproduction by duplicating machines, production under the control of an automatic data processing machine, embossing, photography, photocopying thermocopying or typewriting (see Note 2 to this Chapter), irrespective of the form of the characters in which the printing is executed (e.g., letters of any alphabet, figures, shorthand signs, Morse or other code symbols, Braille characters, musical notations, pictures, diagrams). *The term does not, however, include coloration or decorative or repetitive-design printing.*

...

In general the goods of this Chapter are executed on paper but the goods may be on other materials provided they have the characteristics described in the first paragraph of this General Explanatory Note. . . .

In addition to the more common forms of printed products (e.g., books, newspapers, pamphlets, pictures, advertising matter), this Chapter covers such articles as: printed transfers (decalcomanias); printed or illustrated postcards, greeting cards; calendars, maps, plans and drawings; postage, revenue or similar stamps.

[Bold in original, italics added]

19. The relevant explanatory notes to heading No. 49.11 provide as follows:

This heading covers all printed matter (including photographs and printed pictures) of this Chapter (see the General Explanatory Note above) but not more particularly covered by any of the preceding headings of the Chapter.

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14. There are no relevant section or chapter notes or classification opinions.



**Relevant Classification Provisions Concerning Heading No. 63.07**

20. The relevant provisions concerning heading No. 63.07 provide as follows:

SECTION XI  
TEXTILES AND TEXTILE ARTICLES

...

Chapter 63

OTHER MADE UP TEXTILE ARTICLES; SETS;  
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS

...

**63.07 Other made up articles, including dress patterns.**

...

**6307.90 - Other**

...

--- Other:

6307.90.99      - - - - Of other textile materials

21. The relevant explanatory notes to heading No. 63.07 provide as follows:<sup>15</sup>

This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.

It includes, in particular:

...

(4) Flags, pennants and banners, including bunting for entertainments, galas or other purposes.

...

The heading **excludes** textile articles classified in more specific headings of this Chapter or of Chapters 56 to 62. It further **excludes**:

...

(c) Printed matter (**Chapter 49**).

**PRELIMINARY ISSUES**

22. At the start of the hearing, Premier Gift moved that the exhibits filed by the CBSA on October 14, 2016, be excluded from the record as filed late without leave of the Tribunal and without sufficient notice. The Tribunal denied the motion on the basis that the CBSA had filed the exhibits late for reasons beyond its control. However, in fairness to Premier Gift, the Tribunal also ordered a brief adjournment of the hearing to allow counsel to inspect the exhibits. Further, the Tribunal granted leave for Premier Gift to file additional written submissions limited to any arguments raised by the CBSA at the

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15. There are no relevant section or chapter notes or classification opinions.

hearing relating to the late filings. On November 7, 2016, Premier Gift declined the offer to provide additional submissions on this matter.<sup>16</sup>

23. As noted above, during the hearing, the Tribunal asked parties to comment on the potential applicability of tariff item No. 4911.91.90 were it to find that the goods should be classified under Chapter 49 instead of Chapter 63. It also granted leave for both parties to file additional written submissions following the hearing should they so choose.

24. On November 7, 2016, Premier Gift filed an additional submission in which it conceded that the appropriate tariff item number is 4911.91.90 because it is more specific than tariff item No. 4911.99.90.<sup>17</sup> On November 14, 2016, the CBSA filed a reply, agreeing that tariff item No. 4911.91.90 would be the appropriate item number should the Tribunal find Chapter 49 to be the correct chapter for the goods in issue.<sup>18</sup> Accordingly, the Tribunal's analysis will proceed by considering tariff item No. 4911.91.90, not 4911.99.90.

### TRIBUNAL ANALYSIS

25. The issue in this appeal is whether the goods in issue are properly classified under tariff item No. 6307.90.99 as other made up articles of textiles, as determined by the CBSA, or should be classified under tariff item No. 4911.91.90 as other printed matter, including pictures, designs and photographs, as claimed by Premier Gift.

26. To decide that issue, the Tribunal will start its analysis by considering the applicability of Chapter 49, by virtue of the explanatory notes to heading No. 63.07, which exclude printed matter of Chapter 49.<sup>19</sup> Only if the goods are found not to fall under Chapter 49 will the Tribunal turn to heading No. 63.07.

27. The explanatory notes to Chapter 49 provide that "printed matter" may be printed on media other than paper. They also set out two conditions to determine what is and what is not considered "printed matter": (1) the "essential nature and use" of the goods must be determined by the printing, which must consist of "motifs, characters or pictorial representations"; and (2) the printing must not be mere "coloration or decorative or repetitive design printing".

28. For the reasons given below, the Tribunal finds that the goods in issue meet these requirements and should therefore be classified as "printed matter" under Chapter 49 in general, and subheading No. 4911.91 in particular.

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16. Exhibit AP-2016-002-23 at para. 1, Vol. 1B.

17. *Ibid.* at para. 2.

18. Exhibit AP-2016-002-24 at para. 9, Vol. 1B.

19. The Tribunal has previously held that goods are not *prima facie* classifiable in two headings if, by virtue of a relevant section or chapter note, the terms of one heading are excluded from the terms of the other. Accordingly, the Tribunal has started any analysis with the heading or headings that are excluded by the note. *Build.Com Inc. v. President of the Canada Border Services Agency* (14 December 2016), AP-2015-033 (CITT) at para 29; *Costco Wholesale Canada Ltd. v. President of the Canada Border Services Agency* (29 July 2013), AP-2012-041 and AP-2012-042 (CITT) at para 46; *Cross Country Parts Distribution Ltd. v. Canada (Border Services Agency)*, 2015 FCA 187 (CanLII).

### Are the Goods in Issue Printed Matter?

29. Premier Gift argued that the textile fabric of the flag is merely a canvas for the printed images. It submitted that the images on the garden flags are affixed by a screen printing process in which the textile fabric acts as the functional equivalent of paper. While the CBSA did not contest that the garden flags are indeed printed using a screen printing process, it submitted that Chapter 49 generally covers goods executed on paper and that the garden flags are not made of paper or a paper-like substance.<sup>20</sup>

30. While the goods in issue are made of 100 percent polyester fabric, the Tribunal finds that they are “printed matter”. The explanatory notes to Chapter 49 clearly provide that “printed matter” does not need to be on paper alone. Accordingly, the Tribunal finds that the textile fabric of which the goods in issue are made is simply the medium on which the printed images are printed and, thus, displayed.

31. The Tribunal will now turn to the two conditions set out in the explanatory notes to Chapter 49. The parties do not dispute that the goods in issue are printed with “motifs, characters or pictorial representations”. Likewise, they accept that the printing is not mere “coloration” or “repetitive design” printing. Therefore, the Tribunal will focus on whether (1) the printed matter on the goods in issue determines their “essential nature and use”; and (2) whether the printing is merely “decorative”.

### Is the Essential Nature and Use of the Goods in Issue Determined by the Fact of Their Being Printed with Motifs, Characters or Pictorial Representations?

32. Premier Gift argued that the essential nature and use of the garden flags is determined by the printing. Without the printing, Premier Gift suggested that the goods in issue would have no practical use as they would simply be blank, white flags. Premier Gift further argued that the goods in issue are of the same nature as the goods in File No. AP-2009-056 (*Future Product*),<sup>21</sup> a case in which the Tribunal found polyester flags with National Hockey League logos affixed by screen printing to be “printed” images within the meaning of Chapter 49. As in *Future Product*, Premier Gift maintained that the goods in issue are used to celebrate and display something that is important to an individual, whether it be a sports team, a season, a holiday, or a welcome to one’s home. Finally, Premier Gift claimed that because the goods in issue are printed with licensed intellectual property, they had specificity, recognition and meaning beyond mere coloration or generic decorative or repetitive design.

33. In response, the CBSA argued that because the images on the goods in issue are simply seasonal and holiday scenes and motifs (e.g., flowers), the images are merely “decorative” and, thus, cannot be considered printed matter. The CBSA also argued that the goods in issue cannot be considered “printed matter” because they are used merely to “decorate” (i.e., to ornament) one’s home or garden.

34. The Tribunal finds that the essential nature and use of the goods in issue is determined by the images printed upon them. The printed images define the goods in issue and establish the very reason for which the goods were made, purchased and used. In this way, the Tribunal finds that the printing provides the essential nature or *raison d’être* of the goods in issue; in the words of *Future Product*, “. . . the printing is the product and the product is the printing.”<sup>22</sup>

35. As the parties agreed, the goods in issue can be used as decorations. Nevertheless, the Tribunal finds that the goods in issue are not decorations because they are garden flags. Rather, the goods in issue

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20. Exhibit AP-2016-002-07A at paras. 8, 29, Vol. 1A.

21. *Future Product Sales Inc. v. President of the Canada Border Services Agency* (8 July 2010) [*Future Product*].

22. *Future Product* at paras. 38-39.

are decorations because of the printed images that they display. Without the images, the garden flags have no purpose in and of themselves.<sup>23</sup> Put another way, the goods in issue are used to display the printed images that make them printed matter, and can thereby be used to decorate a garden or the outside of a home.

36. Printed images on any other medium would not be suitable as garden flags. However, given that the goods in issue are made of textile fabric and, thus, impervious to wind, rain, snow or heat, the consumer can display the printed images outside of the home or a garden. In that sense, the garden flags are simply the manner in which the printed images are displayed for all to see and enjoy.

37. As such, the Tribunal finds that the first condition has been met; the essential nature and use of the goods in issue are indeed determined by their printed images. It will now turn to the second condition in the explanatory notes to Chapter 49.

### Is the Printing Merely “Decorative”?

38. The Tribunal finds that the printing is not merely decorative. All of the images on the garden flags are pictures of a festive, welcoming, seasonal or otherwise specific thematic nature. For example, some of the goods in issue depict a harvest scarecrow, a chick standing on Easter eggs or a pumpkin on a fall background.<sup>24</sup> Others feature pictures of sunflower fields in the wild, angels, snowmen, birds, reindeer, moose, a cottage in the woods in winter, and a cat with a butterfly on its nose and the message “live joyfully”. Some of these pictures are artistic renderings sufficiently original to be protected by copyright laws.<sup>25</sup> In this way, the Tribunal finds that the printing goes well beyond designs or abstract, geometric images, as might be found on generic wall paper, bunting or wrapping paper.

39. The CBSA argued that the printed matter is merely decorative because the purpose of the goods is solely to decorate one’s home and garden. The Tribunal disagrees. The word “decorative” does not focus on the use of the good but of the printing in relation to the good. The explanatory notes to Chapter 49 are clear: what is excluded are goods on which the printing is *merely* decorative; it does not matter if the good itself is decorative, as long as the printing on the good is not:

... printed textile articles such as scarves or handkerchiefs, *in which the printing is mainly for decorative or novelty purposes and does not affect the essential character of the goods* ... fall in **Section XI**.

[Bold in original, italics added]

40. The word “decorative” must not be read either in isolation or more broadly than the notes warrant. The explanatory notes begin by affirming that “[w]ith the few exceptions referred to below, [Chapter 49] covers all printed matter of which the essential nature and use is determined by the fact of its being printed with motifs, characters or pictorial *representations*” [emphasis added]. It then excludes printing that is mere

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23. It is notable that the *Explanatory Notes* specifically exclude certain goods (goods of heading Nos. 39.18, 39.19, 48.14 or 48.21) from being classified as printed matter even where they contain printed matter that is “not merely incidental to the primary use of the goods”, i.e., where the printed matter is essential. In this manner, some goods are excluded from being classified as printed matter even when the printing appearing on them defines their essential nature. Notably, flags are not included in this list of excluded goods, although they could have been had the drafters concluded that the form of flags is more important as a matter of tariff classification than what is printed on them.

24. Exhibits AP-2016-002-A-04; AP-2016-002-A-03; AP-2016-002-A-06.

25. Exhibit AP-2016-002-016, Vol. 1A.

“coloration, decorative or repetitive-*design* printing” [emphasis added]. The French version of the explanatory notes provides as follows: “Le terme *imprimé ne couvre pas*, cependant, les impressions et illustrations obtenues par *indiennage*.” *Indiennage* refers to a style of ornamental, often floral, design cotton fabrics, in English sometimes termed “calico printing”.<sup>26</sup> Read together, the English and French versions thus limit the exclusion to printing that simply consists of colouration or repetitive or ornamental designs, as opposed to an actual picture or image like those on the goods in issue.

41. To some extent, all printing can be decorative in the sense that it adds beauty to the place in which the printing appears. Nevertheless, the phrase “coloration, decorative or repetitive-design printing” and the word *indiennage* cannot be read to exclude from printed matter all printing that is decoration—under such an interpretation, a print on a flag of Vincent Van Gogh’s “Sunflowers” would be deemed merely decorative rather than a work of art. That the floral art on the goods in issue does not rise to the level of a Van Gogh is no reason to classify it differently under the tariff classification.

42. As such, the Tribunal finds that the second condition is also met; the printing on the goods in issue is not mere “coloration or decorative or repetitive design printing”.

## DECISION

43. For the foregoing reasons, the goods in issue should be classified under tariff item No. 4911.91.90 as other printed matter, including pictures, designs and photographs.

44. The appeal is allowed.

Ann Penner  
Ann Penner  
Presiding Member

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26. *Webster’s Third New International Dictionary* (2002) defines “calico” as “any of various cheap cotton fabrics with figured patterns” and “indienne” as “a light cotton fabric with designs painted or printed in imitation of designs used orig. in sub-continental India”.