



Ottawa, Friday, April 28, 1989

Appeal No. 2916

IN THE MATTER OF an application heard February 21, 1989, pursuant to section 67 of the *Customs Act*, S.C. 1986, Chapter 1 as amended (the Act).

AND IN THE MATTER OF a decision of the Deputy Minister of National Revenue for Customs and Excise dated September 9, 1987, with respect to a request of re-determination filed pursuant to section 63 of the Act.

BETWEEN:

ANTOINE BOIRIDY

Appellant

AND

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

DECISION OF THE TRIBUNAL

This appeal is dismissed and the Tribunal declares that the 1987 Volkswagen Scirocco, model 533 7J4, imported by the appellant under the Montréal Entry number A536072 dated February 16, 1987, has been correctly classified by the respondent in the September 9, 1987, decision under tariff item 43803-1 as *Automobiles...n.o.p...*

John C. Coleman

John C. Coleman
Presiding Member

Robert J. Bertrand, Q.C.

Robert J. Bertrand, Q.C.
Member

Arthur B. Trudeau

Arthur B. Trudeau
Member

Robert J. Martin

Robert J. Martin
Secretary

UNOFFICIAL SUMMARY

Appeal No. 2916

ANTOINE BOIRIDY

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

Customs Act - Customs Tariff - Classification of an automobile under tariff item 43803-1 as Automobiles and motor vehicles of all kinds, n.o.p. ... or under tariff item 70320-1 as Goods imported [...] by a former resident of Canada [...] and acquired [...] and having been in his possession and use for at least six months prior to his return to Canada - Interpretation of the words possession and use

HELD: *The appeal is dismissed. The appellant did not have his Volkswagen Scirocco for his personal or household use for six months prior to his return to Canada.*

Place of hearing: Ottawa, Ontario
Date of hearing: February 21, 1989
Date of decision: April 28, 1989
Appearances: A. Boiridy
M. Joubert for the Respondent

Jurisprudence: *Gustavson Drilling (1964) Limited v. Minister of National Revenue [1977] 1 S.C.R. 271; Mrs. F. Abtahi, M.D. v. Deputy Minister of National Revenue for Customs and Excise, 12 T.B.R. 600; Nowegijick v. The Queen, [1983] 1 S.C.R. 29*

Acts and regulations cited: *Customs Act, S.C. 1986, Ch. 1, Sect. 67; Canadian International Trade Tribunal Act, S.C. 1988, Ch. 56, Sect. 60*

Interpretation Bulletin: *Memorandum D2-3-2, Revenue Canada, Customs and Excise, Ottawa, September 3, 1981.*

Dictionary cited: *Dictionnaire alphabétique et analogique de la langue française, 2nd ed., Le Robert, avenue Parmentier, Paris XI^e, Vol. VII, pp. 630-631 and Vol. IX, pp. 602 to 604.*

ANTOINE BOIRIDY

Appellant

and

**THE DEPUTY MINISTER OF NATIONAL REVENUE
FOR CUSTOMS AND EXCISE**

Respondent

PANEL: JOHN C. COLEMAN, Presiding Member
ROBERT J. BERTRAND, Q.C., Member
ARTHUR B. TRUDEAU, Member

This is an appeal of a tariff classification selected by the respondent. The appellant, on assignment in Saudi Arabia, purchased a Volkswagen Scirocco in Europe more than seven months prior to his final return to Canada. The automobile was stored during most of this time in Holland. However, the appellant used the vehicle during his holidays in Europe, for a period of 10 days, and upon his return to the United States, for a period of four days. Upon the appellant's arrival in Canada, the Department of Revenue classified the automobile under tariff item 43803-1 as an automobile and motor vehicles of all kinds, n.o.p. The appellant requests that the Tribunal classify the vehicle under tariff item 70320-1 as goods imported and acquired by a former resident of Canada and having been in his possession and use for at least six months prior to his return to Canada.

This appeal is dismissed. The appellant did not have the automobile for his personal or household use for at least six months prior to his return to Canada.

THE LEGISLATION

The tariff items pertinent to this appeal are:

- | | |
|---------|--|
| 43803-1 | Automobiles and motor vehicles of all kinds, n.o.p.; electric trackless trolley buses; chassis for all the foregoing |
| 70320-1 | Goods imported by a member of the Canadian Forces or an employee of the Canadian Government, or by a former resident of Canada returning to Canada to resume residence therein, and acquired by him during an absence from Canada of not less than one year for personal or household use and actually owned by him abroad and in his possession and use for at least six months prior to his return to Canada |

The Governor in Council may, by order, exempt in whole or in part, any goods or classes of goods for any class of persons from any or all of the six-month ownership, possession or use requirements set out in this item.

Goods entitled to entry under this item shall be exempt from all imposts notwithstanding the provisions of this Act or any other Act except that

- (a) any article entered under this item which was acquired after March 31, 1977 by the person claiming the exemption hereunder and which has a value for duty as determined under the *Customs Act*, chapter C-40 of the Revised Statutes of Canada, 1970, of more than \$10,000 is subject to the duties and taxes as otherwise prescribed on the amount of the value for duty in excess of \$10,000, and
- (b) any goods imported under this item which are sold or otherwise disposed of within twelve months after importation are subject to the duties and taxes otherwise prescribed.

THE FACTS

This is an appeal, pursuant to section 67 of the *Customs Act*, S.C. 1986, Ch. 1 (the Act), from a decision of the respondent dated September 9, 1987, classifying a 1987 Volkswagen Scirocco, model 533 7J4, imported under the Montréal Entry number A536072 dated February 16, 1987, under tariff item 43803-1 as an automobile, n.o.p. The appellant contends that this automobile should be classified under tariff item 70320-1 as goods imported by a former resident of Canada and purchased by him for his personal or household use at least six months prior to his return to Canada.

Since the appeal is a continuation of proceedings instituted before the commencement of the *Canadian International Trade Tribunal Act*, S.C. 1988, Ch. 56 (the new Act), it is concluded by the Canadian International Trade Tribunal under section 60 of the new Act.

The parties are asking the Tribunal to decide the following question: does the appellant meet all the criteria set forth in tariff item 70320-1?

To be classified under this item, the Volkswagen Scirocco must:

- (a) have been imported by a former resident of Canada who is returning to the country after an absence of at least one year;
- (b) have been acquired by him;
- (c) have been acquired by him for his personal or household use;
- (d) have been actually owned abroad;
- (e) and have been in his possession and use for at least six months prior to his return to Canada.

At the hearing, the representative for the respondent acknowledged that the appellant met all of the criteria of tariff item 70320-1, with the exception of the provision for possession and use of the automobile for at least six months.

The appellant testified before the Tribunal. A former resident of Canada, he worked in Saudi Arabia for Bell Canada International Inc. from May 1984 to the end of November 1986. During his time abroad, he purchased a new 1987 Volkswagen Scirocco in Europe. The final payment was made on May 9, 1986, and the appellant took possession of the automobile in Osnabruck, Federal Republic of Germany, on May 12, 1986.

Having purchased the car with the intention of eventually using it in North America, the appellant, through the TASP (Tourist Automobile Shipping Programme for North America), had technical modifications made to his Volkswagen in order to meet Canadian requirements.

The appellant used his car to visit Germany, Holland and Belgium between May 12 and May 21, 1986, the date on which he left the vehicle in Amsterdam to be stored.

The appellant informed the Tribunal that he did not use his vehicle between May 21, 1986 and December 21, 1986. Under a shipping contract, the automobile was delivered from Amsterdam via Emden to Albany, New York, where he took possession of it on December 21, 1986. Between then and December 24, the appellant used the Scirocco to travel in the United States and return to Montréal for Christmas. The vehicle's odometer then showed 4,000 kilometers.

The appellant filed an abridged import entry form at the Montréal Customs Office and paid the duty due on February 16, 1987. The automobile was classified under tariff item 43803-1 at that time. He filed an application for review which was dismissed by the customs officer on June 2, 1987. The appellant then asked the respondent to reexamine his file. On September 9, 1987, the latter confirmed the classification of the automobile under tariff item 43803-1 since the appellant did not meet the requirements of possession and use for tariff item 70320-1.

In view of this decision, the appellant filed an appeal with the Tariff Board on December 9, 1987.

THE ISSUE

At the hearing of the appeal, the central issue of the dispute was identified: did the appellant have the automobile in his possession and at his personal or household use for at least six months prior to his return to Canada?

The appellant contends that he meets all the requirements, separately and severally, for tariff item 70320-1. He cites memorandum D2-3-2, published by the Department of Revenue, which came into force on September 3, 1981. In particular, he refers the Tribunal to paragraphs 12 and 13 of this document:

12. Possession means the actual physical control of goods which are at the disposal of the individual on an everyday basis while living abroad.

13. Use requires the putting into action or service of goods for the purpose for which they are designed or intended.

The appellant acquired, registered and insured the automobile in his name. He had control of the stored vehicle at all times. Not having ceded any right to the automobile, he retained the keys at all times and could have, at his discretion, taken it out of storage to use for travel purposes. The distance between the storage location and the appellant's place of work does not affect the ownership. The lack of accessibility is the only limiting factor acknowledged by the appellant with respect to the concept of possession.

As for use of the vehicle, the appellant submits that he used the Volkswagen prior to leaving it at the warehouse and after taking possession of it in Albany, New York, more than seven months after purchasing it. Since memorandum D2-3-2 does not specify any frequency of use of the goods, the appellant requests that the Tribunal overturn the decision of the respondent and classify the vehicle under tariff item 70320-1.

Counsel for the respondent emphasized the admission of the appellant as regards the latter's intent when purchasing the automobile. Since the Volkswagen was purchased with the intent of exporting it to North America and it was never intended for use in Saudi Arabia, the appellant ensured that the vehicle met Canadian standards.

Furthermore, according to the respondent, the appellant did not have the vehicle available to him nor could he use it while it was in storage. He did not have real and physical control of the vehicle, which was not available to him the entire time he was in Saudi Arabia. During this same period, the appellant was unable to make use of the goods in question for his personal and household needs or for the purposes for which they were designed, that is, to enable the owner to travel from place to place.

The respondent contends that, between the purchase date in May 1986, and the date the automobile entered Canada, in late December 1986, the appellant did not have the Volkswagen Scirocco in his possession and use for at least six months.

FINDINGS

The Tribunal relies upon the decision of the Supreme Court in *Gustavson Drilling (1964) Limited v. the Minister of National Revenue*, (1977) 1 S.C.R. 271, in which the basic principle on matters of exemption is set forth. Dickson J writes on page 277 of the decision:

Before examining the rival contentions, several observations might be made. The first is with regard to the onus on a taxpayer who claims the benefit of an exemption. He must bring himself clearly within the language in which the exemption is expressed: *The Assessment Commissioner of the Corporation of the Village of Stouffville v. The Mennonite Home Association of York County and The Corporation of the Village of Stouffville*², at p. 194² ([1973] S.C.R. 189)

In the case before the Tribunal, the appellant must show that he meets all the criteria of tariff item 70320-1 in order to take advantage of the exemption.

As the respondent acknowledged, the only elements in dispute in the statement of the applicable tariff item are the possession and use of the automobile during at least six months.

As for the term use, the tariff item qualifies it as *personal or household* use. The appellant must therefore convince the Tribunal that he had the vehicle for his personal or household use for at least six months before his return to Canada.

The term usage is defined in the *Dictionnaire alphabétique et analogique de la langue française*, published by Le Robert as:

- I. a Le fait d'appliquer, de faire agir [...]
- b Mise en activité effective [...] activité, exercice, fonctionnement.
- c [...] Mettre en usage : se servir effectivement de ..., faire agir, faire fonctionner en vue d'un certain résultat.

This definition clearly states the parameters of the word usage: put into effective action or service.

The parties cited the decision of the Tariff Board in *Mrs. F. Abtahi, M.D. v. The Deputy Minister of National Revenue for Customs and Excise*, 12 T.B.R. 600. The facts and tariff items of that appeal are very different from the present dispute. Indeed, the notion of length of time of use of goods is not discussed. However, the Tariff Board ruled that the fact that one familiarizes oneself with the operation of an automobile does not correspond to the ultimate use of the goods. On pages 608 and 609 of its decision, the Board wrote:

On the basis of the evidence presented to this Board, and in view of the foregoing analysis of the meaning of the word "use" within the context of tariff item 70505-1, I conclude that the appellant did not use the subject vehicle prior to her immigration to Canada. The appellant did familiarize herself with the operation of the car in question. However, this familiarization was undertaken for the express purpose of enabling the appellant, at some future date, to be able to use the car for its intended personal purpose: to transport people and goods from one place to another.

In this case, the appellant used his Volkswagen in Europe from May 12 to May 21, 1986, and then in the United States between December 21 to the date of his return to Canada on December 24, 1986. Although he could have used his automobile at all times, the appellant chose not to do so for obvious economic and practical reasons, since the vehicle was in Holland and he worked in Saudi Arabia. Moreover, the appellant admitted that he did not use his Volkswagen between May 21 and December 21, 1986. The appellant therefore used and effectively put the vehicle into service for a period of less than the prescribed six months.

Paragraph 13 of memorandum D2-3-2, as cited by the parties, offers a similar interpretation in support of the Tribunal's decision. Dickson J refers to the value of administrative documents in *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at page 37 of his decision. He writes:

Administrative policy and interpretations are not determinative but are entitled to weight and can be an "important factor" in case of doubt about the meaning of legislation...

Use therefore requires that the goods be put into service for the purpose for which they were designed or manufactured. To store the automobile for six or more months does not represent personal or household use of the goods which are intended for the transportation of individuals from one location to another. Moreover, the appellant explained to the Tribunal that he only used the automobile on two occasions, namely for ten days in May 1986 to visit a number of countries in Europe and for four days in December 1986, while he was in the United States. This use for a period of approximately fourteen days does not in any respect correspond to the legislative criteria of use during six months.

The Tribunal finds that the appellant did not have his 1987 Volkswagen Scirocco for his use during at least six months prior to his return to Canada.

Since the criteria set forth for tariff item 70320-1 are cumulative and since the appellant does not meet the requirement of use for this tariff item, the Tribunal does not have to rule on the issue of possession.

The appeal is dismissed.

John C. Coleman
John C. Coleman
Presiding Member

Robert J. Bertrand, Q.C.
Robert J. Bertrand, Q.C.
Member

Arthur B. Trudeau
Arthur B. Trudeau
Member