



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeals No. AP-2016-013 and
AP-2016-028

Medical Mart Supplies Limited.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, May 1, 2017*

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IN THE MATTER OF an appeal heard on January 17, 2017, 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 April 12 and July 21, 2016, with respect to a request for re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

MEDICAL MART SUPPLIES LIMITED

Appellant

AND

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

Respondent

DECISION

The appeal is allowed.

Peter Burn
Peter Burn
Presiding Member

Place of Hearing: Ottawa, Ontario
Date of Hearing: January 17, 2017
Tribunal Member: Peter Burn, Presiding Member
Counsel for the Tribunal: Kalyn Eadie
Student-at-Law: Stéphanie Desjardins
Registrar Officer: Bianca Zamor
Registrar Support Officer: Jennifer Gribbon

PARTICIPANTS:

Appellant	Counsel/Representative
Medical Mart Supplies Limited	Rajesh Mamtora
Respondent	Counsel/Representative
President of the Canada Border Services Agency	Sanam Goudarzi

WITNESS:

Daniel Abou-Chakra
Quality Assurance and Regulatory Affairs Specialist
Medical Mart Supplies Limited

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STATEMENT OF REASONS

BACKGROUND

1. These appeals were filed by Medical Mart Supplies Ltd. (Medical Mart) pursuant to subsection 67(1) of the *Customs Act*¹ from decisions made by the President of the Canada Border Services Agency (CBSA) on April 12 and July 21, 2016, pursuant to subsection 60(4) of the *Act*.

2. The issue in these appeals is whether the goods in issue are properly classified under tariff item No. 3923.21.90 as “other articles for the conveyance or packing of goods, of plastics, of polymers of ethylene”, as determined by the CBSA, or should be classified under tariff item Nos. 4911.99.00/4911.99.90 as “other printed matter, including printed pictures and photographs”, as claimed by Medical Mart.

GOODS IN ISSUE

3. The goods in issue are sealable plastic bags, approximately 6" × 9" (15 cm by 26 cm) in size, that are marketed as “biohazard specimen bags”. According to the CBSA lab report, the goods in issue are made of plastics composed of a polymer of ethylene.² They are printed on one side with the internationally recognized biohazard symbol and instructions in English and French.³ The other side has an additional plastic pouch (15 cm by 19 cm).

4. According to Medical Mart, the goods in issue are only used to transport containers of diagnostic specimen samples (biohazardous material). Further, after use, the goods in issue themselves become biohazardous waste because of the potential for leakage of the specimen into the bag.

5. A sample of the goods in issue was presented for inspection by the Tribunal at the hearing.⁴

PROCEDURAL HISTORY

6. Between January 2011 and November 2013, Medical Mart imported the goods in issue in 31 transactions. Medical Mart initially accounted for the goods in issue under tariff item No. 3923.21.90 as “articles for the conveyance or packing of goods, of plastics, sacks and bags”.

7. On February 10, 2014, and September 17, 2014, Medical Mart requested a refund of duty pursuant to paragraph 74(1)(e) of the *Act*. Medical Mart cited an error in its tariff classification, and requested that the goods in issue be classified under tariff item Nos. 4911.99.90 (2011) and 4911.99.00 (2012 and 2013) as “other printed matter, including printed pictures and photographs”.

8. The CBSA denied the refund requested. It determined that the goods in issue were properly classified under tariff item No. 3923.21.90. This decision was treated as if it were a re-determination pursuant to paragraph 59(1)(a) of the *Act*.

9. Between March 11 and April 10, 2015, Medical Mart applied for further re-determination of the tariff classification pursuant to subsection 60(1) of the *Act*, again invoking tariff item Nos. 4911.99.90 (2011) and 4911.99.00 (2012 and 2013).

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

2. Exhibit AP-2016-013-12A, Tab 29, Vol. 1B.

3. Exhibit AP-2016-013-04A, Tab 7, Vol. 1.

4. Exhibit AP-2016-013-B-01.

10. In two decisions, dated April 12 and July 21, 2016, the CBSA confirmed its previous decision and determined that the goods in issue were properly classified under tariff item No. 3923.21.90. The refund request decisions were treated as if they had been requests for re-determination pursuant to paragraph 59(1)(a) of the *Act*.

11. On July 6, 2016, Medical Mart appealed the CBSA's April 12, 2016, decision to the Tribunal. On October 6, 2016, Medical Mart appealed the CBSA's July 21, 2016, decision. On October 17, 2016, the Tribunal joined the appeals.

12. On January 17, 2017, the Tribunal held a public hearing in Ottawa, Ontario. Medical Mart called Mr. Daniel Abou-Chakra, Quality Assurance and Regulatory Affairs Specialist at Medical Mart, as a witness. The CBSA did not call any witnesses.

LEGAL FRAMEWORK

13. 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).⁵ The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings, subheadings and tariff items.

14. 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*⁶ and the *Canadian Rules*⁷ set out in the schedule.

15. 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.

16. 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*⁸ and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,⁹ 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.¹⁰

17. 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

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

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

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

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

9. World Customs Organization, 5th ed., Brussels, 2012.

10. 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.

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.¹¹

18. 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 [Rules 1 through 5] . . .” and that “the relative Section and Chapter Notes also apply, unless the context otherwise requires.”

19. 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.

RELEVANT PROVISIONS AND NOTES

Heading No. 39.23

Section VII

PLASTICS AND ARTICLES THEREOF; RUBBER AND ARTICLES THEREOF

Chapter 39

PLASTICS AND ARTICLES THEREOF

II. -WASTE, PARINGS AND SCRAP; SEMI-MANUFACTURES; ARTICLES

39.23 Articles for the conveyance or packing of goods, of plastics; stoppers, lids, caps and other closures, of plastics.

-Sacks and bags (including cones):

3923.21 - -Of polymers of ethylene

3923.21.10 -- -For vaccines, toxoids (anatoxins), bacterins, toxins, serums containing immune bodies including antitoxins, glandular extracts or antibiotics, to be employed in the manufacture of such products

3923.21.90 -- -Other

3923.29 - -Of other plastics

3923.29.10 -- -For vaccines, toxoids (anatoxins), bacterins, toxins, serums containing immune bodies including antitoxins, glandular extracts or antibiotics, to be employed in the manufacture of such products;

To be employed in the processing, storing or insemination of animal semen

3923.29.90 -- -Other

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

20. Note 2 to Section VII provides as follows:
2. Except for the goods of heading 39.18 or 39.19, plastics, rubber, and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in Chapter 49.

21. The relevant explanatory note to Section VII provides as follows:

Section Note 2.

Goods of heading 39.18 (floor coverings and wall or ceiling coverings of plastics) and heading 39.19 (self-adhesive plates, etc., of plastics), even if printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, do not fall in Chapter 49 but remain classified in the above-mentioned headings. However, all other goods of plastics or rubber of the kind described in this Section fall in Chapter 49 if the printing on them is not merely incidental to their primary use.

22. The general explanatory notes to Chapter 39 similarly provide as follows:

Combinations of plastics and materials other than textiles

In addition to the exclusions mentioned in Note 2, the Chapter **excludes** . . .

- (c) Plastics and articles thereof (**other than** the goods of heading 39.18 or 39.19), printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods (**Chapter 49**).
23. The explanatory notes to heading No. 39.23 provide, in relevant part, as follows:
- This heading covers all articles of plastics commonly used for the packing or conveyance of all kinds of products. The articles covered include:
- (a) Containers such as boxes, cases, crates, sacks and bags (including cones and refuse sacks), casks, cans, carboys, bottles and flasks.

Heading No. 49.11

24. The relevant provisions of the 2012 and 2013 versions of heading No. 49.11 provide 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.
- 4911.10.00 -Trade advertising material, commercial catalogues and the like
-Other:
- 4911.91.00 - -Pictures, designs and photographs
- 4911.99.00 - -Other

25. The relevant provisions of the 2011 version of heading No. 49.11 provide 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.
- 4911.10 -Trade advertising material, commercial catalogues and the like
- Other:
- 4911.91 - -Pictures, designs and photographs
- 4911.99 - -Other
- 4911.99.10 -- -Computer generated mailing lists, not including labels of heading 48.21; Microcopies of the goods of heading 49.01, 49.02 or 49.04, of the goods of heading 49.05 in book form, of children's picture books, of tourist propaganda issued by national or state governments or departments thereof, boards of trade, chambers of commerce, municipal or automobile associations and similar organizations, or of freight rates, passenger rates and timetables issued by transportation companies abroad and relating to transportation outside Canada; Religious certificates, book marks, mottoes, scriptures or prayer cards; Reproduction proofs for the production of printing plates, rolls or cylinders, for the reproduction of non-advertising material in newspapers, or for printing books or music, or for printing periodical publications entitled to second-class mailing privileges the pages of which are regularly bound, wire-stitched or otherwise fastened together, not including catalogues; Posters, when they (a) are of an educational, scientific or cultural character within the meaning of the Agreement for Facilitating the International Circulation of Visual and Auditory Materials of an Educational, Scientific and Cultural Character adopted at Beirut, Lebanon, in 1948, and (b) have been certified by the Government or by a recognized representative authority of the Government of the country of production or by an appropriate representative of the United Nations Educational, Scientific and Cultural Organization as being of an international educational, scientific or cultural character
- 4911.99.20 -- -Printed labels
- 4911.99.90 -- -Other

26. There are no relevant notes to Section X. The general explanatory notes to Chapter 49 provide as follows:¹²

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. . . .

12. As the change in 2011 took place only at the tariff item level, there was no corresponding change to the explanatory notes.

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. However, letters, numbers, sign-plates and similar motifs for shop signs and shop windows, bearing a printed picture or text, of ceramics, of glass, or of base metal are classifiable in **headings 69.14, 70.20 and 83.10** respectively, or in **heading 94.05** if illuminated.

27. The 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.

TRIBUNAL'S ANALYSIS

28. On appeals under section 67 of the *Act* concerning tariff classification matters, the Tribunal determines the proper tariff classification of the goods in accordance with prescribed interpretative rules.

29. As stated above, the Tribunal must 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.

30. The Tribunal has previously held that the 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, it is well established that, when the Tribunal is faced with an exclusionary note, it must begin its analysis with the heading or headings that are excluded by the note.¹³

31. In considering the two headings at issue, the Tribunal notes that note 2 to Section VII provides that “plastics, rubber, and articles thereof, printed with motifs, characters or pictorial representations, which are not merely incidental to the primary use of the goods, fall in Chapter 49.” It is not disputed that the goods in issue are made of plastic and are printed with pictorial representations. Accordingly, the Tribunal must start its analysis by considering whether the printing on the plastic bags is merely incidental to the primary use of the bags. If the printing is more than merely incidental, then the Tribunal will then have to examine whether the goods in issue are “other printed matter” of heading No. 49.11.

Is the Printing on the Goods in Issue More Than Merely Incidental to the Primary Use of the Bags?

Primary Use

32. In order to determine whether the printing is more than merely incidental to the primary use of the bags, the Tribunal must first determine what, exactly, is the primary use of the goods in issue.

33. The CBSA submitted that the primary use of the goods in issue is to transport and convey other goods, specifically, medical specimens.¹⁴ Relying on dictionary definitions of “primary” and “use”, the CBSA submitted that the principal or main purpose of the goods in issue is to transport other goods, in

13. *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).

14. Exhibit AP-2016-013-12A, Tab 1 at paras. 1, 39, Vol 1A.

accordance with their general character as bags. The CBSA submitted that Medical Mart did not contest the fact that in general bags have this primary use, nor did it contest that the goods in issue are used in this manner. Further, the CBSA noted that the printing on the goods in issue itself indicates that they are for transport.

34. Medical Mart acknowledged that the bags are used solely in hospital settings to transport containers of diagnostic specimen samples,¹⁵ but submitted that, if considered from the perspective of the users, the primary use of the bags is in fact to identify the content of the bags as biohazardous material.¹⁶

35. The Tribunal finds that the primary use of the goods in issue is to facilitate the safe conveyance and handling of biohazardous specimens. The goods in issue possess characteristics required to accomplish this purpose which are not generally found on other types of plastic bags, namely, a biohazard warning symbol as well as French and English instructions, a separate plastic pouch to avoid contamination of accompanying paperwork and a sturdy bottom seal.¹⁷

36. Further, the evidence demonstrates that the goods in issue are marketed and sold as biohazard specimen bags.¹⁸ In fact, although the goods in issue are available for purchase to anyone, over 95% of the customers in 2016 were hospitals and clinics.¹⁹ In addition, because of their particular characteristics, the goods in issue are two to three times more expensive than other clear polyethylene bags of similar dimensions, which makes it unlikely that they would be purchased for general use as bags by consumers.²⁰

37. Accordingly, the primary use of the goods in issue is not generally to transport or convey, as with regular plastic bags, but specifically to both convey and ensure the safe handling of biohazardous material.

Merely Incidental

38. Having determined the primary use of the goods in issue, the Tribunal must then determine whether the printing is more than merely incidental to this use.

39. The expression “merely incidental” is not defined in the *Customs Tariff* and there are no Tribunal interpretations of this exact phrase. The Tribunal’s practice in such situations is to adopt the approach to statutory interpretation endorsed by the Supreme Court of Canada, which is the modern contextual approach pursuant to which the words of an Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.²¹

40. Medical Mart relied on various dictionary definitions of “merely” and “incidental”, as well as US Federal Circuit Court jurisprudence, to establish that the ordinary meaning of “merely incidental” is non-essential or occurring by chance.

15. Exhibit AP-2016-013-04A at para. 8, Vol. 1.

16. *Transcript of Public Hearing*, 17 January 2017, at 37-39.

17. Exhibit AP-2016-013-12A, Tab 39; *Transcript of Public Hearing*, 17 January 2017, at 8.

18. Exhibit AP-2016-013-12A, Tabs 38, 39, Vol. 1A.

19. *Transcript of Public Hearing*, 17 January 2017, at 10.

20. *Transcript of Public Hearing*, 17 January 2017, at 11, 14.

21. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para. 21.

41. According to the CBSA, dictionary definitions of “incidental” and previous Tribunal jurisprudence indicate that “incidental” means a position of secondary or subordinate importance.²² However, the CBSA did not address the impact of the addition of the qualifier “merely”.

42. “Incidental” is defined as “**1 a** having a minor role in relation to a more important thing, event, etc. **b** not essential”.²³ This is consistent with the CBSA’s suggestion that “incidental” means of secondary or subordinate importance.

43. “Mere” is defined as “**1** having no greater extent, range, value, power, or importance than the designation implies; **2** insignificant, ordinary”.²⁴ When considered in the context of the definition of “incidental” as secondary or of subordinate importance, this suggests that something that is “merely incidental” is of little or minor importance, i.e. less important even than something of secondary importance.

44. Accordingly, in order to assess whether the printing is more than “merely incidental” to the primary use of the goods in issue, the Tribunal must determine whether the printed biohazard symbol is of more than minor importance to the primary use of the goods in issue, which is to facilitate the safe conveyance and handling of biohazardous specimens.

45. Medical Mart submitted that the printing on the goods in issue cannot be considered merely incidental to their primary use because it does not happen by chance, but is instead a planned process that must specifically be included in the manufacturing. Further, Medical Mart submitted that the manufacturer would not engage in the costly process of printing on the bag if the printing was secondary or non-essential.

46. However, Medical Mart’s primary argument was that the printing on the goods in issue is not merely incidental but is in fact critical to the use of the bags because it is essential for the safe conveyance of biohazardous material. Specifically, it submitted that the printing provides vital information about the potential danger posed by the bag’s contents as well as instructions on how to safely handle the bag and its contents to the carrier of the bag.²⁵

47. In addition, Medical Mart emphasized that there are various statutes that require that, if the goods in issue are to be used to transport biohazardous material, they must be printed with the biohazard symbol and instructions.²⁶

48. The CBSA argued that the printing on the bags is incidental to their primary use, which is to convey medical specimens and that, therefore, note 2 to Section VII does not direct their classification in Chapter 49.²⁷

49. The CBSA submitted that it is the particular characteristics of the goods in issue, and not the printing, that renders them appropriate for use in transporting biohazardous material.²⁸ The CBSA argued that, in accordance with regulatory standards submitted by Medical Mart, the goods in issue would be required to meet stringent requirements with respect to their ability to withstand pressure and being

22. *Bauer Hockey Corporation v. President of the Canada Border Services Agency* (26 April 2012), AP-2011-011 (CIIT) at paras. 40-41.

23. *Canadian Oxford Dictionary*, 2nd edition, s.v. “incidental”.

24. *Canadian Oxford Dictionary*, 2nd edition, s.v. “mere”.

25. Exhibit AP-2016-013-04A at para. 23, Vol. 1.

26. Exhibit AP-2016-013-04A at paras. 22, 47, and Tabs 21-25, Vol. 1.

27. Exhibit AP-2016-013-12A, Tab 1 at para. 40, Vol. 1A.

28. *Transcript of Public Hearing*, 17 January 2017, at 99.

dropped.²⁹ In other words, it is not the label that allows them to safely transport biohazardous materials, but their compliance with these safety standards. As an illustration, the CBSA introduced a grocery bag into evidence to demonstrate that, even if it was printed with a biohazard symbol, a regular grocery bag could not be used to contain biohazardous material.³⁰

50. Therefore, the CBSA argued that because the printing does not determine the primary use of the goods in issue, it is “merely incidental” to the primary use of the goods.

51. In response to the CBSA’s argument that the goods in issue do not become useless if the printing is removed, Medical Mart again emphasized that their primary customers (i.e. hospitals, clinics and other medical facilities) would not purchase the goods without the biohazard symbol as they would then not be able to use them to transport biohazardous material, even if they had the requisite physical characteristics.³¹

52. At the hearing, Medical Mart submitted that the goods in issue are not required to meet the regulatory standards referred to by the CBSA, or any other government standard, because they are for internal use in hospitals.³² Mr. Abou-Chakra was unable to confirm, when questioned, whether the goods in issue met any particular regulatory standard in terms of their construction.³³

53. Even in the absence of evidence that the goods in issue are required to meet regulatory standards for their physical construction, the CBSA maintained that it is their physical characteristics (the sealing mechanism and the separate pouch for paperwork) and not the biohazard label that render them able to safely transport medical specimens and accordingly to fulfill their primary use.³⁴

54. In this case, the evidence shows that there are three attributes to the goods in issue that enable them to accomplish their primary use:

- 1) The physical qualities of the bag, including its ability to be sealed (though it remains unclear, due to a lack of evidence, whether the bag must meet a specified standard);
- 2) The existence of a separate pouch to convey relevant information concerning the specimen contained inside the bag; and
- 3) A highly visible biohazard symbol that acts as a warning signal that should encourage all to handle the bag with due care.

55. The evidence demonstrates that these three elements are essential for a regular plastic bag to become a bag used to convey or transport biohazardous material.³⁵ Further, although the goods in issue are available for purchase by anyone and can be utilized to transport virtually anything, it was demonstrated that over 95% of the purchase transactions were made by medical facilities and that medical facilities would not purchase them without the biohazard symbol.³⁶ Therefore, without the biohazard symbol, the goods in issue cannot be sold for their intended purpose.

29. Specifically, the CBSA has cited the requirements for Type 1B packaging required by the Transport of Dangerous Goods Bulletin (Exhibit AP-2016-013-04A, Tab 22, Vol. 1).

30. *Transcript of Public Hearing*, 17 January 2017, at 105.

31. Exhibit AP-2016-013-04A at para. 51; *Transcript of Public Hearing*, 17 January 2017, at 19.

32. *Transcript of Public Hearing*, 17 January 2017, at 53.

33. *Transcript of Public Hearing*, 17 January 2017, at 28-29.

34. *Transcript of Public Hearing*, 17 January 2017, at 85-87.

35. *Transcript of Public Hearing*, 17 January 2017, at 12, 18, 26-27.

36. *Transcript of Public Hearing*, 17 January 2017, at 10-11, 14.

56. The Tribunal finds that the printing on the biohazard specimen bag is not merely decorative, nor “merely incidental”. Rather, the printed biohazard symbol plays a major and central role in the achievement of the purpose of the goods in issue, acting in concert with the physical characteristics of the goods in issue, as well as the separate pouch containing information about the specimen, to facilitate the safe and appropriate handling of the biohazardous material. The printing is not “subordinate”, but is at least as important as the physical characteristics of the goods in issue in facilitating the safe handling of the biohazardous material, as it is reasonable to conclude that the absence of the symbol on the bag would increase the potential for mishandling due to a lack of awareness of the nature of the contents.

57. The finding that the biohazard symbol is at least as important as the physical characteristics of the bag is reinforced by (i) the evidence that various statutes require that all biohazardous materials be labelled with the symbol and (ii) an absence of evidence that there is a minimum standard governing the physical integrity or sturdiness of the goods in issue.

58. In light of the foregoing, the Tribunal finds that the printing on the goods in issue is not “merely incidental” to their primary use and that as a result the goods in issue are not classifiable in heading No. 39.23.³⁷

Are the Goods in Issue Other Printed Matter of Heading No. 49.11?

59. The general explanatory notes to Chapter 49 provide that, with a few exceptions (that are not relevant to this case), 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.

60. The Tribunal has previously held that, in accordance with the general explanatory notes to Chapter 49, goods will fall under Chapter 49 when the goods are (1) deemed to be “printed” and (2) the essential nature and use of the goods is determined by the fact of its being printed with motifs, characters or pictorial representations as opposed to mere coloration or decorative or repetitive design printing.³⁸

61. In this case, it is undisputed that the goods in issue are “printed”.³⁹ However, the parties disagreed as to whether the essential nature and use of the goods in issue is determined by the printed biohazard symbol.

62. Medical Mart’s arguments as to why the fact that they are printed with the biohazard symbol is determinative of the “essential nature and use” of the goods in issue were largely the same as for why the biohazard symbol is not merely incidental to the use of the goods in issue, i.e. that the goods in issue cannot be used to transport biohazardous material without the symbol and that therefore its presence is determinative of the essential nature and use of the goods in issue.

63. In addition, Medical Mart relied on the Tribunal’s ruling in *Future Product Sales*, where the Tribunal found that flags printed with NHL team logos were classifiable under heading No. 49.11, as the

37. The Tribunal notes that there is a separate tariff item under heading No. 39.23 for bags for conveying vaccines, toxins, etc., (tariff item No. 3923.21.10); however, there is no equivalent specific tariff item for bags conveying biohazardous materials.

38. *Editions Panini du Canada v. Deputy Minister of National Revenue for Customs and Excise* (19 March 1993), AP-92-018 (CITT); *Future Product Sales Inc. v. President of the Canada Border Services Agency* (8 July 2010), AP-2009-056 (CITT) at paras. 33-35 [*Future Product Sales*]; *Premier Gift Ltd. v. President of the Canada Border Services Agency* (21 February 2017), AP-2016-002 (CITT).

39. Exhibit AP-2016-013-12A, Tab 1 at para. 61, Vol. 1A.

logos provided the “essential nature” or *raison d’être*⁴⁰ of the flags. The Tribunal drew a distinction between decorative and essential printing, and noted that without the printing the flags would be blank textile articles which were basically useless, as they derived all of their commercial value from the logos. The Tribunal also emphasized the fact that the logos were protected registered trademarks with significant commercial value in and of themselves.⁴¹

64. The CBSA’s arguments as to why the printing is not determinative of the essential nature and use of the goods in issue were also largely the same as those regarding whether the printing on the goods in issue is merely incidental to their primary use, i.e. that it is the construction of the goods and not the labelling that renders them able to safely transport biohazardous material.

65. The CBSA further submitted that the Tribunal’s decision in *Future Product Sales* supports its position and not that of Medical Mart. Specifically, it submitted that there is no evidence that the goods in issue would be rendered useless if the printing were removed; they could still be sold and used as bags.⁴²

66. The expressions “primary use” and “essential nature and use” are not exactly synonymous. However, in this case, the Tribunal finds that the distinction ultimately has no impact on the decision, as the “essential nature and use” of the good in issue is the same as their primary use, which is as bags used to convey biohazardous specimens.

67. Further, the Tribunal finds that this essential nature and use is determined by the printing of the biohazard warning symbol on the goods in issue. The printed biohazard symbol is what defines the goods in issue and gives them their essential character, their *raison d’être* as a “biohazard bag”, as it is the reason for which the goods in issue are made, purchased and used. Without the printing, the goods in issue would be expensive, clear plastic bags that could not be used for their intended purpose. Their commercial value comes from the fact that they meet the requirements to be qualified as “biohazard bags”, which is determined by the existence of the printed biohazard symbol.

68. As such, the Tribunal finds that the essential nature and use of the goods in issue is determined by the printed biohazard symbol and, therefore, the goods in issue are “other printed matter” of heading No. 49.11.

Subheading and Tariff Item Classification

69. Classification at the subheading level commences by *mutatis mutandis* application (pursuant to Rule 6) of Rule 1 of the *General Rules*, i.e. in accordance with the terms of the subheadings and any relative section, chapter or subheading notes. Rule 6 also provides that only subheadings at the same level are comparable. Accordingly, the appropriate one-dash subheading must first be chosen using the principles of classification contained in Rules 1 through 5. If the appropriate one-dash subheading is subdivided, then the appropriate two-dash subheading must be chosen using the same technique.

70. At the one-dash level, there are two possible subheadings in heading No. 49.11: subheading No. 4911.10, “trade advertising material, commercial catalogues and the like”, and subheading No. 4911.90, “other”. As the goods in issue are plainly not trade advertising material or commercial catalogues, nor are

40. The relevant French text of the explanatory notes to Chapter 49 reads: “Sauf quelques rares **exceptions** mentionnées plus loin, le présent Chapitre couvre tous les articles dont la raison d’être est déterminée par le fait qu’ils sont revêtus d’impressions ou d’illustrations.”

41. *Future Product Sales* at paras. 36, 38-39.

42. Exhibit AP-2016-013-12A, Tab 1 at paras. 65-66, Vol. 1A.

they like either of these types of printed matter, they are not classifiable in subheading No. 4911.10 and fall to be classified in the residual one-dash subheading “other”.

71. Subheading No. 4911.90 is further broken out into two two-dash subheadings: subheading No. 4911.91, “pictures, designs and photographs”, and subheading No. 4911.99, “other”. While the goods in issue are printed with the biohazard symbol, they cannot be described as being simply pictures, designs or photographs, as they are also bags. Accordingly, they are properly classified in subheading No. 4911.99 as “other”.

72. Classification at the tariff item level proceeds by *mutatis mutandis* application (pursuant to Rule 1 of the *Canadian Rules*) of the *General Rules*.

73. There was a change to the tariff item structure of subheading No. 4911.99, which took effect as of January 1, 2012. Since the goods in issue were imported between January 2011 and November 2013, both versions must be considered.

74. Prior to January 1, 2012, there were three tariff items within subheading No. 4911.99: tariff item Nos. 4911.99.10, 4911.99.20 and 4911.99.90. The full text of tariff item No. 4911.99.10 is given above; tariff item No. 4911.99.20 covered “printed labels” and tariff item No. 4911.99.90 covered “other”.

75. The goods in issue do not meet any of the descriptions set out in tariff item No. 4911.99.10; neither can they be described “printed labels” of tariff item No. 4911.99.10. Accordingly, the goods in issue imported prior to January 1, 2012, should be classified under tariff item No. 4911.99.90.

76. As of January 1, 2012, there is only one tariff item within subheading No. 4911.99, which is 4911.99.00, “other”. Accordingly, the goods in issue imported on or after January 1, 2012, should be classified under tariff item No. 4911.99.00.

Conclusion

77. For the foregoing reasons, the goods in issue should be classified as “other printed matter, including printed pictures and photographs” under tariff item No. 4911.99.90 if imported prior to January 1, 2012, and under tariff item No. 4911.99.00 if imported on or after January 1, 2012.

DECISION

78. The appeal is allowed.

Peter Burn

Peter Burn
Presiding Member