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**U.S. Customs and  
Border Protection**

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**JUL 01 2010**

Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, SW  
Washington, D.C. 20436

RE: Proposed Modifications to the Harmonized Tariff Schedule of the United States (HTSUS) pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988; Special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS

Dear Secretary Abbott:

Pursuant to Section 1205 of the Omnibus Trade and Competitiveness Act of 1988, U.S. Customs and Border Protection (CBP) respectfully requests that the International Trade Commission (ITC) commence a Section 1205 investigation regarding Note 1(v) to Chapter 95 of the Harmonized Tariff Schedule of the United States (HTS) and its effects on the tariff treatment of imported festive articles under HTS heading 9505.

CBP further requests that the ITC recommend to the President the amendment of certain special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS in order to ensure substantially rate neutral, duty-free treatment to certain utilitarian articles with festive designs and/or motifs in accordance with the recent judicial decision of *Michael Simon Design, Inc. v. United States*, 452 F. Supp 2d. 1316 (Ct. Int'l Trade 2006), *aff'd* 501 F. 3d 1303 (Fed. Cir. 2007) *reh'g denied* (Fed. Cir. April 2, 2008), which cited *Park B. Smith, Ltd. v. United States*, 25 Ct. Int'l Trade 506 (2001), *affirmed in part, vacated in part, and remanded*, 347 F. 3d 922 (Fed. Cir. 2003), *reh'g denied* (Fed. Cir. March 16, 2004), and *Midwest of Cannon Falls, Inc. v. United States*, 20 Ct. Int'l Trade 123 (1996), *aff'd in part, rev'd in part*, 122 F. 3d 1423 (Fed. Cir. 1997).

\*Original to fax.

## Judicial Decision on Festive Articles

Heading 9505, HTSUS, provides for: “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof”, and was the subject of litigation in *Park B. Smith*. During the course of the litigation in *Park B. Smith*, the Explanatory Notes for heading 9505 were amended. In May 2003, the World Customs Organization, of which the United States is a participating member, amended the Explanatory Note (EN) to heading 9505. The amended EN 9505 reads as follows:

The heading also excludes articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, e.g., tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen.

The amendment to EN 9505 became effective August 2003, during the time period the parties to *Park B. Smith* were awaiting the decision of the Court of Appeals for the Federal Circuit. Although U.S. courts have recognized that the ENs are not legally binding on the United States, the courts have acknowledged the importance of the ENs in determining the intended scope of a tariff heading. Thereafter, CBP published a notice to limit *Park B. Smith* to the specific entries before the courts. See *Limitation of the Application of the Decisions of the Court of International Trade and the Court of Appeals for the Federal Circuit in Park B. Smith v. United States* (Customs Bulletin, Volume 40, Number 15, April 5, 2006).

The Court of Appeals for the Federal Circuit affirmed the Court of International Trade in applying the standard from *Midwest of Cannon Falls* that in order to be classified under heading 9505, HTSUS, “(1) such articles must be ‘closely associated’ with a festive occasion and (2) such articles must be displayed and used by the consumer only during the festive occasion.” Again citing to *Midwest*, the court went on to state: “If the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant, it is ‘closely associated’ to the festive occasion.” *Midwest*, 122 F. 3d at 1429.

*Michael Simon Design, Inc. v. United States*, 452 F. Supp 2d. 1316 (Ct. Int’l Trade 2006), *aff’d* 501 F. 3d 1303 (Fed. Cir. 2007) *reh’g denied* (Fed. Cir. April 2, 2008), involved the classification of certain knitted cardigans, knitted blouses, and woven ladies shirts. Many of these articles were decorated with festive symbols or motifs, including “Oh Xmas tree”, “Angel”, “Silent Night”, “Halloween Party”, “Trick or Treat”, “Elvira”, “Black Widow”, “Casper”, “Cat Nip”, “Catwalk”, and “Fraidy Cat”. Michael Simon claimed that all of the apparel at issue should be classified as festive articles under heading 9505, HTSUS, pursuant to Federal Circuit decisions which held that the scope of the term “festive articles” in heading 9505 included utilitarian articles. CBP argued that the amended EN 9505 helped to clarify that heading 9505 excluded articles that

have a utilitarian function and contain a festive design, decoration, emblem or motif. CBP also sought deference for its position because it had consistently interpreted the scope of the term “festive articles” within heading 9505 as excluding utilitarian articles. With the exception of three styles<sup>1</sup> of apparel, the Court ruled that the articles were “festive articles” properly classified in heading 9505.

The Court of International Trade rejected CBP’s reliance on the amendment of the EN 9505, which expressly excluded articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, including apparel, from heading 9505. The Court decided that the amended EN 9505 was inconsistent with the Court’s previous interpretation of the scope of heading 9505 in *Park B. Smith* and *Midwest*. The Court held that the Federal Circuit’s interpretation of the meaning and scope of the term “festive articles” controls. The Court followed the decisions of the Court of Appeals for the Federal Circuit established in *Park B. Smith* and *Midwest* and applied the two-prong test in *Park B. Smith* to decide that certain utilitarian articles of apparel are classified as festive articles.

The United States appealed the decision in *Michael Simon* to the Court of Appeals for the Federal Circuit. The Federal Circuit affirmed the trial court’s ruling on the applicable law and the use of the *Park B. Smith* and *Midwest* test<sup>2</sup> to determine whether articles are classified as festive articles under heading 9505.

#### Chapter 95, Note 1(v)

Pursuant to Presidential Proclamation 8097 and 19 U.S.C. § 3005, during the course of the *Michael Simon* litigation, and effective February 3, 2007, Note 1 to Chapter 95 was amended by inserting a new subparagraph (v) to exclude certain utilitarian articles from classification in Chapter 95, as follows:

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<sup>1</sup> The Court of International Trade found that three styles, “Cat Nip”, “Catwalk”, and “Fraidy Cat” were not festive articles. The “Cat Nip” sweater comes in a “pearl” or “yam” colored background with black trim, featuring two black cats arching their backs on the front. The “Catwalk” sweater is “lime green” with pink cuffs and three black cats wearing pink collars. The “Fraidy Cat” sweater is a black shirt with four cats outlined in white. The Court, citing *Park B. Smith*, held that these styles were not closely associated with a festive occasion because they were not so intrinsically linked to Halloween that wearing those items at other times of the year would evoke thoughts of Halloween or seem “aberrant”.

<sup>2</sup> The Court of International Trade, citing *Park B. Smith* and *Midwest* on the scope and meaning of heading 9505, applied the two-prong test for determining whether a particular article falls within heading 9505: “[C]lassification as a ‘festive article’ under Chapter 95 requires that the article satisfy two criteria: (1) it must be closely associated with a festive occasion and (2) the article [be] used or displayed principally during that festive occasion.” Additionally, the Court stated that the items must be “closely associated with a festive occasion” to the degree that “the physical appearance of an article is so intrinsically linked to a festive occasion that its use during other time periods would be aberrant.”

Tableware, kitchenware, toilet articles, carpets and other textile floor coverings, apparel, bed linen, table linen, toilet linen, kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).

In a footnote, the reader is also referred to HTS subheading 9817.95.

Because Note 1(v) to Chapter 95 excludes certain utilitarian articles from classification as festive articles under heading 9505 (a duty-free provision), and because the *Michael Simon* decision grants certain utilitarian articles duty-free treatment as festive articles under heading 9505, CBP is requesting that the ITC commence a Section 1205 investigation with a view to recommending to the President the adoption of a new duty-free provision in Subchapter XVII of Chapter 98 of the HTS covering certain utilitarian or functional articles with festive designs and/or motifs.

### Recommendation

CBP respectfully requests that the special classification provisions in Subchapter XVII of HTS Chapter 98 (adopted in 2007 as a result of *Proposed Modifications to the Harmonized Tariff Schedule of the United States*, Investigation No. 1205-6, ITC Pub. No. 3851 (April 2006)) be modified to ensure substantial rate neutrality for certain utilitarian articles with festive designs and/or motifs.<sup>3</sup>

Subchapter XVII of Chapter 98 of the HTSUS currently reads, in relevant part, as follows:

"Articles classifiable in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50, the foregoing meeting the descriptions set forth below:

9817.95.01	Utilitarian articles of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions, such as Seder plates, blessing cups, menorahs or kinaras.....	Free	25%
9817.95.05	Utilitarian articles in the form of a three-dimensional representation of a symbol or motif clearly associated with a specific holiday in the United States.....	Free	25%"

<sup>3</sup> Pending litigation in the Court of International Trade, CBP's position is that the utilitarian or functional articles described as baking pans, cookie cutters, cookie stamps and presses, that are used in preparation for a festive occasion and not used or displayed during a festive occasion, are not festive articles within the scope of heading 9505.

CBP respectfully requests the following amendments:

- 1. Replace subheading 9817.95.01 and the superior text thereto with the following new heading:

9817.95.01 Utilitarian articles (including but not limited to Seder plates, blessing cups, menorahs or kinaras) of a kind used in the home in the performance of specific religious or cultural ritual celebrations for religious or cultural holidays, or religious festive occasions (provided for in subheading 3924.10, 3926.90, 6307.90, 6911.10, 6912.00, 7013.22, 7013.28, 7013.41, 7013.49, 9405.20, 9405.40 or 9405.50) ..... Free 25%

- 2. Insert the following new U.S. Note 9 to subchapter XVII of Chapter 98:

"9. Heading 9817.95.02 applies only to tableware, kitchenware (except baking pans, cookie cutters, cookie stamps and presses) and toilet articles of chapter 39, 69 or 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapter 61 or 62; and made-up textile articles of chapter 63."

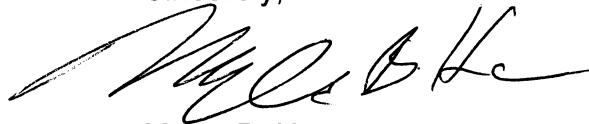
- 3. Replace subheading 9817.95.05 with the following new heading:

"9817.95.02 Utilitarian articles, each incorporating a symbol and/or motif that is closely associated with a festive occasion (for example, Christmas, Easter, Halloween, or Thanksgiving), the foregoing articles used or displayed principally during that festive occasion and not typically at any other time, under the terms of U.S. note 9 to this subchapter..... Free 25%."

These proposed amendments will, when properly implemented, ensure that utilitarian or functional articles (except baking pans, cookie cutters, cookie stamps and presses) with festive designs and/or motifs entered on or after February 3, 2007, will be classified in accordance with Note 1(v) to Chapter 95, while ensuring substantial rate neutrality for this merchandise in accordance with the decisions of the courts.

Thank you for your consideration.

Sincerely,



Myles B. Harmon  
Director, Commercial and Trade  
Facilitation Division