



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

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MEMORANDUM FOR: Directors, Field Operations

FROM: Executive Director, Regulations and Rulings, Office of International Trade

THROUGH: Executive Director, Trade Policy and Programs, Office of International Trade

TO: Director, Trade Operations Division, Office of Field Operations

SUBJECT: Guidance on the Classification of Festive Articles

This is to inform you and your staffs that CBP is issuing guidance on the classification of festive articles in accordance with the decision in 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).

This notice should be distributed to all Port Directors, Assistant Port Directors, Import and Entry Specialists, brokers, importers, and other interested parties. Questions from the importing community concerning this notice should be referred to the National Commodity Specialist Division, U.S. Customs and Border Protection, at (646)733-3000.

  
Sandra Bell

December 8, 2008

## Guidance on the Classification of Festive Articles

### A) Introduction

- 1) This is to inform you and your staffs, as well as the trade community of CBP's guidance on the classification of festive articles in light 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). In *Michael Simon*, the Court of Appeals for the Federal Circuit followed the decisions in *Park B. Smith* and *Midwest of Cannon Falls* to affirm the determination of the Court of International Trade that certain articles of apparel were properly classified as festive articles under Chapter 95 of the HTSUS. Accordingly, this guidance is intended to implement the *Michael Simon* decision as it relates to certain utilitarian or functional articles with festive designs and/or motifs.
- 2) Due to pending litigation in the Court of International Trade, CBP will not issue classification rulings with regard to baking pans, cookie cutters, cookie stamps and presses with festive designs and/or motifs that are used in preparation for a festive occasion and not used or displayed during a festive occasion. See 19 C.F.R. 177.7(b) of the CBP Regulations.
- 3) The instructions in this guidance are intended to supersede the instructions in the previous field directives on Guidance on the Classification of Festive Articles dated April 14, 2006 and June 28, 2005.

### B) Background

- 1) For background of the *Park B. Smith* case, see the Memorandum of June 28, 2005 to Directors in the Office of Field Operations, attached as Appendix A.
- 2) 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, in which the United States is a participating member, amended the Explanatory Note (EN) to heading 9505. The amended EN 95.05 reads:

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.

- 3) The amendment to EN 95.05 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 the 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) and Proposal to Limit 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 39, Number 27, June 29, 2005).
- 4) *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 to 95.05 helped to clarify that heading 9505, HTSUS, 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 of apparel<sup>1</sup>, the

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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,

Court ruled that the articles were “festive articles” properly classified in heading 9505, HTSUS.

- 5) The Court of International Trade rejected CBP’s reliance on the amendment of the EN 95.05, which expressly excluded articles that contain a festive design, decoration, emblem or motif and have a utilitarian function, including apparel, from heading 9505, HTSUS. The Court decided that the amended EN 95.05 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.
- 6) 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, HTSUS.
- 7) Pursuant to Proclamation 8097 and 19 U.S.C. § 3005, during the course of the *Michael Simon* litigation, and effective February 3, 2007, the Harmonized Tariff Schedule of the United States Chapter 95 Notes were amended at 1(v) to exclude certain utilitarian articles from classification in Chapter 95 as follows:

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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 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). 1/ See subheading 9817.95

- 8) Because the Chapter 95 Note 1(v) excludes certain utilitarian articles from classification as festive articles under heading 9505, a duty-free provision, and the *Michael Simon* decision grants certain utilitarian articles duty-free treatment as festive articles under heading 9505, CBP has requested: (1) that the ITC commence a Section 1205 investigation regarding the impact that the adoption of the new Chapter 95 note has had on imports of utilitarian or functional articles with festive designs and/or motifs; and (2) that the ITC recommend to the United States Trade Representative (USTR) the adoption of new duty-free provisions in Subchapter XVII of Chapter 98 of the HTSUS for certain utilitarian or functional articles with festive designs and/or motifs.
- 9) As a result of *Michael Simon*, and the change in the law, we will take the following action.

C) Action

- 1) Except for 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, utilitarian or functional articles with festive designs and/or motifs entered prior to February 3, 2007 shall be classified and liquidated in Chapter 95, specifically heading 9505, as festive articles, if: (1) the articles are closely associated with a festive occasion, and (2) the articles are used or displayed principally during that festive occasion such that use or display at any other time would be aberrant.
- 2) Except for 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, utilitarian or functional articles with festive designs and/or motifs entered on or after February 3, 2007, shall be classified according to their constituent material, and pursuant to the Chapter 95 Note 1(v), as 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, as applicable, and not as festive articles under Chapter 95, HTSUS. However, if: (1) the articles are closely associated with a festive occasion, and (2) the articles are used or displayed principally during that festive occasion such that use or display at any other time would be aberrant, liquidation of entries of this merchandise shall be suspended pending the adoption of new special classification provisions in Subchapter XVII of Chapter 98 of the HTSUS to assure substantial duty-free, rate neutral treatment pursuant to *Michael Simon*.

- 3) You should classify and liquidate in heading 9505 purely decorative articles not otherwise excluded from Chapter 95 or heading 9505 as festive articles, if: (1) the articles are closely associated with a festive occasion, and (2) the articles are used or displayed principally during that festive occasion such that use or display at any other time would be aberrant.
- 4) This guidance does not include costumes. Therefore, the classification of costumes continues to be controlled by the Court of Appeals decision in *Rubie's Costume Company v. United States*, 337 F.3d 1350 (Fed Cir. 2003).
- 5) Questions from the importing community concerning this notice should be referred to the Office of International Trade, Regulations & Rulings, National Commodity Specialist Division, U.S. Customs and Border Protection. Specifically, calls may be referred to National Import Specialist Wayne Kessler at 646-733-3026. In Trade Policy and Programs, and for operational issues involving entry summary/protest issues contact Cynthia Whittenburg at 202-863-6519; for other textile operational issues contact Robert Abels at 202-863-6503.

June 28, 2005

MEMORANDUM FOR: DIRECTORS, FIELD OPERATIONS

FROM: Office of Regulations and Rulings

THROUGH: Acting Executive Director, Trade Compliance and Facilitation  
Office of Field Operations

SUBJECT: Guidance on the Classification of Festive Articles

This is to inform you and your staffs, as well as importing parties that CBP is proposing to limit the court decision in the case of *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), to the entries before the courts in that litigation. The notice should appear in the June 29, 2005 publication of the *Customs Bulletin* for public comment. CBP will not be issuing rulings on articles that may be impacted by this action until such time as a final determination has been published and an effective date set.

Importers who are affected by CBP's proposed notice may wish to take certain actions regarding liquidation of their merchandise. This notice provides clarification regarding the classification of articles with festive motifs.

As CBP is proposing to limit the court decisions in *Park B. Smith*, **utilitarian** or **functional** articles, such as table linens, apparel, mugs, china, etc., should not be classified in Chapter 95. Ports may accept classification and liquidate **purely decorative** articles, not otherwise excluded from Chapter 95 or heading 9505, as festive articles, if: (1) the articles are "closely associated" with a festive occasion and (2) the articles are displayed and used by the consumer only during the festive occasion (use at any other time would be aberrant).

Finally, there are currently seven pending court cases in the Court of International Trade involving the question of classification of various types of merchandise as "festive articles" of heading 9505 of the Harmonized Tariff Schedule of the United States (HTSUS). CBP will not issue classification rulings with regard to any merchandise which would be impacted by the decisions in these cases as well. See 19 C.F.R. 177.7(b) of the Customs Regulations.

Importers seeking classification as "festive articles" of heading 9505, HTSUS, of merchandise which falls within the descriptions below of merchandise subject to pending court cases or seeking classification of merchandise as "festive articles" of heading 9505, HTSUS, based on the court decisions in *Park B. Smith*, may request suspension of liquidation of their entries or may file protests against liquidation of their merchandise in provisions of the tariff schedule other than as "festive articles" of heading 9505, HTSUS.

#### BACKGROUND:

*Park B. Smith, Ltd. v. United States* involved the classification of certain cotton woven table linens (placemats, napkins and table runners) and cotton woven dhurry rugs. Many of these articles were decorated with festive symbols, including Santa Claus or ghosts; some were decorated with color designs and some were solid colors. The articles were sold during various holiday seasons. The Customs Service (now Customs and Border Protection (CBP)) classified these articles as table linens of heading 6302, Harmonized Tariff Schedule of the United States (HTSUS), and woven textile floor coverings of heading 5702, HTSUS, respectively. The importer, Park B. Smith, challenged Customs classification of the merchandise in the Court of International Trade claiming the articles were classifiable as festive articles of heading 9505, HTSUS. With the exception of four articles<sup>1</sup>, the Court ruled that the table linens and rugs were classified as festive articles.

The Court of International Trade based its decision, in part, on the decision of the Court of Appeals for the Federal Circuit (CAFC) in *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). Both parties appealed the decision. The CAFC affirmed the trial court's ruling on the applicable law and the use of the *Midwest* test in determining whether articles are classifiable as festive articles. However, the CAFC remanded the case for reapplication of the *Midwest* test to some of the articles at issue.

The lower court was directed to segregate articles based on whether the articles, by their design and symbols, were directed to a specific festive holiday and whether their use at times other than that holiday would be aberrant. Those articles found to be directed to a specific festive holiday and for which their use at times other than that holiday would be aberrant would be classifiable as festive articles of heading 9505, HTSUS. On April 6, 2005, a Stipulated Judgment Order was signed whereby the parties reached agreement as to the classification of the merchandise in the entries at issue in the litigation.

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<sup>1</sup> The Court of International Trade found that three styles, Savannah, Serendipity and Squaredance, were not festive articles. The Savannah and Serendipity styles consisted of a solid color design and Squaredance consisted of a green, red and blue plaid. The court held these styles were not closely associated with a holiday. With regard to a fourth style, Harvest Time, as no evidence was presented at trial with regard to this style, the court affirmed Customs' classification.



CBP anticipates publication shortly in the *Customs Bulletin*, pursuant to the requirements of 19 U.S.C. 1625(d), of our proposal to limit the decisions in *Park B. Smith*.

The seven pending court cases involving the issue of classification of various articles as "festive" are:

*LTD Commodities v. United States*, Ct. No. 02-00714 (paper-mache boxes, mugs, plates, table linens, basket sets, wooden baskets, porcelain handle baskets, oven mitts, potholders, cheese spreaders, flatware set, burner covers, bottle huggers, wood wall plaques, coasters and cozies, wooden reindeer, shelf sitters, breeze blockers, gift bag sets, candle and holder, jar lamps, boxes, pins, lawn signs, cornucopia or gourds, centerpieces, flags, wired ribbon, candleholder with shade, shade with base for use with candles, porcelain bisque votives and musical clock, lanterns, printed fabric and metallic boxes).

*Nidico Group, Inc. v. United States*, Ct. Nos. 03-00136 and 02-00434 (jacquard placemats).

*Michael Simons Designs, Inc. v. United States*, Ct. No. 04-00537 (ladies' and girls' knit and woven sweaters and blouses).

*Berwick Industries, Inc. v. United States*, Ct. Nos. 98-12-03189, 96-01-00263, 99-01-000436, 99-03-00121, 99-03-00158, 99-06-00356, 98-09-02897, 97-05-00789, 97-06-00983, 97-08-01400, 96-12-0738, 96-05-01359, and 96-04-01197 (assorted plastic and textile bows (regular and oversized)).

*Waterford Wedgwood USA, Inc. v. United States*, Ct. Nos. 00-05-00215, 99-03-00133 and 99-11-00721 (crystal glassware, ceramic tableware, ornamental ceramic articles, lighting fixtures, table knives, music boxes, wood marquetry, etc. (e.g., bowls, platters, plates, mugs, cups, dinnerware place settings, figurines, bells, cake knives, candle holders, nativity backdrops and display sets)).

*Cuthbertson Imports Inc. v. United States*, Ct. No. 03-00846 (earthenware dinnerware (plates, bowls, teacups, saucers, cereal dishes, teapots, coffee pots, serving platters, oven-proof casseroles, rectangular baker-lasagna, etc.)).

*Wilton Industries, Inc. v. United States*, Ct. Nos. 00-11-00528, 00-01-00218, 00-03-00014, 00-03-00015, 00-04-00193, 00-04-00194 and 00-04-00250 (cake and baking pans, cookie cutters, stamps and presses, cake bases, toppers, stands, pillars, ornaments and cake separator plates, floral bouquets, candle caps and pins, and magnets).

## ACTION:

*Park B. Smith* involved the classification of **functional** articles, *i.e.*, table linens and rugs. As CBP is proposing to limit the court decisions in that case, **utilitarian** or **functional** articles, such as table linens, apparel, mugs, china, etc., should not be classified in Chapter 95. You may accept classification and liquidate **purely decorative** articles, not otherwise excluded from Chapter 95 or heading 9505, as festive articles, if: (1) the articles are "closely associated" with a festive occasion and (2) the articles are displayed and used by the consumer only during the festive occasion (use at any other time would be aberrant). In addition, you are to classify and liquidate in heading 9505, HTSUS, **functional** merchandise for which importers have binding rulings or for which importers are able to show that a ruling issued to another party applies to their merchandise.

Importers seeking classification as "festive articles" of heading 9505, HTSUS, of merchandise which falls within the descriptions above of merchandise subject to pending court cases or seeking classification of merchandise as "festive articles" of heading 9505, HTSUS, based on the court decisions in *Park B. Smith*, may request suspension of liquidation of their entries or may file protests against liquidation of their merchandise in provisions of the tariff schedule other than as "festive articles" of heading 9505, HTSUS. Importers should be advised to use reasonable care in classifying their goods.

Questions from the importing community concerning this notice should be referred to the National Commodity Specialist Division, U.S. Customs and Border Protection. Specifically, calls may be referred to National Import Specialist Alice Wong at 646-733-3026. For operational issues involving entry summary/protest issues contact John Leonard of the Office of Field Operations at 202-344-2687; for other textile operational issues contact Susan Thomas of the Office of Field Operations at 202-344-3719.

This notice should be distributed to all Port Directors, Assistant Port Directors, Import and Entry Specialists, brokers, importers, and other interested parties.

/S/

Myles B. Harmon, Director  
Commercial Rulings Division

cc: NIS Alice Wong  
Gwenn Kirschner, Chief, Special Products Branch  
Jeff Konzet, Chief, Textiles and Apparel Branch  
Tom Russo, Chief, Metals and Machinery Branch