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MEMORANDUM FOR: Director  
Field Operations

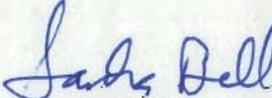
THROUGH: Executive Director  
Trade Policy and Programs  
Office of International Trade

FROM: Executive Director  
Regulations and Rulings  
Office of International Trade

SUBJECT: Revised Guidance on the Classification of Festive  
Articles

This is to inform you and your staffs that CBP is issuing revised 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 guidance supersedes guidance issued on this matter on December 8, 2008.

This notice should be distributed to all Port Directors, Assistant Port Directors, Import and Entry Specialists, brokers, importers, and other interested parties. Questions concerning this revised guidance should be referred to the contacts identified at the end of the guidance.

  
Sandra Bell

cc: Director  
Trade Operations Division  
Office of Field Operations

## Guidance on the Classification of Festive Articles

### A) Introduction

- 1) The instructions in this guidance supersede the instructions in the Guidance on the Classification of Festive Articles dated December 8, 2008; April 14, 2006; and June 28, 2005.
- 2) 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) ("*Michael Simon*"). In *Michael Simon*, the Court of Appeals for the Federal Circuit followed the decisions in *Park B. Smith, Ltd. v. United States*, 25 Ct. Int'l Trade 506 (2001), *aff'd in part, vacated in part, and remanded*, 347 F. 3d 922 (Fed. Cir. 2003), *reh'g denied* (Fed. Cir. March 16, 2004) ("*Park B. Smith*"), 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) ("*Midwest*"), 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.
- 3) Due to pending litigation in the Court of International Trade, involving Wilton Industries, Inc., CBP will not issue classification rulings with regard to baking pans, cookie cutters, cookie stamps and presses and other articles 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).

### B) Background

- 1) 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.

- 2) 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. However, the Federal Circuit did not address the effect of the amended EN in its decision. For this and other reasons, 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).
- 3) *Michael Simon* 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 Court ruled that 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, featuring two black cats arching their

articles were “festive articles” properly classified in heading 9505, HTSUS.

- 4) 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 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.
- 5) 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.
- 6) 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 by adding 1(v) to exclude certain utilitarian articles from classification in Chapter 95 as follows:

Tableware, kitchenware, toilet articles,  
carpets and other textile floor coverings,  
apparel, bed linen, table linen, toilet linen,

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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.” 452 F. Supp. 2d at 1322. 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.’” *Id.* at 1322-23.

kitchen linen and similar articles having a utilitarian function (classified according to their constituent material).1/

1/ See subheading 9817.95

- 7) Subheading 9817.95 was added at the same time to continue duty-free treatment, based on *Midwest*, for certain three-dimensional articles:

Articles classifiable in subheadings 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: 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.

- 8) As a result of *Michael Simon*, and the change in the law, the guidance and analysis under "C)" below should be used for the classification of merchandise and the following action should be taken.
- 9) This guidance does not include costumes. 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).
- 10) This guidance does not include imitation jewelry. The classification of imitation jewelry continues to be controlled by the Court of Appeals decision in *Russ Berrie & Company, Inc. v. United States*, 381 F.3d 1334 (Fed Cir. 2004).
- 11) This guidance does not apply to baking pans, cookie cutters, cookie stamps and presses and other articles with festive designs and/or motifs that are used in preparation for a festive occasion and not used or displayed during a festive occasion.
- 12) This guidance does not apply to articles entered prior to February 3, 2007, that are claimed to be festive articles, but that are not described by a heading in chapters 39, 57, 61, 62, 63, 69, 70. See C) 2) a) below.

C) Action

- 1) Entries involving merchandise which is subject to pending court cases
  - a) Upon the request of the importer, liquidation of entries of this merchandise shall be extended pursuant to 19 C.F.R. 159.12(a)(1)(ii), (d)(2), and (e). If a request for extension has not been filed, the entry shall be liquidated with the articles classified as other than festive articles.
  - b) No protest of an importer should be acted upon at this time involving merchandise of the same category as is the subject of any action pending in the Court of International Trade involving the same importer. A protest may be suspended under an applicable court case.
- 2) Entries made prior to February 3, 2007, of certain articles having a utilitarian function, which are unliquidated or the liquidation of which is not yet final
  - a) This action covers tableware, kitchenware, and toilet articles of chapters 39, 69, and 70; carpets and other textile floor coverings of chapter 57; apparel and accessories of chapters 61 and 62; and made-up textile articles of chapter 63, incorporating festive designs and/or motifs. The classification of such merchandise is governed by the tests enumerated in *Midwest*, *Park B. Smith*, and *Michael Simon*, set forth in the next paragraphs.
  - b) Apply the following analysis to determine classification:
    1. Confirm that the articles are not excluded from classification in Chapter 95, HTSUS, by any legal notes, e.g., electric garlands. Note 1(v) to Chapter 95, HTSUS, was made effective February 3, 2007, and does not apply to articles entered prior to February 3, 2007. If the articles are not excluded, go to the next step.

2. Apply the *Park B. Smith* two-part test:

Determine whether the articles are: (1) closely associated with a festive occasion<sup>3</sup>, and (2) used or displayed principally during that festive occasion such that use or display at any other time would be aberrant.

If the articles are closely associated with a festive occasion and used or displayed principally during that festive occasion such that use or display at any other time would be aberrant, go to the next step.

3. Classify the articles as festive articles in Chapter 95, HTSUS, under heading 9505, HTSUS, because they are excluded from the chapters listed in 2) a) above. Specifically, Chapter 39, Note 2 (y) excludes "Articles of chapter 95 (for example, toys, games, sports equipment)"; Section XI (chapters 57, 61, 62, and 63), Note 1 (t) excludes "Articles of Chapter 95 (for example, toys, games, sports requisites and nets)"; Chapter 69, Note 2 (k) excludes "Articles of chapter 95 (for example, toys, games and sports equipment)"; and Chapter 70, Note 1 (f) excludes "Toys, games, sports equipment, Christmas tree ornaments or other articles of chapter 95 (excluding glass eyes without mechanisms for dolls or for other articles of chapter 95)". Accordingly, liquidate the merchandise in heading 9505, HTSUS.

3) Entries made on or after February 3, 2007, of certain articles having a utilitarian function, which are unliquidated or the liquidation of which is not yet final

- a) This action covers the articles described in Note 1(v) to Chapter 95, HTSUS, 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, and incorporating festive designs and/or motifs.

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<sup>3</sup> E.g., Christmas, Easter, Halloween, and Thanksgiving.

- b) Pursuant to Note 1(v) to Chapter 95, HTSUS, importers shall be required to make entry, and classification shall be determined according to the article's constituent material.
- c) However, such classification may be affected should plaintiffs appeal the CIT's decision in *Michael Simon Design, Inc., et al. v. United States, Slip Op. 09-75 (July 20, 2009)*, which dismissed plaintiff's challenge to the implementation of Note 1(v) to Chapter 95, HTSUS, and Subheading 9817.95.05, HTSUS.

Accordingly:

1. Upon the request of the importer, liquidation of entries of this merchandise shall be extended pursuant to 19 C.F.R. 159.12(a)(1)(ii) and (d)(2). A request may cover more than one entry, but each entry must be identified by number.
2. Notice shall be provided to the importer or the consignee and his agent and surety in accordance with 19 C.F.R. 159.12(b), indicating that the time has been extended and the reasons for doing so.
3. Before an extension expires, an importer may, in accordance with 19 C.F.R. 159.12(d)(2), request another extension in writing, up to the three year statutory limit for extension of liquidations in 19 C.F.R. 159.12(e). If a request for extension has not been filed, or the matter has not been resolved at the end of the 4-year period from the date of entry, the entry shall be liquidated, with the articles classified pursuant to Note 1(v) to Chapter 95, HTSUS.
4. Suspensions of liquidations made pursuant to the Guidance on the Classification of Festive Articles issued December 8, 2008 (which is being superseded by this Guidance) should be converted, at the importer's request, to extensions of liquidations.

5. If a request for extension has not been filed, the entry shall be liquidated with the articles classified pursuant to Note 1(v) to Chapter 95, HTSUS.

d) Any protests that have been or are filed, which include any entries made on or after February 3, 2007, should be suspended until any upcoming appeal to *Michael Simon Design, Inc., et al. v. United States*, Slip Op. 09-75 (July 20, 2009) has been finally decided.

4) Entries of decorative articles

Continue to classify in heading 9505, HTSUS, purely decorative articles not otherwise excluded from Chapter 95, HTSUS, or heading 9505, HTSUS, 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. In addition, consider the general criteria for classification as "festive articles", or "Carborundum factors" (such as the general physical characteristics of the articles, expectations of purchasers and channels of trade), in accordance with the court's analysis in *Midwest*, 20 CIT at 129-30. *United States v. Carborundum Co.*, 536 F.2d 373 (C.C.P.A.), cert. denied, 429 U.S. 979 (1976).

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 any policy concerns, contact Cynthia Whittenburg at 202-863-6519; for other textile operational issues contact Robert Abels at 202-863-6503.